S. HRG. 100-1011, PT.

NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

THE NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

SEPTEMBER 15, 16, 17, 18, 19, 21, 22, 23, 25, 28, 29, AND 30, 1987

Part 2 of 5 Parts

Serial No. J-100-64

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
87-891 WASHINGTON : 1989

5521-24

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, DC 20402

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NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

TUESDAY, SEPTEMBER 22, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:15 a.m., in room SR-325, Russell Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Also present: Senators Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Thurmond, Hatch, Simpson, Grassley, Specter, and Humphrey.

The CHAIRMAN. The hearing will come to order.

Senator Thurmond would like to make a brief statement.

Senator THURMOND. Mr. Chairman, I think you have conducted the hearings in a very fair manner. I want to say that yesterday the hearings, however, lasted about 13 hours, and the witnesses in favor of Judge Bork did not have an opportunity to testify until around 4 p.m.

Now, Mr. Chairman, as a matter of fairness to both sides, I would propose that we strictly limit the time for witnesses to no more than 10 minutes; and, further, that we restrict questions from Senators to 5 minutes per round, with a two-round limit.

Mr. Chairman, there is no way that we can finish these hearings before October unless we have a time limit and stick to it. Again, I thank you for your cooperation.

The CHAIRMAN. Let me say to all my colleagues, the point that Senator Thurmond makes about the length of the hearings, I think I can attest to more than anyone. I sat here in this chair for, I believe, 13 hours with one 55-minute break out of this room. I did not enjoy it any more than the press who had to sit there and cover it or the witnesses who were there for part of the time. But I have said at the outset of these hearings that I was going to see to it that they were conducted fairly.

Now, I want to point out, and I know the Senator from South Carolina is not suggesting otherwise, to set the record straight. I will not estimate it; I am not very good at estimating these days. The bulk of the time, though, yesterday was conducted, as they have every right to do, by the minority who I think we will find asked more rounds—which is their right and I will support it—and spent more time asking questions by a long shot.

Now, I am delighted if we could reach an agreement on the committee whereby I do not think we could cut witnesses to 10 minutes. I think we will have witnesses try to keep their statements to 15 minutes. It is not the witnesses that have been our problem. Their opening statements have not been the time-consuming part. Even when we agreed to 10-minute rounds, my colleagues were using 15, 20 and 25 minutes. When we agreed to a half hour, they were using 40 minutes—which made sense because they have not been questions that have been inappropriate.

But if the committee can agree that we will have for the witnesses, from this witness on, 10-minute rounds and that we would be bound by that, I am delighted to enforce that. But one thing I am not going to do is I am not going to sit here every night until 11 o'clock in an effort to rush this nomination through. If the minority as well as the majority wishes to ask questions, we are going to have a civilized schedule. It means we will not have an executive session on October 1. We will have it on October 7.

There is nothing chiseled in stone and the republic will stand if it is a week later. But it makes no sense for the witnesses, for my colleagues, and, very selfishly, for me to agree that for the next 2 weeks I am going to sit in this chair for 13 straight hours in order to move something along.

If my colleagues have questions and wish to pursue them, then we will pursue them. Again, I want to point out that the bulk of the questions, as they should have been and it made sense, came from the minority side yesterday. I think almost everyone in the minority took several rounds, and a number of the majority were not here.

Anyway, with that, why do we not get the first witness on. Let us agree that we will have the opening statement to be 15 minutes for this witness and every witness to follow; and we will limit the question rounds to 10 minutes, which I am going to enforce, and a second round of 5 minutes for any Senator. Unless there is a rebellion on the committee at that point, we will proceed for the rest of the hearing in that fashion.

Is there any objection from the committee?

Senator METZENBAUM. Mr. Chairman, I think that will work out, but I am not sure that you ought to just lock that in concrete. You are the chairman of the committee. You have got the ranking member next to you. There may be some witness that will come along—I cannot anticipate one at the moment—where somebody might want to inquire of the witness for more than 10 minutes and 5 minutes. I would prefer to put it within the discretion of you and the ranking minority member rather than have it inflexible but I think you are right to limit the rounds to 10 minutes each. I think that makes sense. But beyond that, I think you ought to have a little discretion left to yourself.

The CHAIRMAN. I thank the Senator. The Chair always reserves that right and will in this case.

What I have not wanted to do is I have not wanted to cut off any of my colleagues. But we have a little red light up here today, and in 10 minutes you are going to be cut off.

Senator DECONCINI. Do I understand that each member of each panel will have 15 minutes?

The CHAIRMAN. No. The single witnesses.

Senator DECONCINI. How long will members of the panel have? I missed that. I am sorry.

The CHAIRMAN. If they come up in panels, they should be limited to 5 minutes like we have always done.

Senator DECONCINI. I agree. Thank you.

The CHAIRMAN. But individual witnesses up to 15 minutes; members of panels 5. And I hope those who come up with a panel, if they represent more than one organization, they can submit their statements for the record.

I might point out to my colleagues there is no need to ask every member of a panel every question. But that is obviously up to your discretion.

The Senator from Massachusetts.

Senator KENNEDY. I agree with the Senator from Ohio. It seems to me the nature of the witnesses yesterday necessitated that they have a full hearing. It seems to me that the witness list today and what I have seen for the remainder of the week ought to move in a more timely fashion.

I would agree with the Senator from Ohio that we all try and make the best efforts to move the hearings; and then if we have to bind ourselves by some other kind of process later on in the week, I think it would be perhaps more timely to make that proposal.

The CHAIRMAN. Senator Heflin.

Senator HEFLIN. Mr. Chairman, might I suggest that the committee appoint an official mathematician to figure out the number of witnesses that we have, make certain assumptions that at least 10 members of the panel will take 10 minutes on each of them and 5 minutes on each of them, and see if we are going to be able to finish today.

Now, if we are not going to be able to finish at a certain time, then I think we are going to have to rearrange a time schedule. But I believe that we could use a little mathematics in this, and I think we might figure out where we are.

The CHAIRMAN. I think it is clear—because I am not going to stay beyond 6 o'clock today—unless members discipline themselves we have no possibility of finishing this witness list today. None. None.

So I say to the minority that if, in fact, they wish to question, understand we are adding days; we are not adding anything else. It is a judgment you all can make.

I say to the majority, understand that if you are going to pursue additional questions, you are adding time. Again, what we are about here is a matter of great principle. No Senator, feeling the issue is important with a particular witness, should nor will they be cut off.

I am counting on two things: Not only that we can compute and understand mathematics, but that we can also exercise some judgment here.

I think what has happened here, unlike other nominations, it is clear that this nomination is hanging in the balance. Therefore, it is clear that those who are opposed want to take every opportunity to make the case, and those who are for want to take every opportunity to rehabilitate. I have never in my time here in 15 years seen the minority when we were in the minority nor the minority when the Republicans were in the minority spend as much time on this—and for good reason. There is a lot of question here.

But, again, I do not want to overstate nor understate it. Let us just move on and see where we are going. We are not going to go much beyond 6 o'clock today. We have already wasted about 20 minutes thus far.

Professor Tribe, will you stand to be sworn?

Do you swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. TRIBE. I do.

The CHAIRMAN. The Senator from Wyoming.

Senator SIMPSON. Mr. Chairman, I do hear you clearly. But I want to say, Mr. Chairman, things can be expedited if you will furnish us the witness list. We have a witness list for today. I think Ted just said something about seeing the list for the week. If we could see the list of witnesses, we can be precise in our preparation. Then we do not have to range around and do a fishing expedition. We will know who is going to be here for the rest of the week. We do not care what the order is. Just tell us who is going to show up, and then we will do our homework. It will help expedite things, I can promise you that.

The CHAIRMAN. My understanding is from the minority, majority counsel that that has been worked out, that we will get you that list.

Senator SIMPSON. We need it, Mr. Chairman.

The CHAIRMAN. All right. We have this list. Let us get started. Turn the clock on. The clock keeper has become one of the most important people in this operation.

Obviously, Professor, when the red light is on, you are off. That goes for all my colleagues, too.

I welcome you, and if you would indicate on whose behalf you are testifying, whether you are representing an organization, in what capacity you are here, and then your statement. We would appreciate it very much.

Welcome.

TESTIMONY OF LAURENCE TRIBE

Mr. TRIBE. Thank you, Senator. I am here simply on my own behalf as a professor of constitutional law. I am honored that the committee invited me to testify on this important nomination.

With the Chair's permission, I will submit the prepared statement for the record and simply try to summarize my concerns.

The CHAIRMAN. Without objection, your entire statement will be placed in the record as if read.

Mr. TRIBE. I have very high regard for Judge Bork's intellect, and I have no reason to doubt his integrity. But I must say that, with reluctance, I do have serious reservations about his nomination as a Justice. I am here to explain why.

I should say at the outset that I do not at all view Judge Bork as someone who personally favors laws against birth control or neighborhoods limited to white people or policies that discriminate against women. I do not have that view of the Judge.

I do view him as someone who is principled and whose judicial principles require him to withdraw the Supreme Court from its historic role of limiting governmental excesses and injustices, like those and like others that we cannot yet fully imagine.

Now, I should make clear that I would not oppose confirmation of a Justice simply because he or she does not share my particular philosophy. I supported confirmation of two Reagan nominees to the Supreme Court commonly regarded as conservatives—Justices O'Connor and Scalia—and I did not testify against the elevation of William Rehnquist to the position of Chief. But when a nominee's publicly expressed judicial philosophy seriously threatens constitutional values that have proven fundamental in our history, a different kind of question is posed.

I had no objection to Judge Bork as a nominee to the circuit court. There, any major failure to follow Supreme Court precedent would rapidly be corrected by the Supreme Court itself. But as a Justice, Judge Bork would cast a vote that no higher court could correct.

It is true that he would have only one vote out of nine, but his might often be the decisive vote; and even when it is not, his potential influence on the future development of constitutional law and on the role of the Supreme Court in protecting constitutional rights would be too great to warrant confirmation if the positions that he has long crusaded for seriously endanger the traditional role of the Court as a principal defender of liberty and equality.

Now, one thing seems almost too obvious to say, but I guess it is worth saying so that the degree of consensus in this room and in this country is not obscured by the sometimes heated differences that exist. I think it is plain that, if Robert Bork had come into this room and had affirmed under oath about half a dozen of the positions that are suggested to many people by what he has said and written publicly, he could not be confirmed. To be specific, I do not think there is much doubt that his confirmation would be quite implausible.

If the Senate were convinced that, as a Supreme Court Justice, Judge Bork would vote to uphold laws telling people whether or not they may have children, to uphold the kinds of sex discrimination that the Supreme Court has struck down over the past 15 years, to uphold censorship of art and literature simply because it is not related to politics—I think it is clear that confirmation would not follow if those views, inferred from his writings, were the views that he presented to this committee.

The reasons that these hearings present a difficult issue is that it is not clear—and I am the first to admit it—not clear that Judge Bork would actually do any of those things. It is true that Judge Bork has strongly suggested, even after going onto the circuit court, that most of the constitutional law developed since World War II is illegitimate and should be reconsidered. And yet, in fairness, in appearing before this committee, he left doubt about just what he would do.

Because of that doubt, many people who would otherwise find themselves opposing his confirmation are drawn to support him because he is so obviously capable and has performed at so high a level at the various posts that he has held.

I think that such supporters would not want to discourage provocative, daring thinkers, and they reason that the world today contains few realistic threats of the kind that Judge Bork might theoretically uphold. But a seat on the Supreme Court is a lifetime position. None of us in this room has the gift of prophecy, and so I think we must be cautious when we deal with the Constitution's safeguards against governmental abuse.

It is for that reason that I believe the Constitution counsels Senators to view with some skepticism any apparent shift in a nominee's previously stated belief once that nominee has been selected by the President. However sincerely a nominee reformulates his position, troublesome issues are raised if the reformulation is viewed as a commitment to the Senate. So any new formulation, I think, must be analyzed closely and tested with rigor to make sure that it reliably lays to rest the concerns that would otherwise have led a Senator to withhold confirmation.

I would like to focus on the areas in which I think there have been, to a greater or lesser degree, shifts in position. Perhaps the least of those shifts has occurred with respect to basic liberty. A lot of attention is focused on Judge Bork's quite scornful dismissal of the Supreme Court's long line of decisions from the 1920's to the present upholding the rights of individuals and families to decide for themselves basic matters of marriage, childbearing and childrearing. It is not news to this committee that Judge Bork's writings and speeches up through last year treat those rulings as indefensible because they do not derive closely enough from specific provisions of the Constitution.

Judge Bork has basically said that nothing in the Constitution authorizes judges to treat a married couple's intimacies in the bedroom any differently from a business enterprise's economic decisions in the boardroom. Now, understandably, the notion that judges cannot draw that line has led some to be fearful. And in response, Judge Bork tells this committee that he will listen to new arguments designed to show that some of these rights—rights, perhaps, to things like birth control, maybe even abortion—may be derived, he suggests, by a method that he would find satisfactory from the Constitution's specific text and history.

I would not count on it. I would certainly count on his listening. But how plausible is it that, after all these years, someone will uncover a new constitutional argument in those fundamental areas? And, anyway, even if some such effort could succeed with respect to one right or another, the real problem with Judge Bork's philosophy would remain. That problem is very simple: He reads the entire Constitution as though the people who wrote and ratified it gave up to government all of the fundamental rights that they fought a revolution to win unless a specific reservation of rights appears in the text.

I read the ninth amendment to the Constitution to say the opposite. It says "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Now, in a 1984 speech, Judge Bork expressed uncertainty about what those words mean. He said that a judge might be compelled simply to ignore the amendment—and I use his words exactly—as if it were "nothing more than a water blot on the document."

But it is more than a water blot. Even apart from the ninth amendment, we have in this country—and I am proud that we have—a 200-year-old tradition establishing that people retain certain unspecified fundamental rights that courts are supposed to discern and to defend. Chief Justice Marshall said it as early as 1810. It has been repeated by all of the great Justices in our history.

Chief Justice Burger said it in 1980. Justice O'Connor said it in a unanimous decision upholding a prisoner's right to marry in June of 1987.

Indeed, not one of the 105 past and present Justices of the Supreme Court has ever taken a view at odds with this basic axiom of our Constitution. If he is confirmed as the 106th Justice, Judge Bork would be the first to read "liberty" as though it were exhausted by the rights that the majority expressly conceded to individuals in the Bill of Rights. He would be the first to reject an evolving concept of liberty and to replace it with a fixed set of liberties protected at best from an evolving set of threats.

It seems to me that in an age of biomedical and technological revolution, this frozen concept of liberty is dangerous.

Now, with respect to the crucial area of equality, Judge Bork's latest reformulation has to leave everyone up in the air. The threat is clear. In speeches right up through this June, Judge Bork indicated that the equal protection clause should have been kept to things like race and ethnicity. That leaves out such vital matters as sex, poverty, illegitimacy and handicap.

Again, people were worried. And so, testifying before this committee, Judge Bork offered to close those enormous gaps when he said that, as a Justice, he would strike down all "unreasonable" legislative classifications.

My word. Unreasonable!

In 1873, the Supreme Court saw nothing "unreasonable", and it said so, about excluding women from the legal profession. In 1896, the Supreme Court saw nothing "unreasonable" about racial segregation. In 1924, the Court saw a "reasonable classification" in the decision of New York State to keep women from working in restaurants late at night. In 1961, all nine Justices thought it was "reasonable" to excuse all women from jury service unless they volunteered.

Every law student learns that only the Supreme Court's development of much more closely structured forms of scrutiny of laws based on sex and race has led us predictably toward equality.

Of course, when it comes to the poor, the "reasonable basis" test leaves them out completely. I think that is why Judge Bork still says that it was okay to have a poll tax—not that he favors a poll tax, but that the Court was wrong to strike it down because it was just a little poll tax.

That is why he seemed unaffected when he was told that birth control clinics in Connecticut were closed for two decades because of the law that the Court struck down in 1965, in a decision that Judge Bork says was wholly unprincipled. Justice White concurred in that decision because of the birth control law's impact on the disadvantaged citizens of Connecticut. But there was nothing "unreasonable", one could say, about forbidding the rich and the poor alike to use free birth control clinics.

It is clear that when the Supreme Court has struck down sex discrimination in medical education and in other areas, it has done so only by applying a more rigorous standard. Justice Stevens himself, whom Judge Bork invokes for this new, fluid, open-ended, unpredictable test, was very explicit in joining Justice O'Connor's opinion saying that we need heightened scrutiny in the case involving discrimination in medical education.

If you want to know how Judge Bork is likely to use that notion of reasonableness—which I think none of us can guess for sure—I simply point out to you that this summer he said that the Supreme Court trivialized the Constitution when it struck down a law setting a different drinking age for men and women. The 1976 decision striking down that law was joined by Justice Powell; it was joined by Justice Stevens; it was joined by Justice Stewart; and Judge Bork says that it trivialized the Constitution.

It seems to me that the "reasonable classification" test is a request for a blank check. Women and other vulnerable groups are asked to gamble. Not to gamble on whether Judge Bork is a sexist; I do not believe for a minute that he is. But to gamble on his personal notion of what is "reasonable" according to his sense of community standards.

Now, with respect to freedom of speech, I think Judge Bork's shifts of position are even more problematic. It was pretty clear for many years that he took an extraordinarily narrow view of speech. It was only political speech that was protected, and advocating civil disobedience could land one in jail. More recently, he said that perhaps literature should be included as well and perhaps some civil disobedience should be protected. But in colloquies with Senators Leahy and Specter, what emerged was that Judge Bork disagrees with where the Court has been in this area, but says he is willing to accept it.

We are left with a nearly total cloud. What does it mean to accept a doctrine that one says was fundamentally wrong?

The CHAIRMAN. Would you sum up, please?

Mr. TRIBE. I would be glad to, Senator.

With respect to executive power as well, I think that Judge Bork's new positions really do not solve the fundamental problem. And, as far as respect for precedent is concerned, I think we have heard Judge Bork say that pernicious decisions ought to be overruled if they were misguided unless settled expectations are unduly upset. But who is to say when Judge Bork would find those expectations unsettled?

I think the questions raised are not answered by the new positions formulated.

I would be happy to answer the committee's questions.

[The statement of Mr. Tribe follows:]

TESTIMONY OF LAURENCE H. TRIBE
BEFORE THE SENATE JUDICIARY COMMITTEE
ON THE NOMINATION OF ROBERT H. BORK
TO BE AN ASSOCIATE JUSTICE
OF THE UNITED STATES SUPREME COURT

September 22, 1987

My name is Laurence Tribe. I am the Tyler Professor of Constitutional Law at Harvard Law School. I have been on the Harvard Law faculty since completing a clerkship with Justice Potter Stewart in 1968. I have frequently served as an expert witness and as a consultant on constitutional matters in Congress and have argued many cases in the United States Supreme Court. Among my publications is a 1978 treatise entitled American Constitutional Law. In 1980, I was elected a Fellow of the American Academy of Arts and Sciences and that treatise received the Order of the Coif Award for distinguished legal scholarship. A second edition of that treatise, examining the evolution of constitutional law and constitutional commentary from 1787 through mid-1987, is now in press and will be published this December. Completing that 1,750 page work required me to conduct a comprehensive study of the constitutional views and judicial philosophy of virtually all who have served as Supreme Court Justices throughout our history, and of the major constitutional scholars of the past century.

I am honored to appear at the Committee's invitation to testify on the nomination of Robert H. Bork as an Associate Justice of the Supreme Court. I have high regard for Judge Bork's intellect and have no reason to doubt his character. I nonetheless have grave reservations about his nomination as a Justice. I am here to explain the grounds for those reservations.

INTRODUCTION

I should say at the outset that I supported the confirmation of two Reagan nominees to the Supreme Court commonly regarded as "conservative" -- Sandra Day O'Connor and Antonin Scalia. And I did not testify against the elevation of William H. Rehnquist to the position of Chief Justice.

Although some have argued that the Senate should show no deference whatever to the President's selection of nominees to the Supreme Court, my view is otherwise. I would not oppose Senate confirmation of a Justice simply because he or she does not share my constitutional philosophy, or the philosophy of a majority of the Senate. But when a nominee's publicly expressed judicial philosophy seriously threatens constitutional values that have proven fundamental in American history, a different kind of question is posed.

That question is not answered by noting that the President has a right to select a nominee whose philosophy matches his own, or by observing that the nominee selected has already been confirmed to serve as a judge on a lower federal court. Indeed, I was pleased to see Robert Bork appointed to the United States Court of Appeals for the D.C. Circuit, where any serious failure to follow Supreme Court precedent would rapidly be corrected by the Supreme Court itself. But Judge Bork's proposed elevation to the Supreme Court presents significantly different issues, for there his judgments would be final and not subject to correction by any higher Court.

The judicial philosophy Judge Bork has espoused for two decades thus becomes crucial and cannot be disregarded simply because his performance as a circuit court judge, with the Supreme Court sitting above him, has been more moderate than his publicly stated views suggest his performance as a Supreme Court Justice might be.

BURDEN OF PROOF

Although a Justice Bork would be only one Justice out of nine, his potential influence on the future development of constitutional law, and on the role of the Supreme Court in protecting constitutional rights, is simply too great to warrant confirmation if the positions he has long championed, however recast in recent weeks and days, pose serious risks to the traditional role of the Court as defender of liberty and equality. It is crucial to remember that Judge Bork is not on trial before the Senate; at stake is not simply his future but the Constitution's future. Thus the Senate's advice and consent function counsels placing the burden of proof on those who urge confirmation. Theirs should be the burden of dispelling the considerable doubts this nomination has raised, both before the nominee testified and in light of his testimony.

FORMULATING THE ISSUE

The problems posed by Judge Bork's judicial philosophy cannot be understood by focusing on his most general and abstract statements about his views. In his closing remarks to this Committee on September 19, he described himself as "a jurist who believes his role is to interpret the law and not to make it" -- to construe and enforce the Constitution rather than to decide cases in accord with "some personal political agenda of [his] own," or to shape results in accord with "a desire to set a social agenda for the nation." I am in full agreement with that statement of how a judge should act. The difficulty lies entirely in Judge Bork's views of what the Constitution, regarded as law, means and how the Supreme Court should go about discerning that meaning and enforcing it.

Similarly, the question before this Committee cannot be cast in terms of such notions as "judicial restraint" vs. "judicial activism." As Judge Bork has said on several occasions, "there is nothing wrong with judges being active in the defense of real constitutional principles." The question is: what does Judge Bork understand those "real constitutional principles" to be?

CONFIRMATION CONVERSION?

There is a preliminary matter that cannot be avoided. As many have noted, the views long associated with Judge Bork -- the views he has stated eloquently and often, in scornful denunciations of a "large proportion of the most significant constitutional decisions of the past three decades" (as Judge

Bork said in 1982) -- have been toned down, and sometimes repudiated, in interviews granted by the judge subsequent to his nomination and in his testimony here last week. The point is not that some of Professor Bork's academic writings or speeches were provocative, or that his positions changed from time to time: academics are expected both to provoke, and to evolve. The point is, rather, that positions Judge Bork has consistently taken over a long period, lasting well beyond his becoming a federal judge, seem to have shifted in the brief time since his nomination. Some of Judge Bork's most vocal conservative supporters in particular have been quite merciless in assessing this so-called "confirmation conversion." Bruce Fein of the Heritage Foundation, for example, was quoted on September 20 as saying that Judge Bork's "ambition perhaps exceeds his intellectual devotion." I would not be so presumptuous as to cast aspersions on Judge Bork's motives. Rather, I would take the judge at his word when he said, in his closing remarks on September 19, that he takes the oath he swore before this Committee "as a very serious and affirmative thing."

But, even on the most charitable view, the noteworthy shifts in Judge Bork's positions subsequent to his nomination cannot escape attention; each Senator must decide for himself what to make of those shifts. In my view, what really matters is that the legal and intellectual cables Judge Bork has constructed to lift himself out of the apparent holes dug by his earlier public statements are not strong enough to hold. Closely examined, both on their own terms and in terms of the problems likely to confront the Supreme Court over the next two decades, the lines laid down by Judge Bork would unravel, leaving in place the underlying views that he has never repudiated.

I therefore turn to the ways in which Judge Bork has sought to soften his past positions so as to reassure those concerned with the hard lines he appeared to have adopted in the past. My conclusion is that the newly formulated positions cannot withstand analysis, and that the concerns suggested by what Judge Bork consistently said and repeatedly wrote before his nomination cannot properly be laid to rest by his testimony of last week.

There are five areas in which Judge Bork's views might appear to have shifted: (1) liberty, (2) equality, (3) free speech, (4) executive power, and (5) the binding force of precedent. I address each in turn.

I.

DOES THE CONSTITUTION REALLY PROTECT ONLY THOSE RIGHTS AND FREEDOMS THAT ARE SPECIFICALLY MENTIONED?

Judge Bork's position seems to have changed least of all with respect to the Supreme Court's long line of cases protecting personal liberties, rights and freedoms, many centering on family privacy, that are not specifically mentioned in the Constitution -- the so-called "unenumerated rights."

Although Judge Bork recognized, in a discussion with Senator Specter on September 19, that these cases reflect "a very powerful argument from a very strong tradition," and although Judge Bork has suggested in his testimony that there might be alternative ways of reaching the same results in a few of these cases, Judge Bork emphatically repeated to this Committee his fundamental belief that he cannot properly read the Constitution as recognizing an individual right unless he can find that right specifically pointed out in a particular provision of the document. Judge Bork has often said, in public speeches and in writings both predating his appointment as a judge and while he has been on the bench, that the Supreme Court's entire line of cases establishing the contrary conclusion is therefore "indefensible," "intellectually empty," and even "unconstitutional," because in his view they do not flow clearly and directly enough from specific provisions of the Constitution.

Judge Bork still believes that the Supreme Court was gravely wrong in these cases to define a sphere of liberty protecting certain aspects of personal privacy -- including the right of married couples to use contraceptives, the right of parents to make decisions about how to bring up their children, and the like. Even on matters as simple as compulsory sterilization by government, Judge Bork says that the decision in Skinner v. Oklahoma, 316 U.S. 535 (1942), which he has attacked in the harshest terms, could be defended (if at all) only by proof that racism was implicit in the selection of crimes that, in the state's view, warranted sterilization. It seems that, to Judge Bork, a racially neutral decision by government to decide who may have children, and how many, would confront no constitutional obstacle.

In his testimony, Judge Bork has repeatedly refused to treat these decisions as establishing a body of settled law -- in sharp contrast to what he testified about the law of the Commerce Clause and the law of the First Amendment, as I indicate below. He has thus reaffirmed here his firmly held view that there exists no constitutionally permissible way to distinguish a private sphere of liberty concerning intimate family and sexual matters from such matters as the decision of a company to pollute the environment, or the conduct of businessmen who engage in price-fixing in a private hotel room. To Judge Bork, the idea of a right of personal privacy is "undefined" and "free-floating." Thus, he said in a speech at Catholic University on March 31, 1982, that in "not one" of the privacy cases "could the result have been reached by interpretation of the Constitution." In defending the reasonableness of this view, both Judge Bork and some of his supporters have relied on the fact that several esteemed jurists agreed with his view as to particular cases, such as Justices Black and Stewart in the case of Griswold v. Connecticut, 381 U.S. 479 (1965), recognizing the right of married persons to obtain and use contraceptives. But by 1973, even Justice Stewart had concurred in the Supreme Court's decision in Roe v. Wade, 410 U.S. 113, 168 (1973), saying that he regarded as settled law the body of decisions, including Griswold, marking out a special sphere of personal privacy in family and sexual matters. As revealed by Turner v. Safley, 107 S.Ct. 2254 (1987), a case handed down this June, in which the Court unanimously struck down a ban on marriage by prison inmates, no current Justice disputes that the protection of substantive "liberty" in the Constitution encompasses at least some fundamental personal matters. There, Justice O'Connor, in an opinion joined by every Justice (including Chief Justice Rehnquist and Justice Scalia), noted "that the decision to marry is a fundamental right" even for prisoners. 107 S.Ct. at 2265.

Whatever the proper results of specific cases testing the limits of personal freedom, Judge Bork's is a uniquely narrow and constricted view of "liberty" and of the Supreme Court's place in protecting it. It sets Judge Bork apart from the entire 200-year-old tradition of thought about rights that underlies the American Constitution. And it suggests an incapacity to address in any meaningful way a whole spectrum of cases that we can expect will be vital in our national life during the next quarter century.

The problem with Judge Bork's extraordinary philosophy of liberty goes far beyond his refusal to respect the long line of Supreme Court decisions protecting personal privacy. This refusal is only part of a radical view of the meaning of the Constitution itself. As Judge Bork understands the Constitution, the Framers and the People of the United States who ratified that document two hundred years ago surrendered to government all of the fundamental, natural rights they regarded themselves as possessing -- the rights that the Revolutionary War had been fought to preserve -- with the sole exception of whatever specific rights were to be mentioned in a Bill of Rights which had been promised but had not yet been written. Judge Bork suggests that one provision of the Bill of Rights, the Ninth Amendment, might have preserved certain other rights that were specifically mentioned in the constitutions of the thirteen states, although he testified that he is unsure of even that much, and he suggested, as recently as 1984 in a speech at the University of Southern California, that uncertainty about the meaning of the Ninth Amendment may require that a judge simply "ignore the provision" and "treat it as non-existent," as though it were "nothing more than a water blot on the document."

Despite Judge Bork's espousal of a theory of "original intent," no understanding of the Constitution could be further from the clear purpose of those who wrote and ratified the Constitution and its first ten amendments. The principal aim of the original Constitution -- and the impetus for the insistence, as a condition of ratification, upon a Bill of Rights to preserve natural rights that had been recognized for centuries -- was to create a national government that, although sufficiently powerful to bind together states of great diversity, would not threaten the individual liberty that the people retained and did not cede to any level of government. The broad purposes of this plan are clear from the wording of the Fifth Amendment's protection of "liberty" and the Ninth Amendment's explicit mandate that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." So too, the major purpose of the Fourteenth Amendment -- again with its specific protection of "liberty" -- was to impose similar restraints, in the aftermath of the Civil War, on the power of the states to infringe on the fundamental rights of any person.

From the very beginning of our Republic, the Supreme Court has consistently and unanimously recognized that, in adopting the Constitution, the people of the United States did not place the bulk of their hard-won liberty in the hands of government, save only for those rights specifically mentioned in the Bill of Rights or elsewhere in the document. In the great case of Fletcher v. Peck, 10 U.S. (6 Cranch.) 87, 135, 139 (1810), Chief Justice Marshall barred a state's revocation of a series of land grants by relying in part on "general principles which are common to our free institutions," noting that the "nature of society and government [may limit the] legislative power." Five years later Justice Story, writing for the Court in Terret v. Taylor, 13 U.S. (9 Cranch.) 43 (1815), struck down a state's attempt to divest a church of its property -- long before the Fourteenth Amendment prohibited such confiscation -- simply by declaring that the statute violated "principles of natural justice" and the "fundamental laws of every free government," as well as the "spirit and letter" of the Constitution.

Putting to rest the notion that the Fourteenth Amendment's command that "[n]o State shall deprive any person of life, liberty, or property, without due process of law" spoke only to the fairness of legal procedures, the Court made clear in Hurtado v. California, 110 U.S. 516, 532, 535 (1884), that the concept of limited government embedded in the Constitution "guarantee[s] not particular forms of procedure, but the very substance of individual rights to life, liberty, and property," protecting "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . . ."

The same principle was recognized by Justice Holmes in 1905, who understood that the protection of "liberty" in the Constitution bars government from infringing on "fundamental principles as they have been understood by the traditions of our people and our law." Lochner v. New York, 198 U.S. 45, 76 (1905) (dissenting opinion). It was reaffirmed by Justice Cardozo, who said that the mission of defining the content of the Fourteenth Amendment depended on the search for "principle[s] of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental," and thus "implicit in the concept of ordered liberty . . . ." Palko v. Connecticut, 302 U.S. 319, 325 (1937) (writing for all but Justice Butler). This principle was expressed most eloquently by Justice Harlan in his dissenting opinion in Poe v. Ullman, 367 U.S. 497, 543 (1961). He observed that

> "the full scope of the liberty guaranteed by the Due Process clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, . . . that certain interests require particularly careful scrutiny of the state needs asserted to justify their infringement."

Justices in the modern era as well have had no trouble understanding that the rights of the people are not, and cannot properly be, limited to those specifically mentioned in the Constitution or directly inferable from those expressly listed. In his 1980 opinion upholding the right of the public to attend criminal trials, Chief Justice Burger refuted the argument that such a right could not exist because it was "nowhere spell[ed] out" -- in part by pointing to the Ninth Amendment, which he recognized had been included by draftsmen who "were concerned that some important rights might be thought disparaged because not specifically guaranteed." Richmond Newspapers v. Virginia, 448 U.S. 555, 579 & n.15 (1980) (plurality opinion of Burger, C.J.). The Chief Justice noted that rights such as "the rights of association and of privacy, . . . as well as the right to travel, appear nowhere in the Constitution," but that "these important but unarticulated rights have nonetheless been found to share constitutional protection in common with explicit guarantees." 448 U.S. at 579-80.

Indeed, a careful review of the Supreme Court's precedents reveals that not one of the 105 past and present Justices of the Supreme Court has ever taken a view as consistently radical as Judge Bork's on the concept of "liberty" -- or the lack of it -- underlying the Constitution.

The uniquely narrow character of Judge Bork's view of liberty is highlighted by his response to Senator Specter's question regarding the 1954 decision requiring the desegregation of schools in Washington, D.C., Bolling v. Sharpe, 347 U.S. 497 (1954). In that case, by a unanimous vote, in an opinion joined even by Justice Black -- who had the least patience for general notions of liberty -- the Supreme Court held that segregation by law in public schools of the District deprived schoolchildren of their "liberty" under the Fifth Amendment, on the ground that the term "liberty" cannot be "confined to mere freedom from bodily restraint" but "extends to the full range of conduct which the individual is free to pursue," and that segregation by law limits this liberty in a substantively arbitrary way, 347 U.S. at

499-500. Yet Judge Bork, in responding to Senator Specter's question, conceded that, under his "original intent" theory of the Fifth Amendment's liberty clause, there would have been no basis for striking down such desegregation. After all, the Fifth Amendment was ratified in 1791 -- roughly three-quarters of a century before the end of the Civil War, and long before any ban on race discrimination was enacted as constitutional law.

Judge Bork did suggest that the same result as that reached by the Bolling Court could perhaps be reached by relying on the First Amendment and the freedom of association it implies. But that suggestion is hard to take very seriously. Only political association has ever been protected under the First Amendment, and expanding this freedom to association among schoolchildren (whose parents decide which school they are to attend) would be strikingly incompatible with Judge Bork's own views of the First Amendment, which he regards as protecting speech (perhaps including art and literature, in the latest formulation of his views) only because of its relationship to politics. Moreover, Herbert Wechsler's seminal article on neutral principles, to which Judge Bork traces much of his jurisprudence, consisted largely of a demonstration that a freedom of association argument would not suffice to justify the desegregation decisions.

Indeed, Professor Wechsler was recently quoted by Anthony Lewis (New York Times, Sept. 6, 1987) as commenting that:

> "We have been fortunate . . . to have a last-ditch defense of autonomy and freedom in the Supreme Court. In all the things Judge Bork has written I've never seen any recognition on his part that the open-ended language of the 14th Amendment was not simply a way of describing the admission of Negroes to the polity but was understood to be a broad reference to freedoms. I think that means it is legitimate for judges, within their realm of duty, to articulate untouchable areas of autonomy or freedom."

The point is not that Congress might resegregate schools in the District of Columbia, or that Judge Bork would permit it to do so by overruling Bolling v. Sharpe. I have no such fear. The point, rather, is that Judge Bork's view of the case illustrates how severely restricted his theory of liberty is. That view bodes ill for how he might resolve a wide array of cases we cannot yet anticipate. Judge Bork's rejection of the Supreme Court's historic role in articulating an evolving concept of "liberty" protected by the Constitution -- not simply protecting a fixed set of "liberties" from an evolving set of threats -- has great practical significance in an era when government bureaucracies may be tempted to dictate the deployment of medical technology so as to control choices about the very young and the very old, the infirm and the disabled -- threatening to usurp the most intimate family decisions in these areas and to control who may have children, which children may be brought into the world, and which must be discarded before they come to term. Without the last line of defense defined by the established tradition that the protection of the Constitution extends beyond those rights specifically mentioned in the text, the chilling spectre presented by these and other issues in our increasingly complex world must be of abiding concern.

II.

WHOM DOES "EQUAL PROTECTION OF THE LAWS" PROTECT AND HOW STRONGLY?

While reaffirming his basic position that the citizen possesses only those liberties specifically ceded by the majority, Judge Bork seems to have retreated during these hearings from the similarly narrow position he had long taken with respect to the meaning of equality under the law. Thus, Judge Bork said as recently as June 10, 1987, that he thinks "the equal protection clause probably should have been kept to things like race and ethnicity." Because those were the concrete concerns that led to the Fourteenth Amendment, Judge Bork's theory of original intent inevitably led him to attack the extension of equality to women and other vulnerable groups. Thus his 1971 statement that the Supreme Court "should refer the rights of women . . . to the political process" was no mere academic speculation; it expressed a view that he continued to state, with great emphasis, long after becoming a federal judge. Senator DeConcini and other members of the Committee thus had every reason to express surprise when Judge Bork testified that he would extend the Fourteenth Amendment to all persons, with results supposedly as favorable to women as the Burger Court reached from 1971 to 1986.

As Judge Bork explained his new position on September 19 -- a position he would apply identically to race discrimination cases, sex discrimination cases, and cases of alleged discrimination against corporate enterprises -- it is simply this: "[T]he equal protection clause . . . means what the words say: all persons are protected against unreasonable legislative classifications." With all respect, that formulation accomplishes absolutely nothing. Judge Bork attacks the Supreme Court's privacy doctrine as "capable of being applied in unknown ways in the future, in unprincipled ways." (Testimony, Sept. 15, p. 132.) That is surely true of the "unreasonable classifications" doctrine, which Judge Bork would apply alike to matters of race, sex, and economics.

When the Supreme Court upheld racial segregation by law in railway accommodations, it did so on the ground that the Louisiana legislature, "[i]n determining the question of reasonableness," was "at liberty to act with reference to the . . . customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard," the Court wrote in Plessy v. Ferguson, 163 U.S. 537, 550-51 (1896), "we cannot say that a law which . . . requires the separation of the two races in public conveyances is unreasonable." The fact that Judge Bork believes Plessy was wrongly decided is beside the point: the Plessy decision shows how easily any judge can use the amorphous, unstructured concept of "reasonableness" to uphold any law.

It is precisely on the basis of the "reasonableness" concept that the Supreme Court, prior to the 1970s, upheld one instance of sex discrimination after another; all seemed "reasonable" to the Justices, applying their sense of the community's then-current standards. In 1873, the Supreme Court thought it eminently reasonable to exclude women from the practice of law.

Bradwell v. Illinois, 83 U.S. 130 (1873). See 83 U.S. at 140-42 (Bradley, J. concurring). In 1924, the Supreme Court found no "unreasonable . . . classification" in a law that excludes women, "considering their more delicate organism," from late-evening restaurant employment. Radice v. New York, 264 U.S. 293, 294, 296 (1924). In 1961, the Court -- without a single dissent -- found a state's exemption of women from jury service (unless they volunteer) to be based on a "reasonable classification" in light of how, "[d]espite [their] enlightened emancipation," women are "still . . . the center of home and family life." Hoyt v. Florida, 368 U.S. 57, 61-62 (1961). Every student of the Constitution knows, and Judge Bork is surely aware, that only heightened judicial scrutiny -- at an intermediate level for matters of gender, and at the strictest level for matters of race -- resulted in a consistent and predictable shift toward equality in the vital areas of race and, more recently, sex.

Justice Stevens, whose jurisprudence Judge Bork invoked for the supposedly "new" methodology he would favor, has in fact joined numerous opinions clearly establishing heightened judicial scrutiny in cases of alleged sex discrimination, requiring that any legal discrimination between men and women be closely "tailored to further an important governmental interest," Kirchberg v. Feenstra, 450 U.S. 455, 460 (1980), and not simply that it be "reasonable." In Mississippi University for Women v. Hogan, 458 U.S. 718, 724-25 (1982), a decision striking down gender discrimination in medical schools, Justice Stevens agreed with Justice O'Connor, writing for the majority of the Court, that significantly heightened scrutiny is vital in all gender cases.

Moreover, when Justice Stevens has suggested replacing the Court's multi-tiered analysis with a method based on a reformulated "rational-basis" test, he has carefully explained that he would conduct the inquiry about rationality not in terms of a judge's sense of the majority's current standards, which Judge Bork advocated in his testimony, but in terms of how an "impartial lawmaker," or "a member of [the] class of persons" disadvantaged by the challenged law, would assess its rationality. See Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 454 (1985) (Stevens, J., joined by Burger, C.J., concurring).

Nothing about this method resembles the open-ended, free-floating, essentially lawless "reasonableness" test fashioned by Judge Bork during these hearings. And nothing about either method can be explained in terms of the text of the document or the "original intent" of the Framers or ratifiers of the Fourteenth Amendment, from which Judge Bork would derive his warrant as an enforcer of the Constitution.

Apart from its sad consequences for gender cases, the fact that Judge Bork would employ this "reasonableness" test, in place of the strictest level of judicial scrutiny that has marked the Supreme Court's approach to race discrimination cases since the 1940s, should be a source of particular concern. Not only did the "reasonableness" test underlie the infamous separate-but-equal holding in Plessy that Judge Bork agrees was wrong, but such a test, if taken seriously, could require overturning a number of landmark rulings that Judge Bork has criticized -- most notably, the decision in Shelley v. Kraemer, 334 U.S. 1 (1948), holding that a state court violates the Equal Protection Clause of the Fourteenth Amendment if it enforces a racially restrictive covenant preventing a willing white seller from concluding a transaction with a willing black buyer.

Judge Bork noted in his testimony that other scholars share his critique of the Shelley opinion. He quoted pages 1156-57 of my 1978 treatise to the effect that the opinion did not adequately explain the Court's result. (Testimony, September 15, p. 127.) What Judge Bork omitted to quote was the explanation I offered, there and at page 1170 -- namely, that a state's decision to enforce racially discriminatory contracts, while it fails to enforce other contracts deemed to be against public policy, cannot withstand the strict scrutiny suitable in race cases. Contrary to Judge Bork's assertion that the Shelley precedent "has never been applied again" (Testimony, September

15, p. 127), it has in fact been applied -- in many later decisions, including one by then-Justice Rehnquist writing for a Court unanimous on this issue, in Moose Lodge v. Irvis, 407 U.S. 163, 171, 179 (1972). A state could well persuade a Justice Bork that it is entirely "reasonable" for it simply to enforce privately authored racial restrictions; to preclude that prospect, one must retain the strict scrutiny that Judge Bork would abandon in race cases.

A final consequence of Judge Bork's "reasonableness" approach would be to render the Equal Protection Clause virtually powerless to redress discriminations against the poor. Particularly when the law does not expressly attack the poor as such but merely leaves their interests completely out of account, a "reasonableness" standard is easy to meet. This Committee has already noted the parallel to the famous observation of Anatole France: it is not reason but compassion that is offended by the majestic equality of a law that forbids rich and poor alike to beg in the streets and to sleep under the bridges of Paris. So it is no surprise that Judge Bork would adhere, in his testimony before this Committee, to the view that there was no violation of the Equal Protection Clause in a state's decision to charge all voters a small poll tax for the "privilege" of casting a ballot, a decision struck down in a Supreme Court decision that Judge Bork continues to reject, Harper v. Virginia Board of Elections, 383 U.S. 663 (1966). Absent a showing of racial discrimination, Judge Bork testified, such a tax poses no constitutional problem.

So too the Oklahoma law subjecting certain thieves to sterilization while sending embezzlers to jail, struck down in another decision Judge Bork continues to criticize, Skinner v. Oklahoma, 316 U.S. 535 (1942), poses no constitutional problem for Judge Bork apart from some possible showing of racial animus. The obvious discrimination against blue-collar convicts and in favor of upper-class criminals does not, for Judge Bork, make this law so "unreasonable" as to violate equal protection.

Similarly, in continuing to find no sufficient constitutional basis for the Supreme Court's invalidation of the Connecticut birth control ban in Griswold v. Connecticut, 381 U.S. 479 (1965), Judge Bork seemed unaffected by the letter read to the Committee by its Chairman on September 18, in which Harriet Pilpel, general counsel of Planned Parenthood, explained that prosecutions of doctors and nurses under the Connecticut statute in 1939 had caused all nine Planned Parenthood clinics in the state to close for a quarter of a century. As Justice White wrote in his concurring opinion in Griswold, the state law not only outlaws marital use of birth control devices, but "prohibits doctors from affording advice to married persons on proper and effective methods of birth control." Justice White continued by noting that "the clear effect of these statutes, as enforced, is to deny disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control." 381 U.S. at 503.

In Justice White's view, "a statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment." 381 U.S. at 503. But, as of last week, Judge Bork still could find no basis in the Constitution for the Supreme Court's action in invalidating the Connecticut law, and insisted that the law was not worth worrying about because its enforcement in the bedrooms of Connecticut was not a realistic threat. There was nothing "unreasonable," it seems, about forbidding rich and poor alike to make use of free birth control clinics.

The inescapable conclusion is that even Judge Bork's revised view of the Equal Protection Clause -- that it extends beyond race and ethnicity to all persons, through a general requirement of reasonableness -- cannot begin to remove the fundamental concern that his judicial philosophy would pose grave danger to the principle enshrined in the words chiseled at the entrance to the Supreme Court: "Equal Justice Under Law."

III.

WHAT "FREEDOM OF SPEECH" IS PROTECTED?

With respect to free speech -- an area in which Judge Bork has long espoused a philosophy much more restrictive than the Supreme Court has pursued ever since its essential adoption of the famous Holmes-Brandeis dissents of 1919 and 1920 -- the judge has continually updated his views, telling Senator Leahy on September 17 that he now regards the Supreme Court's Brandenburg decision as "right"; telling Senator Specter on September 18 that he still regards it as wrong but is willing to live with it; and telling the full Committee on September 19, in his closing statement, that he has "affirmed [his] full acceptance of the Supreme Court's First Amendment jurisprudence, including the Brandenburg decision."

But Senator Specter put what seems to me the telling question when he asked Judge Bork how he could avoid deciding future cases, with different facts, in ways powerfully affected by his continuing disagreement with the Supreme Court's basic First Amendment approach, in the line of cases culminating in Brandenburg v. Ohio, 395 U.S. 444 (1969). When a nominee espouses for two decades a view much more restrictive of free speech than that of the Supreme Court, but promises to accept as "settled law" the results thus far arrived at by that Court, such a promise may reassure some, but it leaves in place the very considerable risk that, as the law unfolds over the next decade or two, the nominee's much more restrictive views will decisively shrink the scope of First Amendment protection.

Nor is it even clear just what Judge Bork means by his "full acceptance of the Supreme Court's First Amendment jurisprudence," since his own description of that jurisprudence, as it presently stands, differs sharply from what virtually all commentators with whom I am familiar understand that jurisprudence to be. In repeatedly affirming a community's right to control the speech of individuals in accord with the local majority's morality, Judge Bork has again and again assailed the famous opinion of Justice

Harlan, perhaps the most distinguished conservative jurist of our era, in Cohen v. California, 403 U.S. 15 (1971). There, a young man was convicted and sentenced to a month in jail for the crime of "offensive conduct" because he wore, into a public courthouse, a jacket bearing a political slogan challenging the draft with a vulgar four-letter word. Judge Bork has taken particular exception to Justice Harlan's observation that, if the government can jail someone for using a single word deemed offensive by the majority, then its power over speech is "inherently boundless," since "one man's vulgarity is another's lyric." 403 U.S. at 25.

It is telling that Judge Bork, in his testimony, attributed to Justice Harlan the very different, and less tenable, proposition that "one man's obscenity is another's lyric." Judge Bork evidently viewed the jacket slogan as obscene. But Justice Harlan was surely correct when he wrote in Cohen that this was in no sense "an obscenity case," since state power to punish expression as obscene must at least be limited to expression that is "erotic," and Cohen's "vulgar allusion to the Selective Service System" could not possibly "conjure up such psychic stimulation in anyone likely to be confronted" by his slogan. 403 U.S. at 20.

The Cohen case is worth dwelling upon in some detail because, as Justice Harlan wrote, "the issue it presents is of no small constitutional significance." 403 U.S. at 15. If Judge Bork's version of the First Amendment, as he expressly affirmed that he "accepts" it during these hearings, permits government to punish even political speech -- which Judge Bork concedes lies at the First Amendment's core -- whenever the speaker uses a single word that the government, or the local majority, deems vulgar or offensive, then the nominee's "full acceptance of the Supreme Court's First Amendment jurisprudence" cannot provide much solace for those who have read his many writings on the subject and come away fearful for this most basic of our freedoms.

IV.

WHAT ARE THE LIMITS OF EXECUTIVE POWER?

With respect to presidential power and the ability of Congress to protect itself in federal court from lawless encroachments by the executive, Judge Bork made a grudging concession to Senator Byrd to the effect that, in sufficiently extreme cases, he might revise his firmly stated opposition to congressional standing. That concession is simply impossible to reconcile with the lengthy dissent that Judge Bork wrote in Barnes v. Kline, 759 F.2d 21, 41 (D.C. Cir. 1985), in which he explained in great detail his unqualified conclusion that "[w]e ought to renounce outright the whole notion of congressional standing." To do anything else, Judge Bork argued, would put the federal courts on a slippery slope leading them to engage in "general supervision of the operations of government," with an "eventual outcome" that "may be even more calamitous than the loss of judicial protection of our liberties." 759 F.2d at 71. This may say as much about Judge Bork's level of concern for judicial protection of our liberties as it does about his level of concern to keep courts from policing inter-branch clashes at the behest of Congress. However that may be, this forceful and eloquent denunciation of congressional standing, written by Robert Bork not as a provocative academic but as a sitting circuit judge, cannot be squared with his reassurances to Senator Byrd.

Similarly, when Judge Bork was asked about his public statement that the law providing independent special prosecutors was probably unconstitutional, he suggested that his prior views need not concern any Senator; those views, he said, are irrelevant to the current version of the independent counsel law because the version he was discussing entrusted a federal court with authority to appoint, supervise, and remove the independent counsel and because, in Judge Bork's view, appointing and removing prosecuting officials cannot be made a judicial function. Most students of this subject, so far as I can ascertain, find this position untenable in light of Article II, Section 2, Clause 2, which expressly empowers Congress to "vest the appointment of such inferior officers, as they think proper, in the . . . courts of law." But even if Judge Bork's view were a plausible one, it seems telling that he would assert its irrelevance to the current version of the law. In truth, the current version -- like the version Judge Bork denounced as probably unconstitutional -- gives a federal court the power to appoint an independent counsel and the power to decide if such counsel is guilty of an impropriety warranting removal by the Attorney General. Thus Judge Bork's intimation that his constitutional misgivings about the former law have no bearing on the current law must be regarded as disingenuous at best. And it is a matter of no small moment if a nominee to the Supreme Court in fact believes that Congress is powerless to provide for special prosecutors to investigate illegality high in the Executive Branch in a manner not susceptible to future Saturday Night Massacres.

Perhaps it should be added that, if a nominee's philosophy would significantly reduce the ability of Congress to control executive lawlessness or the ability of federal courts to protect Congress from unconstitutional encroachments by the Chief Executive, no Senator owes the President whatever deference might otherwise be appropriate in confirmation proceedings. Senator Specter astutely raised this issue when questioning Judge Bork on September 19. Although the judge quite properly declined to advise the Senate on this issue, it seems plain enough that, if the Senate were to exercise anything less than fully independent judgment on the acceptability of a potential Justice's views on this subject in particular, then the Chief Executive could unilaterally effect a significant shift in the separation of powers. Whatever else it was meant to achieve, the advice and consent power was surely intended to avoid any such unilateral power.

V.

HOW BINDING ARE THE SUPREME COURT'S CONSTITUTIONAL PRECEDENTS?

There is one final area in which the Judge Bork who testified before this Committee presented an impression decidedly more moderate than the Judge Bork who, as a sitting circuit judge, made numerous public statements as recently as 1985, 1986, and 1987. That area is the matter of precedent, or stare decisis. In these hearings, Judge Bork sought to reassure Senator Heflin and others that he would not lightly overrule even those decisions that he had most vigorously and scornfully attacked in the past. Only if he deemed them "clearly" wrong and capable of generating "pernicious" consequences would he even consider overruling such misguided decisions. And, even then, he would be unlikely to do so if those wrong decisions had led to the building up of enormous institutional and economic structures -- as in the case of paper money, of which the Founding Fathers might have disapproved, or in the case of Congress's broad power to regulate commerce, or in the case of the "whole industry . . . built up around an understanding of the freedom of the press." (September 15, p. 165.)

Many have observed that this testimony suggests far less eagerness to overturn past decisions than Judge Bork himself indicated he would display when he said this in a speech at Canisius College in Buffalo, on October 8, 1985:

> "I don't think that, in the field of constitutional law, precedent is all that important . . . . [I]f you construe a statute incorrectly, then Congress can . . . correct [it]. If you construe the Constitution incorrectly . . . everybody is helpless . . . . If you become convinced that a prior court has misread the Constitution, I think it's your duty to go back and correct it. Moreover . . . willful courts . . . will take an area of law and create precedents that have nothing to do with the meaning of the Constitution. If a new court comes in and says, 'Well, I respect precedent,' which has a ratchet effect, with the Constitution getting further . . . away from its original meaning because some judges feel free to make up new constitutional law and other judges, in the name of judicial restraint, follow precedent, I don't think precedent is all that important. I think the importance is . . . what the framers were driving at . . . ."

When the tape of those remarks was played at these hearings, Judge Bork said: "[G]enerally what I said there is correct."

What is the Committee to make of all this? And what is it to make of this extraordinary comment of Judge Bork, in addressing the Federalist Society in Washington D.C. this January 31: "Certainly at the least, I would think that an originalist judge would have no problem in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy."

Confronted with this stark statement, Judge Bork told this Committee that it should not be alarmed, inasmuch as his very next paragraph indicated that he would not overturn the Commerce Clause cases even if he deemed them non-originalist. But his reason for leaving those cases in place, like his reason for leaving some of the free press cases untouched, is simply that entire industries have grown up in reliance on these decisions.

Whenever that cannot be said, Judge Bork has left no doubt that, under the criteria he described in his testimony last week, all precedents he deems sufficiently "pernicious" will have to go. And he told the Attorney General's Conference in 1986 that "the Court's treatment of the Bill of Rights is theoretically the easiest to reform." It is therefore particularly chilling that, in Judge Bork's testimonial listing of the areas of the law he deems too well settled to warrant overturning, conspicuously excluded were the many cases dealing with personal freedom and privacy -- cases discussed above.

The upshot of Judge Bork's position on stare decisis, even as reformulated in his testimony, is that he would be more willing than most, not less willing, to overturn decisions he deems constitutionally illegitimate -- a category that he has made plain includes vast areas of constitutional law. As he said to this Committee in testifying in 1981 on the Human Life Bill, "nobody believes the Constitution allows, much less demands, the decision in Roe v. Wade or in dozens of other cases in recent years." To the Seventh Circuit Judicial Conference the same year, he said "[n]obody really believes that there is any warrant in the Constitution for much of what has been done." At Catholic University in 1982, he announced that "[n]o writer . . . thinks that any large proportion of the most significant constitutional decisions of the past three decades could have been reached through interpretation of the Constitution." That is not a youthful academic's critique of poorly reasoned opinions; it is the verdict of a mature sitting judge that the Constitution will not support much of what has been done in its name, under any manner of reasoning. No member of this Committee who is concerned about stability in constitutional law can fail to find this more than a little disconcerting. For although few jurists or scholars disagree that the Supreme Court should be more willing to overrule constitutional errors than mistakes in statutory interpretation, an eagerness to overrule seems most unsettling in a jurist who finds so much to attack in the jurisprudence of the past half-century or more.

That Judge Bork might decide to let well enough alone in various areas according to his assessment of how "pernicious" prior errors were, and how worthy of respect the expectations generated by those errors might be, cannot offer much consolation. Surely this criterion, which has nothing whatever to do with original intent and is in no way constrained by objective legal standards, amounts to little more than a blank check. If Judge Bork objects to what the Supreme Court has been doing in recent decades on the ground that it has applied loose, fuzzy, open-ended notions that fail to constrain the judges in a law-like manner, then he certainly ought to object to the very power he asks this Committee to place in his hands -- the power to decide, on inherently subjective criteria, which of a vast number of decisions merit reconsideration and which should be accepted as "settled law."

CONCLUSION

At bottom, the problem with all of Judge Bork's reassurances and reformulations is that they cannot set to rest the grave questions raised by the consistent record of his public statements from 1971 through this year. On September 18, he testified that it "really would be preposterous to say the things

I said [to this Committee] and then get on the Court and do the opposite. I would be disgraced in history." But that misses the point. The point is not that Judge Bork made ironclad promises to this Committee that he could not break without public disgrace. Quite properly, he made no such promises; had he done so, he would have been criticized for prejudging cases that would come before him. Instead, he offered formulas sufficiently loose and flexible that he could, without "do[ing] the opposite" from what he testified, proceed as a Justice exactly as his public record should lead this Committee to fear.

My conclusion, after reviewing the record and the testimony, is that, without making any attempt to categorize Judge Bork's views as "activist" or "restrained," but merely taking them on their own terms, there is ample basis for grave concern not only in the views he expressed prior to his nomination but also in the reaffirmation of these beliefs in his testimony and in the reformulations offered during the course of that testimony. Many Senators may find Judge Bork's beliefs to be outside the acceptable range of judicial philosophy. For those who do, a refusal to confirm him would not entail the application of an ideological litmus test. It would involve only the discharge of a solemn constitutional duty. For in each area of concern -- liberty, equality, free speech, executive power, and the role of precedent -- the moderation suggested by Judge Bork's latest choice of words turns out to be illusory, leaving in place a set of views every bit as hostile to individual rights and deferential to executive power as Judge Bork's two decades of public speeches and writings would have led a detached observer to expect. Were Judge Bork to act accordingly after being confirmed, history's verdict would not be that he had misinformed the Senate but that the Senate had paid insufficient heed to precisely what Judge Bork had told it.

The CHAIRMAN. Thank you, Professor.

Let me start with where you ended: precedent. Judge Bork articulated a more detailed view of precedent than I had heard or read him as saying prior to appearing before the committee. He went fairly far on matters of speech from where he had been, saying that although he did not agree with the reasoning, he would accept the result.

He also did the same in other areas. One area I did not detect him doing either—that is, accept the reasoning and/or the result—was in the privacy area.

Tell me what you think the role of precedent is and how it has been viewed by former Supreme Court Justices. What latitude do they have? Then, if you will, tell me what your view is of what you believe Judge Bork's view of precedent to be.

Mr. TRIBE. Senator, most Supreme Court Justices and most commentators on the Constitution have realized that, unless the Court is willing to reexamine precedent, the Constitution may be frozen into ancient error because it is so hard to amend. I think that is right.

Most Justices, however, have also realized that continuity and stability are important, and that one's elders and one's predecessors might have had some wisdom and so one should not lightly overrule. I think that is also right.

When a nominee comes before this committee, if the nominee's views of precedent are in that range, I think no fundamental problem is posed on that score. The only problem in this case arises because of how much Judge Bork thinks was wrong in the constitutional law of the past several decades. In statements that he had made since becoming a circuit court judge, he went so far as to say that no one believes that very much of what the Supreme Court has been doing since World War II could possibly be justified under the Constitution.

Now, when you have a nominee who has thoughtfully said that so much of it is all wrong, completely wrong, then—unless that nominee is unusually respectful of precedent—putting him on the Court may spell chaos. That, I think, accounts for the two visions that this committee has had: the Judge Bork who told the Federalist Society this January that an originalist judge, like him, should have "no difficulty at all" overturning a nonoriginalist precedent, like the privacy decisions and so on, is the same man who said in this committee that, of course, this is qualified by the fact that he is worried—and I take him at his word—he is worried about settled expectations. When whole industries have grown up, he does not want to uproot them, but he does not say that the law of privacy is settled.

Because there are so many areas that he thinks were radically wrong, I think the fundamental mystery remains. It is not resolved by Judge Bork indicating that he has respect for precedent.

The CHAIRMAN. If one rejects the reasoning in the case that we have all become intimately familiar with, the *Griswold* case—that is, the finding of a marital right to privacy—what cases that flow from that, establishing the existence of a right to privacy, the principle, what cases would fall if that reasoning fell?

Mr. TRIBE. Well, Senator, if the abortion decision, for example, were to be revised on a very narrow and limited ground—respect for the fetus, for example—that kind of decision might be limited in its impact. But that is not, it seems to me, Judge Bork's objection to that decision. The objection he has articulated powerfully over and over again is that the whole line of decisions, from the 1920's all the way up to the present, resting on the idea of family privacy and personal autonomy is wrong. That means that it was wrong for the Court to strike down a State law forcing parents to send their children to public rather than private school; it was wrong to protect the right of parents, as the Supreme Court did, to decide what foreign languages their children would learn. It would surely be wrong to hold, as the Supreme Court did a few years ago, that a grandmother cannot be put in jail because she has chosen to live with the wrong set of grandchildren.

All of those decisions are branches of a tree that traces to the same root, a root deep in the soil of constitutional tradition, family privacy. And when Judge Bork says that such privacy does not really exist in the Constitution—and he has said repeatedly that it is not there, no such right exists—it seems to me that the implications are really quite profound.

The CHAIRMAN. Let us go back to the *Roe* case, because a number of my colleagues have spoken to that issue. It has been kind of curious to me that some who are most outspoken about *Roe* have been making the case that maybe Judge Bork will not overturn *Roe*, and those who are most supportive of *Roe* making the case that Judge Bork would overturn *Roe*. It is somewhat fascinating to listen.

As I understand, there has been a lot of criticism about the decision in *Roe*. The criticisms come from the left and the right. We heard someone yesterday quoting Archibald Cox' criticizing the reasoning in *Roe*.

As I understand it—and please correct me if I am wrong; this will be my last question, I suspect—there are two elements to the decision in *Roe*, the so-called abortion case. That is, one criticism relates to what I understand Judge Bork's criticism to be: the finding of a right to privacy, that a woman has a right to privacy to control her own body. Judge Bork says that right does not exist; at least, he cannot find it in the Constitution under any theory that he has heard thus far.

Then there is a second criticism, that there is a right to privacy but that right to privacy may run headon with another right, the right of a human life and being not to be terminated. The criticism in that area comes in whether or not that occurs at the first trimester, second trimester, third trimester, when that occurs. In all of our law, when there are two equally significant rights and they compete, we make judgments. Freedom of speech but you cannot stand up in a crowded movie theater and yell "Fire."

Now, as I understand Judge Bork, if you reject, as he does, the existence of the right to privacy in the first instance, then you do not even get to the second question about competing rights. There is just no way to determine under any circumstances that a woman could have an abortion. That is left to the States to decide.

Mr. TRIBE. Senator, I do think that is Judge Bork's view, although he raised the possibility in this committee that possibly he would find some other right somewhere in this area. But I do not think that constitutional law is a game of hide and seek. The idea that there might be a right hiding there for Judge Bork to discover in the next decade I think is not very plausible.

But I think that your question focuses the real issue that is posed by Judge Bork's very narrow view of liberty. One can agree or disagree with particular decisions and where the Court draws the line. Many have criticized some decisions. There are great judges who dissented in other decisions that Judge Bork attacks. That is not the point.

The point is that someone who does not believe there are any basic personal liberties with respect to family and intimate personal decision unless they are pinned down in the text of the Constitution, someone who has that view is very much at odds with 105 Justices, who at one point or another in each of their careers has recognized that liberty is broader than that.

I think, therefore, to focus on perhaps the hardest case of our times, the abortion decision, is to miss the most fundamental respect in which Judge Bork's views are very different from those of the American constitutional tradition.

The CHAIRMAN. There are those who criticize *Roe* who do not reject the right of privacy, are there not?

Mr. TRIBE. There are many such people. I have criticized some aspects of *Roe* but think that the basic right of privacy is absolutely fundamental.

Indeed, Archibald Cox and others who have criticized *Roe* have taken the view that liberty is broader than a set of points that are identified in black and white in the Constitution.

The CHAIRMAN. My time is up.

Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Professor Tribe, do you believe, as do most scholars and jurists, that the Supreme Court should be more willing to overrule the constitutional errors than they would in overruling mistakes in statutory interpretations?

Mr. TRIBE. On the whole, Senator, I do agree with that.

Senator THURMOND. Professor Tribe, do you believe that law professors are expected to provoke discussion of issues?

Mr. TRIBE. I think they are expected to provoke discussion in a responsible way. I do not think that being a professor is an excuse for saying things one does not take seriously. I do believe that Judge Bork took very seriously the things that he wrote as a professor and that he has repeated as a judge.

Writing things with a certain flair is not the same thing as floating intellectual trial balloons which can be popped the moment one is nominated.

Senator THURMOND. Professor Tribe, in your opinion is there any subjectivity in the application of the strict scrutiny and the heightened scrutiny test under the equal protection clause?

Mr. TRIBE. I think that is a very good question, Senator Thurmond.

I think there is an element—some element—of personal judgment always involved in every difficult case, so that not even the strict scrutiny the Court has used in cases of race or the heightened scrutiny it has used in cases of gender can absolutely eliminate subjectivity. But it can do a lot better job than a mushy, fuzzy, open ended test that just asks: "is it reasonable?"

That is subjectivity run rampant. There is no structure to the general reasonableness test. It really is an invitation for someone to fill in a blank. So I think if you are after objectivity—as I believe Judge Bork has been throughout his career—the last thing you would want to do is move toward an open-ended test of the kind that I understood him to be advocating for all equal protection cases.

Senator THURMOND. Professor Tribe, under your reading of the Constitution, what standards are used for discerning rights to be promulgated as fundamental rights? Does the Court care at all about what such rights might have been at the time of ratification? Or is the Court to be guided by contemporary concepts of fundamental rights?

Mr. TRIBE. I think that it is very important to focus on the rights that were assumed at the time of ratification. I think that that should be the starting point of inquiry, and in fact, in 1980 when the Supreme Court did invoke the ninth amendment in Chief Justice Burger's plurality opinion to say that the people of this country have a fundamental right to attend criminal trials, something the Court had not held prior to 1980, the Court in that *Richmond Newspapers* case did focus on the rights that were taken for granted at the time of the Constitution's framing. At the same time, for 200 years Justices have said that the rights assumed at the time of the framing were not a fixed, frozen set; that it is an evolving tradition. And therefore, courts have looked to the evolving traditions of respect for marriage, respect for family, respect for personal intimacy, but always looking at those traditions in the context of a Constitution that is a specific text.

When the Constitution mentions things like the home in the fourth amendment, I think judges have, on the whole, managed to learn a lot from those references in terms of what kinds of fundamental freedoms the framers were trying to protect and what kinds of liberties judges ought to protect under the broad phrases of the Constitution.

Senator THURMOND. Thank you, Professor. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Thank you very much, Professor. I, too, want to join in welcoming you, and I think in a very brief time you have touched on the primary areas which have been raised over the course of the hearings on the nominee—the issues of privacy, equal protection, the role of precedent, the very eloquent testimony we heard yesterday in terms of the race issue, and the inherent power of the Executive. Your response to Senator Biden on the issues of privacy, and your other testimony are extremely helpful and very clear.

On the issues of equal protection and how it is going to be applied, particularly with regards to whether women would be considered to be second class citizens, we have seen remarkable progress made in the various tests applied by the Court, from the reasonable basis test, all the way up through the intermediate scrutiny test, to a strict scrutiny test. And in response to various questions to Judge Bork, he has suggested that, by using a reasonable basis test, he can provide the kinds of protections that evidently would assure that women are first-class citizens in our society.

I can read excerpts from the transcript, but just given the emphasis on time, I think that that is a fair characterization. I am just wondering, as a constitutional authority and scholar, what kind of satisfaction you would have in using a reasonable basis test; whether that would really guarantee the kind of first-class treatment for women in our society that ought to be achieved?

Mr. TRIBE. I think, Senator, that the history of legal decisionmaking under the equal protection clause makes pretty clear that the "reasonable basis" test is anything but a guarantee. It is much more likely to be a rubber stamp for laws that the Judge thinks are basically okay and a kind of blank check for the Judge to fill out a veto on laws that he thinks are not okay.

For a great many years that was, in essence, the test that led to the upholding of almost all kinds of sex discrimination. It might well be used to strike down all kinds of sex discrimination. It is possible. But the reason the Court has struggled to put more structure into the law in this area is precisely because that kind of mushy test was unsatisfactory. And I think it would continue to be unsatisfactory and unpredictable.

Senator KENNEDY. Well, the Judge, I think in fairness to him, would respond that he thinks you can achieve the same objective by using a rational basis test. Would you, as a constitutional authority, believe that using a rational basis test one could really achieve what has been the type of progress that has been made in say the last 30 or 40 years, using the other two tests?

Mr. TRIBE. I do not think there is any way to do it, Senator, in a manner that is intellectually honest. That is, all of these laws which have been struck down in decisions that Judge Bork now for the first time says he tends to accept—although he says some of them trivialize the Constitution—all of those laws were passed by legislatures that, after all, were reasoning men and women.

They thought there was a reasonable basis for having a different drinking age for men and women. They thought it was reasonable not to have women working at night. They thought it was reasonable to exclude women from certain professions. What I am saying is that someone who wants to challenge the stereotypes, the assumptions behind those laws, needs more artillery than a reasonable basis test can give. And the public needs more explanation—something that Judge Bork, I think, to his credit emphasized—more explanation of what the Court is doing.

If the Court just retreats behind its curtain and says, we have looked at these laws, this one is reasonable, that one is unreasonable, and creates two piles, then we have not been given any guidance. We do not know what is going on. I do not think it is a decent test.

Senator KENNEDY. One of the other areas that we have talked about in the course of the questioning was Judge Bork's view about the inherent power of the Presidency and how that has played out in a variety of different positions that he has taken over the period of the past, starting, I imagine, at the firing of Archibald Cox and the inherent power that he believes existed for that firing.

We reviewed that over the course of the hearing; his belief that the War Powers Act is unconstitutional, the foreign surveillance legislation could not require the kind of warrants for surveillance terms of American citizens that were considered to be potential threats; and the belief that Members of Congress lacked standing to challenge various pieces of legislation, that they had no standing to challenge actions that would be taken by the Executive.

That, obviously, is a matter of very considerable concern given the fact that in a number of those areas there may not be individuals who are actually harmed by violations of the law. If you had a prohibition of providing military assistance to Iran, for example, there may not be an individual that would be harmed, or a prohibition of aid and assistance to El Salvador. If there had been violations of human rights, there would not be an individual or private form of action.

What can you tell us, from your own study, about the Judge's view about the inherent power of the Executive and whether that really follows the mainstream of Supreme Court opinion?

Mr. TRIBE. Well, I think it is fair to say that from statements that he has made about the limits of Congress' power to have special prosecutors, to prevent the President from invading particular designated countries, and the limits on the ability of Members of Congress to go to court to hold the Executive to account, I think it is fair to say from all of those statements that his views of executive power are unusually deferential to the Executive.

That does not mean that Judge Bork is some kind of imperialist who would not on occasion rule against the Executive. What it means is that, on balance, there really is a significant difference between his views and what I think of as the mainstream.

But that is clearest with respect to the problem of a confrontation between the branches where, as in the example you give, no private individual could take the Executive to court, but where it is clear that the Executive is defying the Congress of the United States. Now, in that context, to say that Congress has no standing is fairly extreme, and when Senator Byrd pressed Judge Bork on that, he said, well, perhaps in extreme cases I would take a different tack.

But that is really hard to square with a very long, powerful dissent that he wrote in a 1985 decision called *Barnes* v. *Kline*, where he really left no doubt about where he stood. He said, and here were his words: "We ought to renounce outright the whole notion of Congressional standing." He said that if we went any other way we would be on a slippery slope that would have the courts running everything.

I think you can draw some reasonable lines to prevent that. And he said that the result, if we went in that direction—and let me quote him again—the result, if we went in that direction, to control the Executive by letting Congress, "may be even more calamitous than the loss of judicial protection of our liberties."

Now, that does say something that I am not sure is very reassuring about the concern that Judge Bork has about judicial protection of our liberties. But it also suggests that he has a very profound commitment—and I do not question its principled character—a very profound commitment to keeping the courts out of the Executive's hair. And he has a very deep belief that the Executive has enormous inherent powers including, presumably, the power to order someone, in violation of regulations, to fire a special prosecutor, which, of course, is what Mr. Bork was ordered to do and did with respect to Archibald Cox.

Senator Kennedy. Well, if we can just go back for a moment. It is quite evident that you are familiar both with his response to the question of whether that was a legal act or an illegal act. I think the only decision that was made was made by a district judge that found that action to be illegal.

Judge Bork has taken issue with that, indicating that the President did have the inherent power, and even though the regulations were not abandoned or lifted, the fact that the President gave him the order, in effect, achieved the elimination of those regulations and that his actions should not be considered to be illegal and if there was some violation, it was a technical violation.

Your reaction and response?

Mr. Tribe. Senator Kennedy, I am puzzled by Judge Bork's views on that matter. He is certainly correct to point out that the decision which held his action illegal was vacated and is no longer a binding precedent for anyone. That is true.

But it also true that the U.S. Supreme Court unanimously held in *United States* v. *Nixon* that executive regulations securing the independence of the special prosecutor are binding law—binding upon the entire executive branch, the Supreme Court said, until they are repealed.

Now, Judge Bork, I think, takes the position that they were effectively repealed when he received a note from President Nixon saying, abolish the Office of Special Prosecutor.

Yet, my understanding—and here is where I am puzzled—my understanding is that Judge Bork says, I did not abolish the Office; I kept it intact; I wanted to make sure that someone else instead of Mr. Cox could take the President to court and demand those tapes.

It does lead one to wonder why he thought he was being asked to fire Mr. Cox. Surely it was not because of some personal thing; they did not like his bow tie. It must be because they thought the Office ought to be removed. I do not think one can have it both ways.

Either the Office was being removed, in which case it is impossible for Judge Bork to maintain that his purpose was to keep the Office going, or the Office was not really removed, the regulations were still in place, in which case, under the Supreme Court's decision in *United States* v. *Nixon*, the discharge of Archibald Cox was flatly illegal. And I do not know on which horn of that dilemma one would want to rest.

Senator Kennedy. My time is up, Mr. Chairman. Thank you.

The Chairman. Senator Hatch.

Senator Hatch. I am happy to welcome you to the committee, Professor Tribe. You and I have been friends for a number of years and I have great respect for you. In fact, I have followed your brilliant career with a great deal of interest and it is no secret that you are often mentioned as a possible nominee to the Supreme Court yourself by the Democrats or by those who believe in liberal points of view.

Over that time I notice that you yourself have criticized a great number of Supreme Court cases. I think all law professors of any quality do. And in some cases you have merely faulted the reasoning, as Judge Bork has, and others you have disagreed with both the holdings of the cases and the reasoning of the various cases.

For example, you disagree to one degree or another with *Bowers* v. *Hardwick*, the homosexual rights case; with *U.S.* v. *Leon*, the exclusionary rule case; *New York* v. *Quarles* and *Selective Service System* v. *Minnesota Public Interest* in the criminal area; with *Lynch* v. *Donnelly* and *Lemon* v. *Kurtzman* in the area of church/state relations; with *Allen* v. *Wright* and *Warth* v. *Seldin* and *Schlesinger* v. *Reservists Committee* in the area of standing; with *Block* v. *Richardson* and *Hudson* v. *Palmer* in the prisoners' rights area; with *San Antonio Schools* v. *Rodriguez* in the equal protection area; with *Clark* v. *Community for Nonviolence* and *Red Lion* v. *FCC* in the First Amendment area; *Ingraham* v. *Wright* and *Paul* v. *Davis* in the due process area; and of course, *Erie* v. *Tompkins* and *Garcia* v. *San Antonio Transit* in the Federal/State relations area; and with many other cases.

Now, this is just a short list, but I have particularly chosen this list because in many of these cases Mr. Justice Powell was in the majority and disagreed with you and the predecessor here to this particularly position.

Now, the point I am making is that I basically would be the first to say that your disagreement with these many cases on their reasoning should not disqualify you, should you be nominated to the U.S. Supreme Court, or any other federal court, for that matter. And as a member of this committee—assuming I would be here—I would resist, it seems to me, any of those who might contend that you would upset a preconceived notion of balance on the Court, because you would, at least with regard to those cases. And I think we could pick a whole raft of other ones.

I am not doing that to be unfair. I am doing that to just point out that law professors—and especially brilliant law professors like yourself and Judge Bork, when he was a law professor—find very good reasons to criticize, very good reason to find fault.

And in many cases—well, I should not say many—but in some cases your reasoning has been picked up by the Supreme Court itself because you have argued cases before the Supreme Court, and because of the persuasiveness of your writings. And I think that is to your credit.

Mr. Tribe. Senator, might I make a comment about that?

Senator Hatch. Sure. I would be glad to have you comment.

Mr. Tribe. Of course, anyone who writes about hundreds and hundreds of Supreme Court decisions, as I do and as other scholars do, is going to find some he disagrees with. I just finished a 1,700 page book analyzing thousands of decisions——

Senator Hatch. You promised to send me a copy.

Mr. Tribe. And I will do that, Senator.

Senator HATCH. And I am going to read it.

Mr. TRIBE. But the point is that I have no quarrel with someone disagreeing with a whole bunch of decisions. That is not my point at all. Of course, the Justices themselves often disagree. A lot of these cases are 5 to 4. And that is why no aspect of my argument and my concern about this nomination has anything to do with a nose count of exactly how many cases are rejected.

Senator HATCH. I agree with that.

Mr. TRIBE. My concern is that the rejection of the entire tradition of liberty beyond the specification of the Bill of Rights is very, very troubling; that the limitation of equal protection to the areas of race and ethnicity, except for a new an unpredictable test of reasonableness, is deeply troubling; that the willingness to uphold executive power with no congressional standing is deeply troubling. It is not just a list of cases.

Senator HATCH. All right. I understand that point. But my point is that we have distinguished here between Robert Bork as a law professor, criticizing and finding fault and holding matters to be wrong, and Robert Bork's actual actions, which I think speak a lot louder than his words as a Solicitor General and as a Judge on the Court.

Now, let me just give another illustration. You have been particularly critical of the Supreme Court with regard to the death penalty.

Mr. TRIBE. Actually, I do not know that I have, Senator.

Senator HATCH. Well, you have been pretty critical.

Mr. TRIBE. I find that one of the hardest areas of all.

Senator HATCH. Let me give you an illustration—and I am quoting out of your book, "God Save This Honorable Court." And look, I respect your right to have this point of view. But I would suggest that, really, an awful lot of the difference here is because you view things considerably differently ideologically than Judge Bork does.

Now, you also agree on a lot of things, and I think that is fair to say, and you and I agree on a lot of things. But let me just say this, in your book, "God Save This Honorable Court," you wrote:

> No discussion of the Nixon Court would be complete without mention of its death penalty decisions. When Justice White parted company with the Nixon camp in *Furman* v. *Georgia* in 1972, the Court struck down all of the death penalty statutes then in effect on the ground that they gave juries too much leeway to select individuals for executives for prejudiced reasons, or for no reason at all. The four Nixon appointees—that is, Justices Burger, Rehnquist, Powell and Blackmun—gained the upper hand in 1976 and formed the solid core of the majority that upheld rewritten death penalty laws in *Gregg* v. *Georgia*.

Now, I get the distinct impression as I read your writings that you think——

Mr. TRIBE. That is just a description—is that not an accurate description?

Senator HATCH. Yes, it is. But I get a distinct impression that you think the death penalty is never, or really rarely constitutional.

Mr. TRIBE. I have not decided that.

Senator HATCH. Let me go on just a little bit. I agree.

You say that President Nixon picked these nominees for their "harsh commitment to law enforcement ueber alles." And you conclude that, "Ten years after Richard Nixon had been hounded from the White House, his nominees remained on the Supreme Court, exhibiting less interest in avoiding the death of possibly innocent people than in helping the Government keep the grim line of the condemned moving briskly to meet their appointments with the executioner."

Mr. TRIBE. I was very distressed and I still am, Senator, with the notion that speed and efficiency here counts more than making sure that one never executes an innocent person.

Senator HATCH. But Mr. Tribe, I do not think that the Justices were looking at it that way. I think they were trying to resolve a very, very important issue that is mentioned four or five times in the Constitution—the death penalty—and I suggest to you that that passage is possibly very revealing about how you judge Supreme Court nominees.

You seem to be strongly offended by State death penalty laws, and certainly your rhetoric in writing—and look, anybody can write. As a law professor I think you ought to continue to do what you are doing. You are very provocative, you are very good, and I think you have had an influence on a lot of people, including myself. But you know, your rhetoric gives the impression, and you lump justices as diverse and really as highly respected as Justice Blackmun and Justice Powell together——

Mr. TRIBE. Well, Senator, in a book of that kind as opposed to a lengthy treatise of the sort that I have been writing and have written in the past——

Senator HATCH. I agree, and I like the book.

Mr. TRIBE [continuing]. One is trying to summarize a couple of things. But the point really is not what I think of the death penalty, or what Judge Bork thinks of the death penalty.

I think if you review my testimony, it will be fairly plain that I do not and would not object to any nominee simply because he criticized a lot of cases or because I disagree with him on one or two issues. That is not the point.

I am concerned about a very simple 200-year-old tradition of liberty. I am concerned about——

Senator HATCH. As you interpret it. See, that is the difference. He interprets it rather broadly, too, if you listen carefully to his statements. And you cannot say that they were all suddenly manufactured out of thin air as he appeared before the committee.

Mr. TRIBE. I guess I am relying on statements——

Senator HATCH. On his writings as a professor.

Mr. TRIBE. No. I am relying on statements by John Marshall, Joseph Story, virtually every Justice, that liberty is not limited to the specifics in the Bill of Rights. And I am saying that someone who does not believe that is making a fundamental error with respect to what our revolution and our Constitution was all about.

Now, that is not a minor matter to people who believe, as I believe you do, Senator, in limited government, in the proposition that our rights do not all stem from what the majority gave us.

Senator HATCH. That is true. I do not think that Bork stands for that either. I think that you have basically taken his writings as a professor and you have extrapolated from those what you think is his concept of liberty. And frankly, knowing the man as long as I have and having read what he has written, in addition to listening to what he has said and looked at his actions as a Solicitor General and as a judge, I found it to be considerably different—his viewpoints—to be considerably different from the way you have represented them here today.

Now, I understand that there is room for reasonable people to differ. And again, I will close with this. I have a lot of respect for you. I like you personally. When I was chairman of the Constitution Committee we counted on you to testify before that committee on a number of occasions, and even when I differed with you I always—I have to say this—you were always articulate, intelligent, and you always did a very good job.

The CHAIRMAN. Your time is up.

Senator HATCH. Okay. Let me just finish with this last 10 seconds.

Mr. TRIBE. While he is complimenting me, let him go on.

Senator HATCH. Yes. Let me just say something nice about my friend.

The fact of the matter is, if you were here today, I would certainly have to admit that I differ with you on a number of issues. But I also think you are a quality person who would make a good member of the U.S. Supreme Court. That is kind of a nice endorsement to you in open forum.

Mr. TRIBE. Well, I appreciate that.

I think the issue, though, is a very different nominee.

Senator HATCH. Well, I think, as you view him.

I apologize. Thank you, Mr. Chairman.

The CHAIRMAN. The Senator from Ohio.

Senator METZENBAUM. Professor Tribe, before and during these hearings Judge Bork has said that *Katzenbach* v. *Morgan* was wrong. As you know, *Katzenbach* was the Supreme Court case that upheld Congress' power to ban literacy tests as a qualification for voting.

On September 17, 1987, Senator Hatch said to Judge Bork: "Senator Hatch: I would like to dwell on the *Katzenbach* v. *Morgan* case, the 1966 case. That is where the Supreme Court upheld a Congressional statute that redefined the words of the Constitution itself, as I view it. Is that a fair characterization?"

Judge Bork responded: "That is exactly what happened, Senator."

Later, in response to a question from Senator Hatch, Judge Bork said, about the *Katzenbach* case, "*Katzenbach* is in direct conflict with that historic decision because it did allow Congress to alter a constitutional provision of statute."

Now, Professor Tribe, I am concerned because Judge Bork has written and said that not only is *Katzenbach* wrong, but that other Supreme Court decisions upholding Congress' power under the 13th, 14th and 15th amendments are, "very bad, indeed pernicious constitutional law".

Would you explain to this committee what this issue is all about and tell us whether you agree with Judge Bork that *Katzenbach* is inconsistent with *Marbury* v. *Madison*?

Mr. TRIBE. Senator, I do not agree with Judge Bork about that, although I think this is an issue on which you will find people divided in a variety of ways. The basic question relates to the whole purpose of the Civil War amendments. They were designed to secure equality and freedom, but they were designed by people who knew the courts could not perform the task alone.

That is why they contain enforcement provisions saying that Congress can enforce the provisions of these amendments, including the 14th, by all reasonably necessary legislation.

That is exactly what Congress tried to do in a case like *Katzenbach* v. *Morgan*. It is true the Supreme Court had said literacy tests in and of themselves do not necessarily violate the Constitution. And Congress did not disagree with that. What Congress did do was investigate the operation of literacy tests for a certain group of people—Puerto Ricans in New York.

Congress concluded that, for those who had finished 6 years of an accredited school, the literacy test was discriminatory. It disenfranchised them. It made it harder for them to protect their rights in other ways, and therefore, Congress, using its broad remedial powers under the enforcement section of the 14th amendment, did not redefine the Constitution, but simply said, we can do for this group of people what the Constitution does not necessarily make it possible for courts to do.

Now, one can disagree with how wise that legislation was. One can even make, I think, a not very powerful argument that it might have been unconstitutional. But what I do not think you can say in a credible way is that Congress was just ripping up and rewriting the Constitution.

The reason I would stress this is that it does seem to me a bit strange that someone who is deferential to the will of the majority, someone who believes in letting majorities rule—as Judge Bork does—would be so activist as to strike down rational congressional legislation enforcing the 14th amendment.

I do not believe he does it because he has something against Puerto Ricans in New York. I do not want to be understood to say any such thing. But I do believe that Congress has broader power under the Constitution than Judge Bork seems willing to concede to it, and that does create for me yet another puzzle about his judicial philosophy.

Senator **METZENBAUM**. Is not that a reversal of his usual position that it is the Congress that should be making the laws and not the Supreme Court of the United States?

Mr. **TRIBE**. Well, I think in a sense that is true, that the Court in the *Katzenbach* case was deferring to Congress and that, under the usual view Judge Bork espouses, he should have been deferential to that.

Senator **METZENBAUM**. It has been stated during these hearings that Judge Bork is well within the mainstream and that his views and philosophy are similar to those of other Justices, including Justice Stewart.

Now, you clerked for Justice Stewart while he was on the Supreme Court, and I assume you know his views well. Would you say that Justice Stewart would have agreed with Judge Bork's views on some of the major issues raised during these hearings?

Mr. **TRIBE**. I think that Justice Stewart, whom I knew and admired greatly both when I worked for him and in the years thereafter, was really a very different kind of judge. He was less doctrinaire. He was more willing to pay attention to tradition, perhaps less sure of himself, less willing to impose a particular conception, such as that of original intent.

Now, it is true that Justice Stewart dissented in some of the very cases that Judge Bork criticizes. For example, it is true, as several have pointed out, that Justice Stewart was one of the dissenters in the *Connecticut birth control* case in 1965. But there is a fundament difference. By 1973, 8 years later, Justice Stewart wrote a concurring opinion in the far more difficult and more controversial abortion case, saying that he now, having reviewed the doctrine, agrees that the Constitution does protect fundamental personal liberties that are not mentioned.

And of course we know that Judge Bork has a very different view. He thinks that the *Roe* decision with which Justice Stewart agreed was fundamentally illegitimate and totally unconstitutional. So I think there are very big differences.

There are justices here and there who would have voted with a Justice Bork. But as I say, there is not one of the 105 who shares his fundamentally narrow view of liberty.

Senator METZENBAUM. You know that Judge Bork has criticized the *Shelley* v. *Kraemer*, the case in which the Supreme Court said that racially restricted covenants could not be enforced in the courts. Yesterday it was suggested that you agreed with Judge Bork's criticism of *Shelley*. Is that correct? Do you agree that *Shelley* was wrong?

Mr. TRIBE. Well, actually, as I have been listening to these hearings, that was one of the things that puzzled me most, when Judge Bork quoted my critique of *Shelley* and when it was quoted by Senator Humphrey and others. I have the page in which I criticized what the Court did, the opinion of the Court, on page 1156 of my 1978 treatise. But then I go on to explain at great length—all the way up to page 1170—why *Shelley* was right; why even though the opinion was not as persuasive as it should have been, why *Shelley* in fact was correct.

The answer, the reason, is very simple. In that case the courts of Missouri were not being really neutral. They were not enforcing all contracts. Not all kinds of contracts were enforced. Many kinds of restraints on your freedom to sell your property were not enforced. It was the racially restrictive ones that were enforced. So this was clearly a racist act by the State.

Now, in Judge Bork's criticism of *Shelley* in his famous "Neutral Principles" article, he does not just say the Court wrote a sloppy opinion. He says—and I quote him from page 15: "I doubt that it is possible to find neutral principles capable of supporting *Shelley* v. *Kraemer*."

In other words, in his view, there is just no way to get there from here. Under our Constitution, there is no way to prevent courts, as a matter of constitutional law, from enforcing racially restrictive covenants. I disagree with that completely and I do not think I have ever said the contrary.

Senator METZENBAUM. If Judge Bork were to be on the Supreme Court and if the holding of *Shelley* v. *Kraemer* were to be reversed we would again find an America in which racially restrictive covenants would be valid.

Mr. **Tribe**. That is true, Senator. But let me add something. I think that a natural response to a question like that from a supporter of Judge Bork would be, how likely is it. And it seems to me——

Senator **Metzenbaum**. Let me answer that for you.

Mr. **Tribe**. That would be fine.

Senator **Metzenbaum**. Two weeks ago in Cincinnati, a group of people presented to me a whole handful of deeds that still contain racially restrictive covenants. And I must say to you that in my lifetime I bought a home with a racially restricted and religiously restricted covenant in it and I said I was just going to go ahead and buy it anyhow. But I did have a problem getting a mortgage on it.

So I would say to you, if Judge Bork or anyone else would make the point that a restrictive covenant is not probable in this day and age, do not kid yourself. It is not only probable. It is a reality in the world in which we presently live. There are many deeds coming through with racially restrictive covenants, even as we sit here this morning.

Thank you.

The **Chairman**. Did you want to respond to that? Any other comment?

Mr. **Tribe**. Well, I would only add one thing, and that is that, even though there are statutes, including the civil rights statutes, that now would make such covenants hard to enforce, and even though I do not predict, no matter what happens in these hearings, that *Shelley* v. *Kraemer* would be overruled, it says something to me about a judicial philosophy that someone would find no way to support as fundamentally correct and basically decent and constitutionally grounded a decision as that in *Shelley*. It suggest a very narrow view of equality again, and that does concern me as a matter of constitutional philosophy.

The **Chairman**. The Senator from Wyoming.

Senator **Simpson**. Thank you, Mr. Chairman, and welcome to you, Professor Tribe.

You are indeed a very well respected man, a very bright and remarkable professor with a fine reputation, and also not nearly as prolific as Judge Bork, but nevertheless, you have put your pen to paper several times. And I have read some of this. It was very interesting. And you have written a great deal on the law, have you not?

Mr. **Tribe**. I guess I have, Senator.

Senator **Simpson**. You have. And how long have you been writing and speaking on the issues of law and lawyers and the Constitution?

Mr. **Tribe**. I think for about 18–19 years, ever since I joined the law faculty.

Senator **Simpson**. Could you please furnish the committee with a list or copies of your legal writings and speeches and papers? That would be helpful to me as I go forward.

Mr. **Tribe**. Senator, there are about 90 articles and 12 books. Do you really want them all? I would be happy to submit them.

Senator **Simpson**. Yes, I do.

Mr. TRIBE. Okay.

Senator SIMPSON. They need not go in the record, but I would like them.

Mr. TRIBE. I would be happy to do that.

The CHAIRMAN. Let me ask you a question, are you going to make him pay for the copies? Are they hardbound copies?

Senator SIMPSON. Now, you do not have to go through all of that. No. Just give me a list. That is all. I asked for a list. I did not ask for copies.

Mr. TRIBE. That would be fine. I will be glad to.

Senator SIMPSON. Again, I am always fascinated how we return to the same themes of Watergate—which has been laid to rest so many years ago it is hard to believe. I mean, this man went through that pitch twice; when he was nominated for Solicitor General and U.S. district court judge.

There is not much more, as I say, you can get out of that action. That is one of the most extraordinary things, but it is like our philosophy around here in legislating, nothing ever dies. It always comes back. But that, I think, is something.

And then, of course, the *Griswold* case, which was concurred in by Justice Black. We always manage to miss that. Justice Stewart, I believe, called it a—what did he call it? He called it a somersault. Justice Stewart said about the *Griswold* case, "To say that that Ninth Amendment has anything to do with this case is to turn somersaults with history."

Mr. TRIBE. You know, Senator, that in 1968 Judge Bork wrote one of his finest articles in which he explained why Justice Stewart was wrong about that and explained why the ninth amendment did apply. If he had adhered to those views, I think perhaps he would represent less of a concern about liberty.

Senator SIMPSON. Okay. Let me get back really a fascinating adventure here, and that is the Indiana Law Journal article of Robert Bork in the fall of 1971. You do not have to go for it, Laurence—nothing to do there—because everybody else has gone for it.

Mr. TRIBE. Yes, I must admit I have read it.

Senator SIMPSON. And this has been dissected and masticated and digested and undigested, and really the thing about it that is so curious, no one ever refers to the first two paragraphs, and I would think that a person like you, who is a professor, academe, and interested in thought and process would be just as concerned, I think, as anyone in the United States about how this article has been distorted and pulled and twisted, because the author said—it was a general theory—it was to be properly viewed as, "ranging shots, an attempt to establish the necessity for theory, to try to evolve the argument."

The style is, "informal, since these remarks were originally lectures and I have not thought it worthwhile to convert these speculations and arguments into a heavily researched, balanced and thorough presentation, for that would result in a book." That is the opener.

And then he closed and said that it was tentative and exploratory.

Mr. **Tribe**. But in the very next line, after saying tentative and exploratory, he said, "yet, at this moment I do not see how I can avoid the conclusions stated."

And for 15 to 20 years thereafter, in other articles and in other speeches, he took virtually the same positions on the basic themes of that article. It is simply unfair to Judge Bork to say that, because the article was ranging and because it was informal, that it does not reflect a well thought out philosophy, for which I credit him.

My concern is that that philosophy is sharply at odds with traditions of liberty and equality in this country—not the style of the article.

Senator **Simpson**. Let me ask you, many have spent a great deal of time on that article, and I ask you as a professor, do you think that the interest and remarkable attention that has been given to this article, with the preface that the author made 16 years ago, might well chill the interest of law professors and those who like to theorize to write provocative articles or to share controversial thought?

Mr. **Tribe**. I, Senator, cannot imagine that consequence. Most law professors love attention and love having people take potshots at them, agree or disagree. I do not think there is anything chilling about it at all.

Senator **Simpson**. But you have not been here while they talked about it for 5 days. I think it would have chilled you a little if you had.

Mr. **Tribe**. I have been listening. I understand that when one—you know, you write something and you venture out in public, and then if people disagree strongly, that is what life and debate is all about. That is why I believe so strongly in the first amendment.

Senator **Simpson**. It is also about change, is it not? Is that not what life is about, too?

Mr. **Tribe**. I admire change. I admire growth. I wish that Judge Bork could change some of the views that I find so profoundly troubling.

Senator **Simpson**. Do you still adhere to all the various views and writings that you held and expressed 15 years ago, or 20 years, or even 30 years ago?

Mr. **Tribe**. I hope not. I have not canvassed every single thing I have said.

Senator **Simpson**. Well then you have joined the rest of us, and I like that. And it is important to know that growth is change, and change is maturity and it is life itself, and without that we do not have much.

But I was interested in some of your provocative statements. You stated that the Supreme Court's decision allowing the display of a Christmas Nativity scene—*Lynch* v. *Donnelly,* was as bad as the decision—which we all abhor—allowing racial segregation, *Plessy* v. *Ferguson.* You said that.

Mr. **Tribe**. Well, Senator, what I said was that——

Senator **Simpson**. That is pretty provocative.

Mr. **Tribe**. What I said was that to say that those of the Jewish faith and those others who feel left out by the Nativity scene, to dismiss them by saying it is their problem, it is their problem if it bothers them, is just as bad as saying in *Plessy* v. *Ferguson,* as the Court did, it is the problem of blacks if they think being separated makes them unequal. I was making a very specific comparison.

Senator SIMPSON. Well, fortunately, we cannot blame that one on Bork. He did not have anything to do with that. But your comment was interesting.

And then you know that other comment about the death penalty. This is a pretty potent thing you are saying. You are not exactly nonprejudiced in this area, and I use prejudice in the correct term without the connotation of racism. A harsh commitment to law enforcement ueber alles—which is an interesting statement in itself, an old reference that was distasteful in a time past—ueber alles, Deutschland ueber alles was that part—and then you go on with this statement about the Supreme Court "exhibiting less interest in avoiding the death of possibly innocent people than in helping government keep the grim line of the condemned moving briskly to meet their appointments with the executioner." That is a quote from you, and you are talking about Justice Blackmun and Powell in a most extraordinary way.

I just think that that shows a passion that you would not want to miss.

My time is closing, and that is what happens to us around here, but let's admit—maybe we could, and I am not trying to put anything into your mouth—let's admit that you are very interested in politics and you have some deeply held political views. You said earlier that politics—and I certainly said it—that politics is playing a significant role in this confirmation process.

I believe that any American observing it has got that figured out by now. And nevertheless, you appear here as a professor or as an academic. I have the richest respect for that, for your writings, for your university. I have been honored to be at the John F. Kennedy School two or three times in a lecture series and debates.

But you are political. In fact you said one time to our colleague on this committee, to Ted and his interest in politics, you said, "I would give him any advice he wanted. He knows that I would want to participate in his campaign."

Now, everybody has the right to identify with a political party and a political person, but I think we have to be aware of your strong political leanings and of the fact that the title "professor" does not just allow you to sit outside of the mainstream of politics. I think that we would want to indicate that when you offer yourself to work for a politician or a political campaign, that that is politics at the deepest and most intimate and most intense level.

They ridiculed Judge Bork at Yale University for being for Goldwater. I think he said there were two professors that were for Goldwater, and they took their lumps. He said it in good humor.

All I am trying to do is say that let's not be here and say things as if there was an academic tilt to it that is not deeply rooted in your own personal, deeply held philosophy, ideology of politics. And that is what I want to convey.

Mr. TRIBE. Senator, I do want to say that my constitutional philosophy and my political beliefs are very often at odds. I have patiently explained in many contexts why I think one cannot read the Constitution in the radically egalitarian way that some people would like to, to just redistribute things. Whatever views I may have politically have nothing to do with that.

As a political matter, it is a lot easier not to come to a hearing like this. But if one has read somebody's work and believes that there is a real tension between it and a very widely shared set of views, as I said, shared by 105 Justices of every imaginable political stripe, then I think being chilled, staying out of the debate, is not terribly helpful.

So the fact that I have political views—which I surely do and which I am not ashamed of—does not have a lot to do with what I have testified here, or anything to do with why I am testifying here.

Senator SIMPSON. Well, I know you believe that, but I have a little problem with believing it. And the interesting thing is, 5½ years this man has written——

The CHAIRMAN. Senator?

Senator SIMPSON. Just one second. I do not transgress often. This is important.

Five and a half years of writings of opinions on that Court and not one person yet has come in and said that any of those opinions are out of the mainstream. Is not that fascinating? Not one.

Mr. TRIBE. I do not think it is—with all respect, to be honest—I do not think it is that fascinating, because I have never doubted, nor has anyone else, Judge Bork's really fine intellect and his capacity to write fine opinions that will not be reversed by the Supreme Court.

The fundamental difference between being on a court of appeals where one is operating within the bounds of precedent and being on the Supreme Court where one is making precedent is the reason that people like William Coleman and others have looked to 20 years of prolific writing and speechmaking about the Supreme Court and about what it should indicate as a guide to what Judge Bork might do upon that Court.

Senator SIMPSON. Mr. Chairman, thank you for your courtesy.

The CHAIRMAN. Let me say two things here. I think it is very important that these ad homonym arguments cease. No one questions—or no one should question, in my view—the right or the substance of what a witness says any more than they question the substance of what one of us say, unless on the substance you can find a criticism.

The fact of the matter is the issue is, at this point, not what your political views are; it is what you have said here. Now, if we have criticism of what you said here and arguments with what you have said here, we should state it.

I would like to give you an opportunity to respond to something you did not in the soliloquy get an opportunity to respond to, and maybe you do not want to—your statements about the death penalty, the comment read. Do you wish to respond to that at all? You need not. I just want to know if you do.

Mr. TRIBE. Well, I have been very critical of the speed with which certain death penalty cases have been resolved. But I have also found the entire subject of whether the death penalty is constitutional to be one of the most perplexing.

I do not find it as easy as Judge Bork does. He says because the Constitution mentions capital punishment, that is the end of it. Of course, they assumed there would be death. It also mentions hacking off people's limbs—"no person shall twice be put in jeopardy of life or limb." But I believe Judge Bork would agree that doing that would be unconstitutional.

And Judge Bork himself said that, when it comes to desegregation, even if the authors of the 14th amendment assumed that separate was equal, their core commitment to equality should override that. And I am disappointed that he does not seem to consider the possibility of a similar argument about death.

On the other hand, I do not think that some of the opinions about the death penalty, saying that it is automatically cruel and unusual, make a lot of sense to me. I think it is a difficult issue and I do not have a clear view of it.

The CHAIRMAN. The Senator from Arizona.

Senator DECONCINI. Professor Tribe, if you were nominated for the Supreme Court—if you were the nominee——

Mr. TRIBE. Dream on, Senator.

Senator DECONCINI [continuing]. Would you not expect to be asked about your writings and the statements that you have made over the last 18 or 19 years, and be prepared to respond to them?

Mr. TRIBE. I would certainly expect to be asked and I would try to be prepared to respond to them.

Senator DECONCINI. And you would not be surprised if someone came forward who was a colleague or a professor and objected to your views of how you interpret Supreme Court decisions?

Mr. TRIBE. Not at all surprised. I would be surprised if no one did. That is the nature of this process.

Senator DECONCINI. That really is the role of the public witnesses as I see them, on both sides, to express their views. They are not before us for confirmation. You are not here for confirmation. Maybe some day you will be, and if you are, I am sure there are going to be several Senators that are going to have some dandies that they are going to ask you.

Mr. TRIBE. Is this supposed to have a chilling effect, Senator? [Laughter.]

Senator DECONCINI. No. I do not think the one I am going to ask you is going to be any great dandy, but let me ask it, anyway.

Your conclusions about Judge Bork seem to be that—I think in your statement it says, "the moderation suggested by Judge Bork's latest choice of words turns out to be illusory, leaving in place a set of views every bit as hostile to individual rights and deferential to executive power as Judge Bork's two decades of public speeches and writings would have lead a detached observer to expect."

Now, my problem with that—and I have great respect for your writings and I know you have been a witness here a number of times and I have read many of your things—a number of very distinguished individuals, many with long history in service and honor in the area of civil rights, have or will testify in favor of the Bork nomination.

Let me just mention a few: Gerald Ford, Attorney General William Rogers, former Attorney General Elliot Richardson, and Mr. Lloyd Cutler, former counsel to the President.

These people have been active in civil rights activities and do not have a reputation of being hostile in that area. How do you explain the support of these distinguished individuals who come forward and say that, hey, this nominee is okay, you do not have to worry about him; how do you go through that rationale when you see that kind of distinguished people supporting Judge Bork?

Mr. TRIBE. I would suppose, Senator, that on any nomination of a controversial sort there will be differences or view in how one understands a public career. One of the things that makes the case difficult is that many people I respect have a different view of Judge Bork's work than I do, and I respect Judge Bork as well. And so it would be easy to say, well, if there are some good people in that corner and he is a fine fellow, why do we not all just go home?

The reason that I do not just go home, and the reason I really think that this committee deserves credit for taking its role so seriously, is that the stakes are far higher than the illustrious personalities on both sides. The stakes are even higher than the future of one distinguished man, Robert Bork.

It is a question of where the risk should fall. You know, I have been teaching about the Constitution for a very long time. I care deeply about it. Some people might not agree with everything I think about it. That is fine.

But I think we can all agree that, if something we deeply believe is fundamental to the constitutional tradition is at risk, then we should not take chances, that the burden should be on those who want to run that risk. And that is where I come out.

I am given pause by the fact that there are distinguished, serious, thoughtful people on the other side. One of them is Robert Bork himself. But it seems to me that each member of this committee, each Member of the Senate, has a responsibility to think it through on his or her own, to read these writings, not to ignore the opinions, not to ignore the work as Solicitor General, but to realize that they were within a more constrained framework, and to ask, ultimately, whether his judicial philosophy—one that I believe he holds in a principled way—is dangerous to principles of liberty and equality? And if your best judgment is yes, then no list of people on the other side can erase that.

Senator DECONCINI. You are saying it is really going to be a subjective decision by each member of this committee and each Member of the Senate, or it ought to be.

Mr. TRIBE. I think it has to be a decision for each member's conscience.

Senator DECONCINI. In your statement, on page 19, Professor Tribe, you state: "Only heightened judicial scrutiny at an intermediate level for matters of gender, and at the strictest level for matters of race, resulted in the consistent and predictable shift toward equality in the vital areas of race, and more recently, sex."

Is it not true that the predictability and consistency that we desire in this area comes not from the standard announced by the Court but rather from the record of the Court? Is it not better guidance for State legislators to look at the type of statutes upheld or overturned than to try to guess how the Court will apply its standards?

Mr. TRIBE. Senator, I think that, as Mr. Coleman and others who have had lots of litigation experience have testified here, the standard is crucial for predictability. That is, if you just line up the results and put on one pile the list of laws that have been upheld and then on another the set that have not been upheld, you still have less idea than you need, in drafting laws and in arguing about them and in advising people, about just how powerful a reason there must be to justify a line that government has drawn between men and women.

When the Court has said, in very important cases such as *Mississippi University for Women* v. *Hogan*, that the scrutiny should be heightened, I think what it has really been telling us is that it is not enough that you can think up a good reason for the law. You have to be able to find in the history of the law a powerful showing that there was an unusually significant public objective that could be served only in that way. Stereotypes will not do.

That has given me guidance as a litigator. It has given other people guidance, and if you wipe that away and wash it away with a bland formula about reasonableness, then all of the predictability we have built up since the Supreme Court entered this area long ago will be undermined.

Senator DECONCINI. Well, let me ask you this. Could not two Justices apply the heightened scrutiny standard in the due process clause and come to different results, and conversely, could not they apply different standards and come to the same results?

Mr. TRIBE. It is possible, Senator, but statistically the standard is very influential. That is why many people have thought that still stricter scrutiny would be useful in gender cases. But the one area where the standard tells you nothing about the results, where it basically is a blank check, is with respect to this fuzzy notion of just reasonableness, because as the cases illustrate, that does not help at all.

Senator DECONCINI. Have you, in your course of study, determined if the reasonableness standard has ever been presented that you know of before—similar to what I think Judge Bork has presented two or three different times here, which troubles me a great deal, particularly as it applies to women and gender, but for all aspects of the due process clause—has that standard been seriously advanced before? I am just asking a question to learn something because I do not know. I have never come across it until Judge Bork brought it up.

Mr. TRIBE. Senator, I think it is a Robert Bork product, and I think no one has doubted his originality. He does suggest that it is not new, and he suggests that it is what Justice Stevens has been doing. And in preparing for this testimony, I have reread all of Justice Stevens'——

Senator DECONCINI. Yes. Is it Justice Stevens?

Mr. TRIBE. I do not think so.

Senator DECONCINI. I do not think so either, but I want your opinion.

Mr. TRIBE. Well, Justice Stevens occasionally uses the word "reasonable," but he makes it very clear that he is applying that standard from the perspective of what he calls an impartial lawmaker, and in one case involving a home for the retarded, he says that what you have to do is ask yourself how someone in the group that is hurt by the law would assess its reasonableness.

Now, that is at least somewhat more structured than the question of whether it is reasonable to the whole community.

Senator **DeConcini**. What do you think Judge Bork, when he says reasonableness as to race—do you think he is talking about the strictest standard?

Mr. **Tribe**. It does not sound like it to me. His views of *Shelley* v. *Kraemer* reinforce that view. That is, if he believes that it is consistent with the 14th amendment for courts to have enforced racially restrictive covenants, then he is certainly not applying the strictest scrutiny, and he is applying a version of reasonableness that will let various kinds of race discrimination through as well. That is obviously a source of concern.

Senator **DeConcini**. Would I draw from that conclusion that you think his reasonable standard would be more in line with the rational standard?

Mr. **Tribe**. If I had to guess, Senator, I would think it is more in line with that. But in fairness to him, I do not think——

Senator **DeConcini**. Now, he says not. He says it takes it all in. You kind of shift it down and just let it come down and it will all be okay.

Mr. **Tribe**. It will all check out.

Senator **DeConcini**. But I have trouble with that.

Mr. **Tribe**. That is why I called it a blank check, Senator. I think it is impossible in fairness for anyone to take what he said—which was really a way of explaining earlier statements that equal protection does not extend to women—to take what he has said and to make anything predictive out of it, to use it as a source of some sense of personal security that women are going to fare well under that test. I think simply it is a dream and a prayer and a blank check.

Senator **DeConcini**. Thank you, Professor Tribe.

Thank you, Mr. Chairman.

The **Chairman**. Thank you.

The Senator from Iowa.

Senator **Grassley**. Thank you, Mr. Chairman.

Professor Tribe, a quotation from "God Save This Honorable Court," at page 103, brings to my mind the point that maybe you think it quite unfortunate that there are those who seem to be making an issue of Judge Bork's intellectual growth and the fact that he has changed his position on certain issues.

You stated there, "Perhaps the most important qualification for a Supreme Court Justice is the possession of an open mind." Does a scholar who learns from experience and intellectual debate exhibit an open mind?

Mr. **Tribe**. I think so, Senator, and I continue to believe that an open mind and ranging mind is a vital qualification. I am not among those who have ever criticized Judge Bork for the views he has changed. I have been worried more about the views he has not changed.

And let me just take another moment, if I might. I have, though, addressed the problem for this committee when the changes occur under the spotlights and in the formulation of a new standard, such as the reasonableness standard that emerged for the first time in the confirmation hearings or in the colloquies over the first amendment. I do worry about whether it is reasonable for the committee to ask a nominee, in effect, to make a commitment about a new position. If that is a problem, then what you do is emphasize more where the nominee has been for 20 years, what he has been writing all along.

Senator GRASSLEY. Well, I think if we compliment people for scholarship and a changing mind, then it is also legitimate that when scholarship has reaffirmed old positions that that is nothing to be extra critical of. You find it to your liking when you agree with Judge Bork when he has changed his mind. I think that you would not expect people of principle to be changing their mind on everything that they study. There has got to be some affirmation of issues they bring up.

I want to go on because I do not really have a lot of questions, but I do want to bring into this discussion some comment on a theme that I derive from some of Judge Bork's writings. That theme that I want to bring up of Judge Bork's is one that is highly critical of what I would call the professoriate, and I would mean by that a group of intellectuals with distinctive public policy biases, a group bent on using whatever influence they have in the colleges and the law schools to move society where they want that society to go; in other words, push society faster than the democratic process would dictate.

The suggestion from these law professors is that people ought to distrust popular government. Of course, I think that is very ironic while we are celebrating the 200 years of a document committed to allow participatory democracies to work for people to govern themselves.

But putting that irony aside for a minute, the further suggestion is that if democratic societies do not want to accept the ideas of these professors, or are as yet not ready to accept them in full, then that democratic society is somehow morally deficient. Judge Bork's writings, even when he was a law professor himself, show that he has little use for those who distrust or are critical of our system of government.

And I think that at this point, as a compliment to Judge Bork, I want to refer to writings published on September 5, 1985, in Judicial Notice. On this point, he was asked the question: "What ideology then, if any, animates the law schools?"

This was his answer: "Among many constitutional law professors, there is a continual search for general philosophical principles about the nature of a just society which the professors would like judges to convert into constitutional law. This is a relatively new development," he says, "and I cannot say I understand all of the reasons for it."

Continuing the quote, "Perhaps they just love playing with philosophy and find law too mundane or pedestrian, or perhaps in some cases the professors have realized that they are never going to get the electorate or their representatives to agree with them on social policy. A quick way, the only way to the society they want is to get judges to make this society over."

Now, it seems to me that that is really the judicial philosophy of too many law professors, to make society over the way that they think best. I suppose we could ask if these selected few—whether they be from the Harvard Law faculty or from any other law faculty—really know what is best for America, we ought to appoint them all to the Supreme Court, and make the Supreme Court up solely of people like that. After all, democracy moves slowly, really too slowly for some of these people.

They just cannot wait for elected officials in Congress or in State legislatures to bring about the changes. And I think that we ought to recall what Senator Daniel Webster said about this. We have off the Senate floor a portrait of one of these giants of history, which Daniel Webster is. The words of Daniel Webster, I think, capsulized what these hearings are all about. They summarize best the role of the courts in the democratic society, and particularly the way I think Bork says that some of these professors say that the role that the courts in a democratic society ought to play.

This quote, I think, is important, Mr. Chairman.

> Good intentions will always be pleaded for every assumption of power. It is hardly too strong to say that the Constitution was made to guard the people against the dangers of good intentions. There are men in all ages who will govern well, but they mean to govern. They promise to be good masters, but they mean to be masters.

And I think we ought to consider this as we consider the process of participatory democracy that is as much what our Constitution is about as what the Supreme Court is, and to remember those writing in the Federalist Papers who said they expected the Supreme Court to be the least dangerous of our branches of government.

Mr. TRIBE. Senator, they also expected, I believe—from Jefferson and Madison to more contemporary observers—they also expected the courts to preserve certain fundamental liberties that are not up to any majority.

I would be very much with you in criticizing anybody—though I guess I would not much emphasize whether he was a professor or not—criticizing anybody who says, "I have got the key to the good society, and I want to impose it from above." I am distrustful of power. I believe that power can lead to arrogance.

But I believe that the fundamental genius of our constitutional scheme—in leaving certain matters not to government but to the family, to the individual, certain fundamental liberties that were never ceded to Government, that that genius depends on a Court that has the authority to protect personal privacy from those who think they know best for everybody.

So I do not think you and I are that far apart. It seems to me that the real difference is not in where we believe those who run the society should come from. I think that democracy is terrific in that respect for making policy choices, but within a frame of reference that is ultimately dedicated to keeping certain fundamental liberties away from government. That is why I began my expression of concern about Judge Bork's philosophy with the fact that his view of that sphere of liberty seems to me to be so narrow. And it is not because I believe that an elite group should be in control. It is precisely the opposite, because I believe there are some things that people should control for themselves.

Senator GRASSLEY. Well, I appreciate the response. I do want to bring into the debate Judge Bork's view because I think that there is in the debate before this committee, a feeling that the courts are the only solution to the problems that face our society. In my judgment, that is antithetical to the political process which is the strength of our decisionmaking process and our basic democratic principles. And particularly when I see that the real gains in civil rights, the real gains in women's rights in the last 20 years have come through the legislative branches of government, not through the judicial branches of government.

Mr. TRIBE. Senator, that is why I am puzzled by Judge Bork's view that, when this Congress tries to enforce the 14th amendment, as it did in *Katzenbach* v. *Morgan,* that courts should step in and overturn it. That is why I am puzzled by some of the doubts he has expressed about democratically created programs of affirmative action.

The activists, those who want to give the courts more power, are not always on one side of this debate. It seems to me that it oversimplifies the issue to cast it as though it is a debate between those who want courts to wield all the power and those who wants courts to be powerless. I do not think that is what is at stake.

The CHAIRMAN. Your time is up, Senator.

The Senator from Vermont.

Senator LEAHY. Thank you, Mr. Chairman.

Professor Tribe, it is good to see you again.

Mr. TRIBE. Thank you.

Senator LEAHY. There are days you probably feel that you live in the Senate Judiciary Committee when we are having these kind of confirmations.

Also, I want to tell you how helpful your book, "God Save This Honorable Court" was. I brought it up to my farm in Vermont during the August recess and read it. I also a couple of times backslid and read some of the best seller thrillers that were around but——

Mr. TRIBE. That shows good taste, Senator.

Senator LEAHY. I read it, especially the part about the Senate as an equal partner in this matter. And I think that that is something that has to be emphasized. We are not here to rubber stamp any nominee. I think Judge Bork would be the first one to agree with that. And we are not, in these rather extraordinary hearings, hearings that have gone into far greater detail than any I can remember in my 13 years here.

In your testimony this morning you spoke of the free speech issue, which is the area that I was most concerned about in these hearings, and you did not address one aspect of the question—there was no way you could address all of it—but that concerns me, and that is a first amendment protection for speech that is neither obscene nor has a relationship to the political process.

The vast realm of speech, from the same best sellers I might read when I get back home to the prime time entertainment TV, currently it has first amendment protection. Now, Judge Bork's writings concern me a great deal about that. In 1971, of course, in the Indiana Law Journal he stated that only explicitly political speech should be protected. Over the years he has softened that position somewhat. He conceded that some speech that directly feeds the democratic process should be protected, even if it is not explicitly political.

But he never really squarely renounced it until he was answering my questions last week. Now, you have read his testimony. You have seen the answers he gave to my questions and some of the followup ones. Does his testimony reassure you that if he is confirmed he is going to in fact adhere to this long established precedent and actively protect nonpolitical speech?

Mr. **Tribe**. To be completely candid with you, Senator, I just cannot tell. I mean, it is clear that Judge Bork is struggling with that issue and I believe he is struggling sincerely with it. What I understand him to have said to both you and Senator Specter is that, if he were doing it from the beginning, we would not have been where the Supreme Court is—nowhere near it—and that he really continues to disagree with the great dissents of Holmes and Brandeis in 1919 and 1920.

But on the other hand, he thinks—and I believe that is entirely sincere as well—that his attempt to do a bright line test in 1971 was a bit too professorial, not sufficiently practical.

But what it all adds up to, what kind of protection that would mean for artistic expression, for literary expression, I think is impossible to tell. And I say that particularly because of Judge Bork's continuing critique of one of the landmarks of modern first amendment law, an opinion by the great conservative jurist John Marshall Harlan, *Cohen* v. *California*.

In that case there was purely political speech, a vulgar slogan on a jacket worn by a young man. But the community took offense and sentenced him to a month in jail. In explaining why he should have been protected, Justice Harlan used the famous phrase, "one man's vulgarity is another man's lyric."

But I notice that when Judge Bork paraphrased it, he had a different phrase. He said, "one man's obscenity is another man's lyric."

Senator **Leahy**. Yes, I realize that.

Mr. **Tribe**. Now, it seems to me that shows an awfully broad vision of what might be obscene. Justice Harlan said quite early in that opinion, of course, this is not an obscenity case, there is nothing erotic or stimulating about that slogan on the jacket.

But if by "obscene" Judge Bork means, as he appears to mean, whatever gives offense to the community—if even a single word can make a political statement obscene—then even the formulation of first amendment jurisprudence which Judge Bork gave this committee leaves some fairly serious room for worry about the health of freedom of expression in the United States.

Senator **Leahy**. Well, this is why I raised the question. We have before us his writings and speeches over almost 20 years and then his answers to questions by me, Senator Specter and others on first amendment here. They are sometimes at variance. But as recently as last spring he had told a TV interviewer that first amendment protection for artistic work should be determined on a case-by-case basis. Do you see a problem? Do you see a chilling effect on the first amendment in that regard?

Mr. TRIBE. I have been asked about whether hearings like this might cause a chilling effect.

I think that is nothing compared to the chill that you will see if judges assert the power—if anybody in government asserts the power—to decide of each piece of writing, of each piece of art work, whether it is too close to the border, whether it is sufficiently worthy to be protected. That kind of censorship is what the first amendment is designed to prevent.

It seems to me that Judge Bork, in answering Senator Specter's question about whether this was not taking from the courts the power to determine first amendment issues, really did not address the degree to which it was giving to courts a kind of potentially censorial power, a power to pick and choose. And I am afraid of that particularly because one of Judge Bork's opinions—and I do want to discuss this one briefly—on the D.C. Circuit, the one the U.S. Supreme Court has agreed to review—suggests that, when Government picks and chooses based on the content of the message, that does not strike Judge Bork as offensive to the first amendment.

When people demonstrate against a foreign embassy, they are violating an act of this Congress, and Judge Bork suggested that it is okay for the law to be drawn that way. That is, he said Congress may draw a distinction between those who want to demonstrate against a foreign embassy and those who do not. And that worries me about his first amendment jurisprudence more.

Senator LEAHY. Well, in fact, I had looked at that one particularly because Judge Bork has had only one majority opinion go up on cert. and that is now waiting to be decided. I was particularly intrigued by that one and questioned him about it because if you were to push that to the extreme—the statute which says that you can demonstrate within 500 feet, or you can carry a placard within 500 feet if you are in favor of the policies of that Government, but not if you are objecting to the policy—if you push that to the extreme, it means after Iraq had one of their airplanes attack our ship in the Persian Gulf—the Starke—kill dozens of Americans on it, it would be legal to carry a placard in front of the Iraquian Embassy saying, "We agree with everything you have done. We applaud your government and we applaud your policy." But if a parent or spouse of one of those people killed were to carry a placard saying "We think this was a dastardly, murderous act," they could not demonstrate.

And it concerned me on that particular one that that is the only one that has gone up. My concern and one of the things that all of us are going to have to answer is what of Judge Bork's writings have been professorial discussions to raise an issue—to get your students thinking—and what have been the views of a potential Justice of the Supreme Court.

And on first amendment rights, I think that is so basic to the way our country is run, is so basic to providing the kind of diversity in this country that preserves our democracy, that that question has to be answered pretty solidly in the minds of each Senator before they can vote on this.

And I look at what has happened here. If Judge Bork is confirmed, he would appear to be the only member of the Supreme

Court who believes that, one, there is not a constitutional right to privacy in family matters; that government classifications should be judged by single reasonableness test under the equal protection clause; that *Brandenburg* v. *Ohio* was wrongly decided because it gives too much protection to speech.

If that is so—and, you know, each person will have to go back and decide whether that is a fair analysis of Judge Bork—if that is so, if he is the only person who takes that position, is it going to make any real difference if he goes on the Supreme Court? There are, after all, eight other members of that Court.

Mr. Tribe. I guess, Senator, it is a weak argument for someone that he is so far out that he is not going to affect anything. I would not think that Judge Bork's supporters would be very comfortable with that characterization. I think the truth has got to be somewhere in between.

Every Justice who serves for life makes a difference, makes an impact on the law, and makes an impact particularly at a time when so many of the Justices are really very old and when the Court is in a process of transition.

I do not think we can afford to say that, "oh, well, it is just one seat." It is a lifetime seat, and there are a lifetime of problems that will confront whoever occupies it.

I also think the Senate makes a statement when it votes to confirm or to reject a nominee. If what it concludes a nominee stands for, in however principled a way, is that virtually all of the major constitutional developments since World War II were just wrong, I think the Senate has to decide whether it agrees with that statement. And if it does not, then I suppose it ought not to confirm, even if a person who holds that view may be isolated.

I think the issue really is not for anyone to guess exactly what the impact will be. As I said in my opening statement, prophecy is not a gift any of us have. The real question is what risks are we prepared to take and what statement should the Senate of the United States makes.

Senator Leahy. Thank you, Mr. Chairman.

The Chairman. Senator from Pennsylvania.

Senator Specter. Thank you, Mr. Chairman.

Professor Tribe, I compliment you on your written statement, very long. You have taken testimony from Saturday, September 19 and analyzed it, written it up, duplicated it and presented it to this committee by Monday, September 21. I have a good idea now why you were not on the Sunday talk shows. But it is quite an analysis.

Mr. Tribe. Thank you, Senator.

Senator Specter. At the outset, Professor Tribe, I think that it is worth noting because of the volume of telephone calls that I am getting that my questions to you do not suggest that I am for Judge Bork any more than my questions to Judge Bork suggested that I was against him.

You talk about Judge Bork's testimony leaving doubt about what he would do. But it seems to me that Judge Bork has provided more information for this committee, telling his views. And when Justice Scalia was here, and Justice O'Connor was here, there was I think more doubt as to what they would do.

I quite agree with you on your assessment that this committee has to decide where the risks will fall. And I also agree with your assessment that Judge Bork, as you put it, is a daring provocative thinker.

In your New York Times Magazine article earlier this month you point out that the federal judiciary is elitist, undemocratic, counter-majoritarian, a form of government without the consent of the government. Such an attack is not easily dismissed.

Now my question is: Given the strength of the balance of the court, why not in the interest of the country put on a bold, provocative thinker who would articulate a position which you say is important? Why not put that into the mix of the court in the national interest?

Mr. TRIBE. I think, Senator Spector, that if the only way that view could be heard and taken seriously was from a pulpit in the Supreme Court, it would be a different world. But the fact is that Judge Bork has been writing for 20 years, has been writing opinions on the D.C. Circuit, has been making speeches since going onto the D.C. Circuit, and the views that he holds are rather easy for anyone to grapple with and debate.

I think the question, when someone is elevated to the Supreme Court, has to be in a somewhat different context. I do not think we can afford quite the same degree of playfulness at that level.

The fact that someone's ideas are provocative is a credit. The question in a Supreme Court nomination is whether the consistent message of those ideas is hard to square with the fundamental traditions of the Constitution as each Senator understands them.

For example, if Judge Bork believed that *Marbury* v. *Madison* should be overruled, which of course he does not, that would be provocative, it would be interesting. I would welcome a colleague who would advance that view.

But if that view——

Senator SPECTER. Well, he is not on a view which is provocative and outlandish. He is articulating a view which you say is not easily dismissed. He is going to a very fundamental principle which you acknowledge as worth considering, that the federal judiciary is elitist, undemocratic and countermajoritarian.

Now Judge Bork has done his best to attract attention beyond any question with words like "civil disobedience of the Judges" and "without legitimacy" and "why not make the argument to the Joint Chiefs of Staff," which is a form without legitimacy but has a better means of carrying out its orders.

But notwithstanding that hyperbole and that emphasis and that proclamation, he has not attracted much attention. I did not know about the Indiana Law Journal article until he was a nominee. I do not even think that Senator Simpson knew about it.

But if he has some ideas that are worth exploring, why not on the court? You have talked extensively—and I want to get to equal protection in just a moment.

You have talked about the women's rights cases and they are important. But *Kirchberg* had Marshall and Brennan and Blackmun and Stevens and Rehnquist concurring. And the *Mississippi University* case had O'Connor and Brennan, White, Marshall and Stevens. And in *Turner*, which has a very unusual constitutional right in my lexicon, a constitutional right for a convict in jail to marry, has an O'Connor opinion joined in by Rehnquist, Scalia and White.

Now is Judge Bork going to overpower? You worry about his influence on the court. I worry about it too. But let me ask you the question. Is he going to overpower O'Connor and Rehnquist and Scalia on their conclusion that a convict has a right to marry or overpower young judges, young justices as well as older justices? You point that out on fundamental women's rights.

Mr. TRIBE. Senator Specter, first of all, let me say that the argument that I said was worth taking seriously in that New York Times piece was simply the argument that the federal judiciary is elitist and countermajoritarian. I did not say it is worth taking seriously the argument that courts should therefore recede from their historic 200-year-old role of protecting liberties that are not specified and pinned down in the Constitution.

I think that view is a fairly outlandish view. It is not a view that was shared by any Justice. It seems to me that that is the view which marks this philosophy as inimical to liberty.

Now I grant you that it is always possible to say that the less a view has going for it in terms of tradition, the more likely it is that others will overcome it. But I do not think that the Senate should ask itself the question: Will a nominee bring the Constitution to a halt?

If that is the standard, then it really does not matter what someone's views are in this entire process. It would not be worth engaging in.

Senator SPECTER. How about Judge Bork's change of position? I have said that I feel that his change of position ought to be accepted, not that it decides the case because then you have got to decide if he can apply settled law that he philosophically disagrees with, not that it settles the case on equal protection.

But do you think that I am wrong in accepting Judge Bork's statement that he will apply the accepted law, that he now views equal protection and, if sworn in as judged by history, which he is very emphatic about, that he will accord equal protection to women and indigents and illegitimates beyond the range that he previously wrote about?

Mr. TRIBE. I take him at his word that he will try, but the nature of that commitment, as I am sure you recognize, Senator, is so open-ended, that one cannot draw any inferences from it.

Cardozo in his book "The Nature of the Judicial Process" said, "To determine to be loyal to precedents does not carry us far upon the road. Precedents and principles are complex bundles. It is well enough to say we shall be consistent, but consistent with what?"

When Judge Bork says he will accept a whole body of law by applying a new formula like reasonableness, I am not questioning his sincerity, but I do not think that that tells you very much.

Senator SPECTER. Well, let us pick that up. We have got 3½ minutes to talk about equal protection and the Stevens' doctrine and four Supreme Court cases. So there is plenty of time to make this not too weighty decision.

And I believe in my mind—and I am yet undecided genuinely so. It is a question of free speech, *Brandenburg,* and it is a question of equal protection and how it is applied. There are other issues, but those are very dominant issues, the liberty issue and the freedom issue.

He has said that he would follow Justice Stevens' pronouncement on equal protection of the law, and there has been some statement which deviates from that, and you have written somewhat to the contrary. But my recollection of his testimony is that he would accept the Stevens' doctrine.

Now Justice Stevens wrote a concurring opinion in *Craig* v. *Boren* and then he later wrote a concurring opinion in *Cleburne*.

Now you cite Stevens' intervening opinions in *Kirchberg* and *Mississippi University,* where he joins other standards, standards which really are not very clear, do not advance the ball much. The Marshall opinion in *Kirchberg* does not talk about strict scrutiny. But so far as Stevens is concerned—and I think it fair to judge Judge Bork on Stevens—Stevens comes back in *Cleburne* and he refers to his concurring opinion in *Craig* v. *Boren,* and he talks about a rational test. And he talks about the legitimate public purpose that transcends the harm to the members of the disadvantaged class. And he talks about the tradition of disfavor.

Now if you compare that to *Kirchberg* and the Marshall opinion on gender-based discrimination, which talks about unconstitutionality, absent to showing that the classification is tailored to further an important governmental interest and requires an exceeding persuasive justification, or you take the Justice O'Connor opinion in *Mississippi University for Women,* which picks up the issue of important governmental objectives substantially related to the achievement of those objectives, an exceedingly persuasive justification, my reading of those cases—and I have studied them—is that if Judge Bork is agreeing with Justice Stevens on the definition of equal protection of the law—and this assumes that we can accept Judge Bork's statement and to apply it, which is another question—what is the difference with Stevens in *Cleburne* and Marshall in *Kirchberg,* or O'Connor in *Mississippi University*?

The CHAIRMAN. Two points, Senator. You can answer the question in full, but that is the last question.

Senator SPECTER. I am within my time, Mr. Chairman.

The CHAIRMAN. Well, your little red light just went on and, with all due respect, I follow the little red light, but you answer the question fully.

Mr. TRIBE. I do think that Justice Stevens in the *Cleburne* case shows a very special sensitivity to the perspective of the victim of any given law, and that that distinguishes his approach from that of some other members of the Court. And without going through, given the limits of time, all of the permutations, one thing I think emerges with very great clarity.

Prior to the hearings, including in a statement made in June, Judge Bork suggested it was a mistake to extend equal protection to groups like women. Now that was not a very easy position to persuade members of this committee about, I would imagine.

I think in all good faith Judge Bork says, "Well, now I am for a simple rule. If it is reasonable, I will uphold it." But then that looks pretty fuzzy. And so he says, "Well, that just means I am like Justice Stevens."

But surely Judge Bork does not mean to be telling this committee that he is giving Justice Stevens two votes on equal protection cases. I mean, we have to figure out what the philosophy that this distinguished judge has been writing about for a long time means. And I do not think it is enough to say, well in shorthand it means he agrees with Justice Stevens.

Nothing that he has ever said, nothing that he has ever written suggests any similarity to the Stevens' approach, except an occasional overlap of a word.

And so I think that the fundamental judgment here has to be that there is a serious risk to equal protection doctrine in the views that Judge Bork has expressed.

Senator SPECTER. Thank you, Professor Tribe.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Heflin from Alabama.

Senator HEFLIN. Professor Tribe, in your writings of Judge Bork have you found any writings in which he has expressed an opinion pertaining to the selective incorporation of the doctrine of the due process clause of the 14th amendment to bring the Bill of Rights into that due process clause?

Mr. TRIBE. I believe, Senator Heflin, that in one of the speeches that I have read, he suggests that, even though that might not have been consistent with original intent, that probably it is too late in the day to eliminate the protection of the Bill of Rights.

Senator HEFLIN. Do you happen to know what that speech is?

Mr. TRIBE. I will try to find it for you, Senator, and I will submit it later. I am afraid I do not recall at the moment.

Senator HEFLIN. Senator Specter got off somewhat into the area of predictability, as to when a person is on a court. And that, from a historical viewpoint, has been pretty difficult. And I suppose President Eisenhower's appointments of Warren, Brennan and Stewart were not—did not turn out perhaps as the advocates of their appointment to President Eisenhower's suggestion.

How do you account for this type of change or growth from the original predictability?

Mr. TRIBE. Senator Heflin, I account for it largely by the fact that many Presidents in choosing nominees have been far less concerned to find someone who matches their ideology and their philosophy than President Reagan seems to have been. That is, when President Eisenhower chose Earl Warren, it was largely, as I understand the history, to get him out of the way in Republican politics in California. It was not because he had studied all of his speeches and had figured out that he liked where Earl Warren was going in terms of constitutional theory.

Quite often appointments are made for reasons that have very little to do with philosophy, and quite often nominees have less of a track record than this nominee has.

In my own review of the nominations that have been made throughout our history, my conclusion is that Presidents who try very hard to pick nominees with a careful view to a specific philosophical bent much more often get it right than wrong.

The surprise comes when they really are not too worried about philosophy when they make the choice, or when the set of issues becomes very, very different.

The issues about which Judge Bork has written cover the gamut of liberty and equality. And I admit that the future is not ours to know, but whatever that future holds, it is going to be affected by the points of view on which Judge Bork has powerfully and consistently expressed himself.

Senator HEFLIN. You do not seem to give much credence to the position that perhaps there are persuaders, men of giant intellect that are on the Court that may persuade some of the people that have been appointed, that might have different philosophies when they went on the Court than what they expressed in their votes and in their writings.

Do you think that that is a factor that could play an important part in the future of the U.S. Supreme Court today?

Mr. TRIBE. I think, Senator, it can play an important part, and I wish it would play a larger part. I have just finished writing a brief, and fairly favorable, I might say, review of Chief Justice Rehnquist's latest book on the Court. And one of the things I was quite disappointed to learn from that book is that the Court's internal proceedings, at least under his Chief Justiceship and under that of his predecessor, are really not calculated to permit as much of that cross-fertilization as they might be.

Chief Justice Rehnquist describes that, at conference, there is almost no discussion, and that by the time the newest member of the Court opens his mouth, the other eight have spoken and have voted. I think in the long run the country would be better off if there were more room for discussion and more room for people to shape one another's views upon the Court.

Senator HEFLIN. A discussion on the Court does not necessarily take place only at a conference. The individuals' discussions, even law clerks' discussions among themselves can end up having some influence.

I suppose what I am driving at is, if we have a Court of a trio, say Rehnquist, Scalia and Bork, will that group who have somewhat similar ideas be persuasive pertaining to future appointments or the present membership of the Court?

Mr. TRIBE. Senator Heflin, I think that that question really relates closely to Senator Specter's question about whether, after all, Robert Bork is not just one man. As you point out, the whole may be greater than the sum of its parts. There may be the kind of combination that should lead you to believe that it understates the importance of this matter to say he is just a single vote.

And I think it is possible that the very kind of combination you describe magnifies the stakes that are before this committee in this nomination.

Senator HEFLIN. Well, predictability has problems. I have seen writings after the short period of time that Justice Scalia—in which they have described him much more liberal in his writings and in his votes than what was predicted that he would be. And I am not sure exactly that we know exactly where he would come down. And I think to some degree the jury is still out on where

Justice O'Connor would come down, particularly in the situation of vote on a reconsideration of *Roe* v. *Wade.*

Do you have any comments on the period of time that Justice Scalia has been on the Court and what his record has been, what philosophy you basically have seen him following and his predictability pertaining to that?

Mr. Tribe. Well, 1 year, of course, Senator Heflin, is a short time for generalizations. But, as I indicated at the outset, based on what I knew about them at the time, I had supported the confirmation of both Justice Scalia and Justice O'Connor because I thought that those who regarded them as very extreme were simply misinformed.

Now maybe I will have been proved wrong someday, but that was my assessment. What is unique, I think, about this nomination is so long and consistent a record of very specific positions on the entire range of issues. Justice Scalia's opinions on the Court have been fascinating. I have found myself on several occasions in agreement with him more than with any of the other eight Justices, as I have said in a number of lectures, and I think that he is a person whose philosophy may not be mine, and it often is not. But that did not lead me to oppose him, and it does not lead me to think that I would in the future oppose someone just because the philosophy is different.

And that is what makes this a unique case, it seems to me. What makes it unique is a very long crusade against where the Court has been ever since World War II.

The Chairman. Thank you.

Senator Humphrey.

Senator Humphrey. Thank you.

Professor, you come across as a scholar and a gentleman in the literal sense of those words. I think we come to the same conclusions but you support yourself very well.

In response to another question—I am not sure who asked it actually at this point—but it was in regards to the case of *Cohen* v. *California,* which involved the wearing of a vulgar word on someone's jacket.

Do you think it would be within the decorum of this hearing for you to say that word or for me to say that word?

Mr. Tribe. I do not, Senator, and I think a narrowly tailored rule requiring decorum in a courthouse would have been a different matter in *Cohen,* but what the Court said was that there was no such rule at the time, and there was a fundamental due process problem about using a general rule about not offending the public to prosecute in that case.

Senator Humphrey. You do not think that the courts should be able to exclude the wearing of vulgar words in order to maintain the same decorum which you think we should maintain here?

Mr. Tribe. I think they should and do have that power if they use it. That was not at issue in that case. There was a very broad rule that said if you are offensive, you go to jail.

Senator Humphrey. I do not want to use up all of my time on that.

Let me turn to the contention, the repeated contention—we heard it again here this morning, indeed on your part—that the

104 decisions which Robert Bork wrote as a D.C. Circuit Court of Appeals' judge, indeed the 432, I think it is, in which he participated are irrelevant because Robert Bork and circuit court judges are bound by Supreme Court precedent.

And I think that is an unreasonable assertion to make, an unfair assertion to make and an inaccurate assertion to make. Are you suggesting to us that these cases come to the courts in neat little packages which fit perfectly into little pigeon holes called Supreme Court precedents?

Mr. TRIBE. No, Senator, I am not suggesting that, and I am not suggesting that the cases are completely irrelevant. That was not my point. I agree very much with the testimony of William Coleman yesterday on that subject.

These cases show that Judge Bork professionally is capable of writing a fine opinion on matters that relate to statutory interpretation, and they tell you very little, not nothing but very little, about his fundamental philosophy, a philosophy he has expressed for many years in writing about what he thinks Supreme Court Justices should do.

Senator HUMPHREY. Well, if you are saying——

Mr. TRIBE. And he said himself that to figure out what someone thinks in that circumstance, you read all of his writing.

Senator HUMPHREY. You agree that these cases are not so textbook perfect that they fit into little pigeon holes called Supreme Court precedents. In other words, you agree that there is some latitude for circuit court judges?

Mr. TRIBE. There is certainly some latitude, and that is why I would not go so far as to say that these opinions are totally irrelevant. That would be unfair.

Senator HUMPHREY. Well, to what degree are they relevant?

Mr. TRIBE. I do not think they tell us anything about his fundamental views of liberty or his fundamental views of equality because he has not had those kinds of cases. When he has, what they tell us is not very happy.

In the *Franz* case, for example, he suggested in an opinion not joined by his colleagues that the liberty interest of a mother or a father in visiting a child over whom they no longer have custody is not entitled to protection under the U.S. Constitution.

So when the opinions really express a view on fundamental matters of family liberty, they do not express a view that is very encouraging.

In the *Vinson* case Judge Bork was in dissent, saying that in a sex harassment situation, the employer really should be able to show voluntariness as a complete defense. And the U.S. Supreme Court, although it did not review his opinion directly, unanimously came to the opposite conclusion in an opinion by Justice Rehnquist.

So that when his opinions have addressed very sensitive issues, I am not sure that we would all be very happy, that you would be very happy with where the conclusions came out. But on the whole, when they address matters of statutory interpretation, they are very well done.

It would be unfair to Judge Bork to say that you could just pull them out of a bottle, and that they do not tell you anything about his intellect; they do. But they do not tell you anything about the fundamental issues to which I have directed my testimony.

Senator HUMPHREY. Well, at least you are willing to go further than some members of this panel who dismiss outright the relevance of these cases and the record, the exemplary and the extraordinary, impeccable record which this man has compiled in 5½ years in the second most important court in the country.

And I would reiterate, as has been said a number of times—but cannot really be said too often—that these decisions, 104 which he wrote, not one of which has ever been overturned by the Supreme Court and some 432, I think it is, in which he is joined, and in some cases, in 6 cases, in fact, he has been on the minority side of cases for which the Court granted cert and was upheld even though he was in the minority six times.

Mr. TRIBE. Senator, could I just interject a word? I do think that we ought to play fair about those numbers. Many people have criticized the critics of Judge Bork for tallying up cases and looking at numbers instead of getting down to cases and looking at the actual analysis.

And with all respect, I think to some extent you are doing that yourself when you just say well look at 100 here and 100 there.

Senator HUMPHREY. Yes, yes.

Mr. TRIBE. It seems to me we ought to look at the analysis and the beliefs expressed, and not just tally things up numerically.

Senator HUMPHREY. I think the Supreme Court does that when it considers whether or not to take the appeal, and in most cases they have chosen not to take the appeal.

Mr. TRIBE. Well, they have about 5,000 cert petitions a year. They only take about 100. They have said over and over again that they often disagree completely with decisions they decide not to review.

Senator HUMPHREY. That is true.

Let us turn to some of these fundamental rights. The impression has been left by the opponents that Robert Bork is an enemy of privacy. And I can understand why people would get upset when they hear those kinds of assertions or implied charges, because privacy is really absolutely essential to dignity. Indeed, it is essential to freedom. It is almost synonymous with freedom. And I cannot imagine anything worse than to lose one's privacy, except to lose one's freedom. And I am not sure they are all that different.

I want to make the point that Judge Bork has not proclaimed any opposition to the privacy rights explicitly enumerated in the Constitution. What he has suggested is that there is not a broad, vast, unencumbered right to privacy.

Mr. TRIBE. Well, not only——

Senator HUMPHREY. If I may finish. He has acknowledged, as you know, the first amendment rights to free practice of religion, which is in a way a privacy right, and assembly and speech, which are—at least speech is a privacy right, the fourth amendment right to be secure against unreasonable searches and seizures of our persons, property, houses, papers, effects and so on.

Has he argued in favor of unreasonable searches and seizures, in your opinion?

Mr. TRIBE. No. And, of course, he does not want to repeal the Bill of Rights.

Senator HUMPHREY. Yes.

Mr. TRIBE. I think that gets off the point. The point is—and I think it is implicit in your statement, Senator Humphrey—the point is that he says that, once you get down that list, and if you do not find it on that list, however basic it may be to our traditions like the right of parents to visit their children, it is just not protected. And that, it seems to me, is very unusual—to put it mildly.

Senator HUMPHREY. I am going to pursue that further with you. But let me again on this fourth amendment right, which is so important, the privacy right against unreasonable searches and seizures, do you have any problem with his statements on that point?

Mr. TRIBE. I am not sure I know which statements you mean. But the only reason it is worth protecting the privacy of the home is that you have some protection for what you do there. And I do not think that it is a coherent philosophy that says you had better get a warrant, but then you can control every detail of what a married couple does or what parents do with their children.

Senator HUMPHREY. He has not proposed that. Now be fair, Professor.

Mr. TRIBE. He has said that there is no right of privacy that protects these decisions unless you can find it in the Bill of Rights.

Senator HUMPHREY. He and many eminent constitutional scholars have said that, implying that if the duly elected, democratically elected representatives of the people want to create such a vast right of privacy, or want to further enumerate explicit rights of privacy, there is a means of doing that, but that judges should not do it in their place.

Mr. TRIBE. Should not create a vast right in their place. But what I have tried to suggest in my testimony is that, for 200 years, a right has been recognized in one form or another, which is not all that vast. It just relates to the most down-to-earth fundamental things about marriage, family, parenthood. And it is only Judge Bork who says that that whole tradition is unconstitutional, is illegitimate.

I do not accept the characterization that that is a vast and undefined right.

Senator HUMPHREY. Well, he and other eminent scholars and jurats in particular cases have agreed on that.

Mr. TRIBE. You can find some who have agreed in one case or another, but I have looked and I cannot find anyone who thinks that the whole development of these fundamental rights should just be wiped away.

Senator HUMPHREY. That is an unreasonable step. You are asking me to find people who agree with someone else in every case.

Mr. TRIBE. Not every case——

Senator HUMPHREY. You are not going to find that with respect to any individual, are you?

Mr. TRIBE. Just this basic principle, the principle that there is some liberty we have not ceded to the government, and it is not completely exhausted by the Bill of Rights.

Senator HUMPHREY. All right. Let me ask you this, let us go to a case.

The CHAIRMAN. Time is up. Let me point out to my colleagues that I will forebear temptation to ask some more questions. We have been on this witness and we could learn a great deal more if we kept him for another 2½ hours.

And we have 20 witnesses today. This is our first witness. Now we did go by the rules we have set. I would ask if there are any further questions of the Professor, that maybe they be submitted in writing to him without making an additional amount of work for him, and we recess and come back at 2 o'clock and make a judgment about whether we are going to further curtail our right to question.

Before we do that—and I would ask the audience to hold still while we finish this, okay—is there any objection to that?

[No response.]

The CHAIRMAN. There being none, let me enter in the record two letters that have been sent to me, addressed to me and to Senator Thurmond from 100 law professors. Seventy-one have identified themselves as Constitutional law professors, and 32 are law school deans; three persons signed both letters. I would like to enter them in the record.

These teachers of law are writing to express their opposition to Judge Bork.

[Letter follows:]

September 22, 1987

The Honorable Joseph R. Biden, Jr.
The Honorable Strom Thurmond
Senate Judiciary Committee
Washington, DC 20510

Dear Senators Biden and [illegible]

As teachers of law and as citizens concerned with the preservation and enforcement of constitutional rights, we ask that the Senate withhold its consent to the nomination of Robert H. Bork to be an Associate Justice of the Supreme Court of the United States.

None of us has reached this decision easily. Judge Bork is a highly skilled lawyer. He has also been a colleague in the teaching of law where his skills and experience are widely respected.

We have decided to oppose his nomination because of a substantive concern that we believe to be so important as to override matters of credentials or personal considerations. Our concern is this: Judge Bork has developed and repeatedly expressed a comprehensive and fixed view of the Constitution that is at odds with most of the pivotal decisions protecting civil rights and liberties that the Supreme Court has rendered over the past four decades. In many of the areas covered by these decisions the Court has become closely divided. If Judge Bork were to be confirmed, his vote could prove determinative in turning the clock back to an era when constitutional rights and liberties, and the role of the judiciary in protecting them, were viewed in a much more restrictive way. While change and growth in constitutional law are not to be opposed for their own sake, we believe that the changes threatened by Judge Bork's nomination would adversely affect the vitality of the Constitution, the fairness and justness of our own society and the health and welfare of the Nation. We also believe that most Americans are justly proud of our system of strong judicial enforcement of basic rights and that Senators should not consent to a nomination that threatens to make major inroads into that system.

The nominee's hostility [illegible] as an instrument for vindicating individual [illegible] liberties has been manifested on a wide variety of issues. For example, while Judge Bork acknowledges the concern of the Fourteenth Amendment with racial discrimination, he has opposed many of the [illegible] that the courts and Congress have adopted for giving redress to the victims of such discrimination. As a teacher he found insupportable Supreme Court decisions barring enforcement of racially restrictive covenants and striking down poll taxes and literacy tests as impingements on the right to vote. Later, as Solicitor General, he unsuccessfully opposed remedies that the courts found constitutionally necessary in order to redress governmentally imposed segregation in housing and public schools. Often the nominee appears not to have understood the realities of racial discrimination and its devastating impact on minorities; once he advised a Senate Committee that the infamous poll tax "was a very small tax, it was not discriminatory."

In Judge Bork's view courts should be [illegible] to [illegible] treatment that are not founded on racial discrimination. He has, for example, criticized in scathing terms Supreme Court decisions striking down a state law providing for the sterilization of some convicts and a law barring "illegitimate" children from bringing wrongful death actions.

With regard to claims of privacy, Judge Bork believes that there is no foundation anywhere in the Constitution for challenges to the authority of the state to interfere in the intimate private or family lives of citizens. Accordingly, he opposes not only the Supreme Court's decision on abortion in Roe v. Wade, but its earlier holding invalidating a Connecticut statute that made it a crime for married couples to use contraceptives, a Nebraska law that made it a crime to teach a foreign language in public schools and an Oregon law that made it a crime to send children to private schools.

With respect to freedom of expression, the nominee may have modified his view that the First Amendment protects only "political speech", but he still would give no protection to artistic expression. On the bench he has sought to uphold restrictions on expression imposed by government in the name of the most general considerations of national security or foreign policy.

In one area after another, Judge Bork would support compelled conformity by all to the "moral principles" set forth by a legislative majority (something he once labelled "tyranny").

These are simply illustrations of an extreme and comprehensive set of beliefs held by the nominee under which courts would give almost no meaningful content to some of the most fundamental constitutional guarantees contained in the Bill of Rights and the post-civil war Amendments. We do not contend that there are no respectable arguments to be mustered for some of the state-imposed restrictions that Judge Bork defends. We do believe that, taken as a whole, his open hostility to judicial protection for fundamental individual rights is sharply at variance not only with modern jurisprudence but also with the views of Thomas Jefferson who urged adoption of the Bill of Rights because "of the legal check it puts into the hands of the judiciary" and of James Madison, who saw the courts as "impenetrable bulwarks" against "every encroachment upon rights.

Judge Bork's views also conflict with those of jurists like Felix Frankfurter, John Harlan and Lewis Powell, each of whom has contributed to the protection of liberties in critical areas and who share Justice Powell's view that "the liberties we enjoy to a greater extent than any other country in the world are in effect guaranteed by the [Supreme] Court enforcing the Bill of Rights." Indeed, in his readiness to read out of existence whole provisions of the Constitution and to discard longstanding bodies of law assuring personal liberties, the nominee has manifested an extraordinary lack of respect for traditional methods of constitutional adjudication and the development of law. Perhaps most important, Judge Bork's views would deprive the nation of the critical, albeit limited, role that the judiciary has played in helping to solve conflicts that have threatened to divide our society.

While conceding the extremity of some of Judge Bork's views, proponents of his nomination have noted that as a Court of Appeals Judge he has followed Supreme Court decisions and suggested that once on the Supreme Court he will do the same. But Judge Bork himself has noted that the Supreme Court "ought to be always open to rethink constitutional problems" and that it is the one body able to correct its own mistakes of constitutional interpretation. Moreover, Judge Bork does not merely think that the decisions discussed above were mistaken but that they were disastrously wrong. He has described the privacy decisions variously as "unconstitutional," "judicial usurpation," "unprincipled," and "utterly specious." He has viewed many of the equal protection decisions as "improper" and "intellectually empty." In establishing the one-person, one-vote principle under the Fourteenth Amendment, the Supreme Court in Judge Bork's view was unable "to muster a single respectable supporting argument." While Justices sometimes surprise, it would be a disservice to Judge Bork to suppose that once on the Court his actions would not be in accord with his strongly stated principles.

Nor are proponents of the nomination persuasive in explaining Judge Bork's views as reflecting a consistent philosophy of judicial restraint rather than personal values. While calling for deference to legislatures where personal rights and liberties are at stake, Judge Bork has shown little regard for such considerations in other areas of the law and has, for example, openly stated that congressional intent may sometimes be disregarded in applying the antitrust laws.

Finally, [illegible] note that the issue before the Senate is not properly a partisan matter or one that may be summed up by labels such as "liberal" or "conservative". Rather, the responsibility of all Senators is to assure that a member of the life tenured judiciary does not disdain the Bill of Rights or the Fourteenth Amendment's command for equal protection of the laws and due process.

If after a full examination of the record Senators conclude, as we have, that the nominee holds views of the Constitution that would substantially diminish the rights of Americans they have both the authority and responsibility to withhold consent to the nomination.

Sincerely yours,

Bruce A. Ackerman, Sterling Professor Yale Law School

Lee A. Albert, Professor, State University of New York, Buffalo

Norman Amaker, Professor, Loyola University School of Law, Chicago

Judith C. Areen, Associate Dean and Professor of Law and Professor of Community and Family Medicine, Georgetown University Law Center

Derrick A. Bell Jr., Professor, Harvard University Law School

Boris I. Bittker, Sterling Professor Emeritus, Yale Law School

Ivan E. Bodensteiner, Dean and Professor, Valparaiso University School of Law

Vivian O. Berger, Professor, Columbia University School of Law

Albert Broderick, Professor, North Carolina Central University School of Law

Robert A. Burt, Southmayd Professor, Yale Law School

Gordon A. Christenson, University Professor, University of Cincinnati College of Law

George C. Cochran, Professor, University of Mississippi School of Law

William C. Cohen, Wendell & Edith M. Carlsmith Professor, Stanford Law School

John O. Cole, Professor, Mercer University Law School

Perry Dane, Associate Professor, Yale Law School

Samuel Dash, Professor, Georgetown University Law Center

Drew S. Days III, Professor, Yale Law School

Walter E. Dellinger III, Professor, Duke University School of Law

Lori Fisler Damrosch, Associate Professor, Columbia University School of Law

Robert F. Drinan, S.J., Professor, Georgetown University Law Center

Thomas Emerson, Professor Emeritus, Yale Law School

Susan R. Estrich, Professor, Harvard University Law School

Julian N. Eule, Professor, University of California at Los Angeles School of Law

Charles Fairman, Professor Emeritus, Harvard University Law School

Martha A. Field, Professor, Harvard University Law School

David Filvaroff, Visiting Associate Professor, New York Law School

Lucinda M. Finley, Associate Professor, Yale Law School

Marc S. Galanter, Evjue-Bascom Professor, University of Wisconsin Law School

Richard N. Gardner, Henry L. Moses Professor of Law and International Organizations, Columbia University School of Law

Paul D. Gewirtz, Professor, Yale Law School

Jack Greenberg, Vice Dean and Professor, Columbia University School of Law

Thomas C. Grey, Professor, Stanford Law School

Elwood B. Hain, Jr., Professor, Whittier College School of Law

Charles R. Halpern, Professor, City University of New York at Queens

Jacob D. Hyman, Professor Emeritus, State University of New York at Buffalo School of Law

Nicholas Johnson, Adjunct Professor and former FCC Commissioner, University of Iowa College of Law

William A. Kaplin, Professor, Catholic University of America School of Law

Kenneth L. Karst, Professor, University of California at Los Angeles School of Law

Arthur Kinoy, Professor, Rutgers, The State University of New Jersey, S.I. Newhouse Center for Law & Justice

Harold H. Koh, Associate Professor, Yale Law School

Milton R. Konvitz, Professor Emeritus, Cornell Law School

Philip B. Kurland, William R. Kenan, Jr. Distinguished Service Professor, University of Chicago Law School

James A. Kushner, Professor, Southwestern University School of Law

D. Bruce La Pierre, Professor, Washington University School of Law

Sanford Levinson, Charles Tilford McCormick Professor, University of Texas School of Law

Robert B. McKay, Professor, New York University School of Law

Karl M. Manheim, Associate Professor, Loyola Law School, Los Angeles

Michael Meltsner, Professor, Northeastern University School of Law

Frank I. Michelman, Professor, Harvard University Law School

Martha L. Minow, Professor, Harvard University Law School

Robert L. Oakley, Associate Professor, Georgetown University Law Center

Daniel H. Pollitt, Graham Kenan Professor, University of North Carolina School of Law

Margaret J. Radin, Professor, University Of Southern California Law Center

Norman Redlich, Dean and Judge Edward Weinfeld Professor, New York University School of Law

Donald H. Regan, Professor of Law and of Philosophy, University of Michigan Law School

Herbert O. Reid, Charles Hamilton Houston Distinguished Professor, Howard University School of Law

Susan Deller Ross, Professor, Georgetown University Law Center

Lawrence Gene Sager, Professor, New York University School of Law

Louis M. Seidman, Professor, Georgetown University Law Center

John E. Sexton, Professor, New York University School of Law

Suzanna Sherry, Associate Professor, University of Minnesota Law School

Larry G. Simon, H. W. Armstrong Professor of Constitutional Law, University of Southern California Law Center

Gary J. Simson, Professor, Cornell Law School

Lawrence B. Solum, Associate Professor, Loyola Law School, Los Angeles

Leonard Strickman, Dean and Professor, Northern Illinois University College of Law

Girardeau A. Spann, Associate Professor, Georgetown University Law Center

Kathleen M. Sullivan, Assistant Professor, Harvard University Law School

Laurence H. Tribe, Ralph S. Tyler Jr. Professor of Constitutional Law, Harvard University Law School

Mark T. Tushnet, Professor, Georgetown University Law Center

Heathcote W. Wales, Associate Professor, Georgetown University Law Center

Wendy W. Williams, Associate Professor, Georgetown University Law Center

ADDENDUM

Prof. Albert Broderick:
I respectfully disagree with any implicit endorsement of *Roe v. Wade*. I otherwise enthusiastically join in the views expressed in this letter.

Prof. Gordon A. Christenson:
I do not oppose the nomination only on the particular jurisprudence that forms the basis for groups opposing his nomination on grounds that they do not like the substantive directions of his decisions. Rather, I oppose his confirmation also for other reasons, namely that I so not fully trust the so-called principled, neutral position he has developed in deferring to the political branches in the absence of explicit Constitutional intent or historical evidence on the Founders' values to be protected against the majority. He has changed his position on issues too many times in relationship to external power and authority for me to be confident that he has objective principles other than deference to those with the greatest power, namely, the Executive, the majority and utility (efficiency). That position seems antithetical to what I would expect a judge to do in upholding the rule of law to protect the minority based on interpretation of text, history and structure.

Prof. Gary J. Simson:
In my view, the Reagan Administration has long regarded its judicial appointment power as a means to secure results in court compatible with its political and social agenda, and the Bork nomination is its most unequivocal and potentially most damaging attempt to use the power in this way. I believe that Senators should regard it as their responsibility to vote against this nomination and the misuse of power that it represents.

September 22, 1987

The Honorable Joseph R. Biden, Jr.
The Honorable Strom Thurmond
Senate Judiciary Committee
Washington, DC 20510

Dear Senators Biden and Thurmond:

As teachers of law and as citizens concerned with the preservation and enforcement of constitutional rights, we ask that the Senate withhold its consent to the nomination of Robert H. Bork to be an Associate Justice of the Supreme Court of the United States.

None of us has reached this decision easily. Judge Bork is a highly skilled lawyer. He has also been a colleague in the teaching of law where his skills and experience are widely respected.

We have decided to oppose his nomination because of a substantive concern that we believe to be so important as to override matters of credentials or personal considerations. Our concern is this: Judge Bork has developed and repeatedly expressed a comprehensive and fixed view of the Constitution that is at odds with most of the pivotal decisions protecting civil rights and liberties that the Supreme Court has rendered over the past four decades. In many of the areas covered by these decisions the Court has become closely divided. If Judge Bork were to be confirmed, his vote could prove determinative in turning the clock back to an era when constitutional rights and liberties, and the role of the judiciary in protecting them, were viewed in a much more restrictive way. While change and growth in constitutional law are not to be opposed for their own sake, we believe that the changes threatened by Judge Bork's nomination would adversely affect the vitality of the Constitution, the fairness and justness of our own society and the health and welfare of the Nation. We also believe that most Americans are justly proud of our system of strong judicial enforcement of basic rights and that Senators should not consent to a nomination that threatens to make major inroads into that system.

The nominee's hostility to the role of courts as an instrument for vindicating individual rights and liberties has been manifested on a wide variety of issues. For example, while Judge Bork acknowledges the concern of the Fourteenth Amendment with racial discrimination, he has opposed many of the remedies that the courts and Congress have adopted for giving redress to the victims of such discrimination. As a teacher he found insupportable Supreme Court decisions barring enforcement of racially restrictive covenants and striking down poll taxes and literacy tests as impingements on the right to vote. Later, as Solicitor General, he unsuccessfully opposed remedies that the courts found constitutionally necessary in order to redress governmentally imposed segregation in housing and public schools. Often the nominee appears not to have understood the realities of racial discrimination and its devastating impact on minorities; once he advised a Senate Committee that the infamous poll tax "was a very small tax, it was not discriminatory."

In Judge Bork's view courts should be even more inhospitable to claims of unequal treatment that are not founded on racial discrimination. He has, for example, criticized in scathing terms Supreme Court decisions striking down a state law providing for the sterilization of some convicts and a law barring "illegitimate" children from bringing wrongful death actions.

With regard to claims of privacy, Judge Bork believes that there is no foundation anywhere in the Constitution for challenges to the authority of the state to interfere in the intimate private or family lives of citizens. Accordingly, he opposes not only the Supreme Court's decision on abortion in Roe v. Wade, but its earlier holding invalidating a Connecticut statute that made it a crime for married couples to use contraceptives, a Nebraska law that made it a crime to teach a foreign language in public schools and an Oregon law that made it a crime to send children to private schools.

With respect to freedom of expression, the nominee may have modified his view that the First Amendment protects only "political speech", but he still would give no protection to artistic expression. On the bench he has sought to uphold restrictions on expression imposed by government in the name of the most general considerations of national security or foreign policy.

In one area after another, Judge Bork would support compelled conformity by all to the "moral principles" set forth by a legislative majority (something he once labelled "tyranny").

These are simply illustrations of an extreme and comprehensive set of beliefs held by the nominee under which courts would give almost no meaningful content to some of the most fundamental constitutional guarantees contained in the Bill of Rights and the post-civil war Amendments. We do not contend that there are no respectable arguments to be mustered for some of the state-imposed restrictions that Judge Bork defends. We do believe that taken as a whole, his open hostility to judicial protection for fundamental individual rights is sharply at variance not only with modern jurisprudence but also with the views of Thomas Jefferson, who urged adoption of the Bill of Rights, because "of the legal check it puts into the hands of the judiciary" and of James Madison, who saw the courts as "impenetrable bulwarks" against "every encroachment upon rights.

Judge Bork's views also conflict with those of jurists like Felix Frankfurter, John Harlan and Lewis Powell, each of whom has contributed to the protection of liberties in critical areas and who share Justice Powell's view that "the liberties we enjoy to greater extent than any other country in the world are in effect guaranteed by the [Supreme] Court enforcing the Bill of Rights. Indeed, in his readiness to read out of existence whole provisions of the Constitution and to discard longstanding bodies of law assuring personal liberties, the nominee has manifested an extraordinary lack of respect for traditional methods of constitutional adjudication and the development of law. Perhaps most important, Judge Bork's views would deprive the nation of the critical, albeit limited, role that the judiciary has played in helping to solve conflicts that have threatened to divide our society.

While conceding the extremity of some of Judge Bork's views, proponents of his nomination have noted that as a Court of Appeals Judge he has followed Supreme Court decisions and suggested that once on the Supreme Court he will do the same. But Judge Bork himself has noted that the Supreme Court "ought to be always open to rethink constitutional problems" and that it is the one body able to correct its own mistakes of constitutional interpretation. Moreover, Judge Bork does not merely think that the decisions discussed above were mistaken but that they were disastrously wrong. He has described the privacy decisions variously as "unconstitutional," "judicial usurpation," "unprincipled," and "utterly specious." He has viewed many of the equal protection decisions as "improper" and "intellectually empty." In establishing the one-person, one-vote principle under the Fourteenth Amendment, the Supreme Court in Judge Bork's view was unable "to muster a single respectable supporting argument." While Justices sometimes surprise, it would be a disservice to Judge Bork to suppose that once on the Court his actions would not be in accord with his strongly stated principles.

Nor are proponents of the nomination persuasive in explaining Judge Bork's views as reflecting a consistent philosophy of judicial restraint rather than personal values. While calling for deference to legislatures where personal rights and liberties are at stake, Judge Bork has shown little regard for such considerations in other areas of the law and has, for example, openly stated that congressional intent may sometimes be disregarded in applying the antitrust laws.

Finally, we note that the issue before the Senate is not properly a partisan matter or one that may be summed up by labels such as "liberal" or "conservative". Rather, the responsibility of all Senators is to assure that a member of the life tenured judiciary does not disdain the Bill of Rights or the Fourteenth Amendment's command for equal protection of the laws and due process.

If after a full examination of the record Senators conclude, as we have, that the nominee holds views of the Constitution that would substantially diminish the rights of Americans they have both the authority and responsibility to withhold consent to the nomination.

Sincerely yours,

Dean Roger I. Abrams, Nova University Center for the Study of Law

Dean Frederick Randolph Anderson, American University Washington College of Law

Dean Jerome A. Barron, George Washington University National Law Center

Dean Florian Bartosic, University of California at Davis School of Law

Dean Terence Benbow, University of Bridgeport School of Law

Dean Paul Bender, Arizonia State University College of Law

Dean Ivan E. Bodensteiner, Valparaiso University School of Law

Dean Haywood Burns, City University of New York Law School at Queen College

Dean James M. Douglas, Texas Southern University Thurgood Marshall School of Law

Dean John A. Fitzrandolph, Whittier College of Law

Acting Dean Bryant G. Garth, Indiana University at Bloomington School of Law

Dean Howard Alan Glickstein, Touro College Jacob D. Fuchsberg Law Center

Dean Joseph D. Harbaugh, University of Richmond, The T. C. Williams School of Law

Dean William N. Hines, University of Iowa College of Law

Dean John Robert Kramer, Tulane University College of Law

Interim Dean Travis H.D. Lewin, Syracuse University College of Law

Dean Carl Colburn Monk, Washburn University School of Law

Dean Wade J. Newhouse, State University of New York at Buffalo School of Law

Dean Robert Pitofsky, Georgetown University Law Center

Dean Robert Popper, University of Missouri-Kansas City School of Law

Dean Norman Redlich, New York University School of Law

Dean George Schatzki, University of Connecticut School of Law

Dean Carl M. Selinger, West Virginia University College of Law

Dean James F. Simon, New York Law School

Dean J. Clay Smith, Jr. Howard University School of Law

Dean Leonard P. Strickman, Northern Illinois University College of Law

Dean Leigh H. Taylor, Southwestern University School of Law

Dean Gerald F. Uelmen, Santa Clara University School of Law

Dean Robert M. Viles, Franklin Pierce Law Center

Dean and Roscoe Pound Professor James Vorenberg, Harvard University Law School

Dean John P. Wilson, Golden Gate University School of Law

Dean Marilyn V. Yarbrough, University of Tennessee College of Law

ADDENDUM

Dean Carl Colburn Monk:
My principle opposition concerns Judge Bork's failure to treat women and minorities equally under the Constitution and that his view are outside the mainstream of principled judicial conservatism.

The CHAIRMAN. When we come back, we will start with the panel, the first panel of Hills, McConnell, Campbell, Stewart and Born, and then we will go to the second panel of Bollinger, Styron and Rauschenbert. And it would be my sincere hope that we could get agreement from my colleagues that—first of all, the witnesses should know that they should be limited to 5 minutes apiece in their statements, and I would hope my colleagues would consider limiting themselves to 5 minutes. But we will discuss that when we come back.

And then we will go to Lloyd Cutler and Ms. Mary Jane O'Dell. And then if we are anywhere near being able to finish around 6 o'clock, we will finish with the law enforcement panel.

The hearing is recessed until 2 o'clock. And I thank you, Professor, very, very much.

Mr. TRIBE. Thank you, Senator.

[Whereupon, at 12:55 p.m., the committee was recessed to reconvene at 2 p.m. the same day.]

AFTERNOON SESSION

Senator KENNEDY [presiding]. We will come to order. We have a full witness list for the afternoon, so we will begin right away.

On the first panel we have Carla Hills, the former Secretary of HUD, currently a partner in Weil, Gotshal & Manges. Michael McConnell, assistant professor of law, University of Chicago, wrote a memo on Bork's first amendment positions. Thomas Campbell, professor at Stanford Law School, field of antitrust, wrote a memoranda on labor law. Richard Stewart, professor at Harvard Law School, wrote a memoranda on administrative and regulatory law. Gary Born, adjunct professor, University of Arizona, wrote a memo on Bork's civil rights record.

We want to welcome all of our witnesses here this afternoon, and we will ask all of you if you would be kind enough to stand and be sworn in.

Do you swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Ms. HILLS. I do.

Mr. MCCONNELL. I do.

Mr. CAMPBELL. I do.

Mr. STEWART. I do.

Mr. BORN. I do.

Senator KENNEDY. I am reminded by my good friend and colleague, the Senator from South Carolina, that we are attempting to move this hearing along. We want to hear what you have to say. We will hope you will do it in as timely a fashion as possible.

I think we would like to try and see if each of you can keep it somewhere between 5 and 10 minutes. I know many of you have traveled across the country, and I think it is important to extend sufficient courtesy so that members are able to express their views. We hope that they will try and do so within those time constraints.

We will mention at the time it comes to 10 minutes, and we will hope that you could make it somewhat briefer.

We will recognize Carla Hills. We welcome you back to the Senate. We look forward to your testimony.

TESTIMONY OF PANEL CONSISTING OF CARLA HILLS, MICHAEL McCONNELL, THOMAS CAMPBELL, RICHARD STEWART, AND GARY BORN

Ms. HILLS. Thank you, Mr. Chairman.

I am, indeed, privileged to be joined by the four distinguished professors at this table, and I would like to introduce them with a little more detail.

To my left is Michael McConnell, assistant professor of constitutional law at the University of Chicago Law School, former assistant to the Solicitor General, and law clerk to Mr. Justice Brennan, as well law clerk to Judge J. Skelly Wright.

Further to my left is Thomas J. Campbell, professor of antitrust law at the Stanford Law School, former executive assistant to the Deputy Attorney General and law clerk to Mr. Justice Byron White.

To my immediate right is Gary Born, adjunct professor of law at the University of Arizona, member of the D.C. Bar, former assistant professor of constitutional law at the University of Arizona.

To my far right is Richard B. Stewart, professor of law of the Harvard Law School, former law clerk to Mr. Justice Stewart and special counsel to the Senate Watergate Committee.

I personally have known and admired Judge Bork for a long time. His years as a professor were at my law school, Yale, and I have shared his interest in the antitrust laws as a student, author, professor and practitioner. I have known him personally since 1973, when Elliot Richardson asked me to head the Civil Division of the Justice Department. The day that I accepted, Mr. Richardson resigned. Thereafter, Judge Bork persuaded me that the turbulence of those times should not dissuade me from government service. His selfless devotion to the department and his unabashed respect and affection for his colleagues were determining factors in my decision.

These were highly charged days: the last months of President Nixon's administration and the first of President Ford's. We grappled with a broad menu of complex and controversial legal issues—many of them matters of first impression. During that period, Judge Bork displayed an uncommon capacity to listen with an open mind, a relentless fairness in all of his actions, and an enormous dedication to intellectual effort.

Given my deeply held views of Judge Bork's splendid character and capacity, I was startled and saddened by the proliferation of reports from interest groups contending that his presence on the Court threatens that group's particular interest. Rather than reason with his considerable intellect, too many have used highly selective quotations from his writings and skewed tabulations of his opinions to brand him "antilabor," "antifirst amendment," "antifeminist," and, in particular, "anti" the social objective of the writer.

Troubled by the quality of the debate that preceded the commencement of these hearings, a number of distinguished scholars—some Democrats, some Republicans—prepared essays to analyze these alleged shortcomings of Judge Bork. As you know, four of the authors are here with me this afternoon.

As far as I know, this is the only scholarly study of Judge Bork's opinions made by wholly independent scholars, none of whom belong to any interest group. I have collected them; there are 10 in total; and I have delivered a book like this to each member of this committee in the belief that those who, to borrow the words of Judge Learned Hand, "take the trouble to understand" Judge Bork's work will conclude that the Senate should celebrate this Bicentennial year of our Constitution by consenting to his nomination.

I would like to spend a few minutes that I have with you with the essay of Professor Glendon of the Harvard Law School, responding to those who contend that Judge Bork's confirmation threatens legal gains made by women in this century.

Professor Glendon says it best when she writes, and I quote, "Judge Bork is likely to be a strong supporter of women's rights." Two aspects of Judge Bork's judicial philosophy are germane to her conclusion.

First, judicial activism has badly harmed women in the past and could harm them in the future. Our greatest gains as women have been made and, I believe, will continue to be made in through the legislative process. When the Supreme Court has imposed its values on the Constitution in an activist fashion, it has had a track record of invalidating legislation favorable to women. An activist Court spent the first third of this century overturning Federal and State laws that were designed to protect women in the marketplace.

Remember *Lochner, Adkins* and *Moorehead.* The Supreme Court simply annulled that legislation with which it disagreed, claiming that the laws violated the "rights" of employers to discriminate against women in hiring and pay. Surely, we do not wish to resurrect a jurisprudence that did so much harm to women's fight for equality. Judge Bork, with Justice Black and a great number of other distinguished constitutional scholars who have criticized the logic, not the result, in *Roe* and the *Griswold* cases, seek to avoid precisely that type of activism.

Second, Judge Bork's view of gender equality under the equal protection clause advances, not retards, women's rights. Judge Bork has suggested that equality between the sexes ought not to be treated in precisely the same way as equality between the races. Laws that make some fine distinctions in some circumstances in the treatment of sex could assist women and thereby be tolerated in Judge Bork's be view; whereas, there can be no distinctions based on race.

Judge Bork's view in this regard is similar to that of many feminists like Herma Hill Kay, Lucinda Finley, and Mary Becker. As Professor Kay writes, "The focus has shifted from a recounting of similarities between women and men to a reexamination of what differences between them could be taken into account * * * to achieve a more substantive equality."

As Professor Glendon notes, "excessively rigid notions of equality that require women and men to be treated precisely the same under all circumstances" harm women. For example, many feminists note that the worsening economic condition of women after divorce is partly due to rigid application of an abstract notion of equality that ignores women's special roles in procreation and child raising. Yet some of Judge Bork's opponents would impose rigid equality through the courts.

Judge Bork would, in interpreting the 14th amendment, allow State and federal legislatures to pursue a nuanced and differentiated concept of gender equality by letting them make fine distinctions on reasonable grounds between the sexes. This approach is consistent with his philosophy favoring judicial restraint. By allowing democratically elected bodies to make those distinctions, Judge Bork is not being less serious about women's rights, as his opponents charge; rather, he is being more sensitive. In letting legislatures, which are directly responsive to female voters, take into account special needs of women, Judge Bork aligns himself with leading feminist legal theorists.

This committee this past week has displayed commendable willingness to cut through distorted criticism to seek the truth about Judge Bork's writings and his opinions. But I must correct one distortion that was repeated this morning, is found in the National Women's Organization report, and is found in the ACLU report—two organizations which I myself at times have supported in the past. Their statement that the Supreme Court did not follow Judge Bork's opinion dissenting in the court of appeals decision denying the motion to rehear *Vincent* v. *Taylor* is simply false. I do not have time in that which has been allotted to me to discuss the case. But I am perfectly capable of doing so. I would only tell the members of this committee that this case is fully and fairly discussed in Essay J in this report which you have. In fact, the Supreme Court adopted the two principal points that Judge Bork brought out in his decision that was filed as a dissent to the refusal to rehear in *Vincent* v. *Taylor*.

It is our collective hope at this table that the 10 essays the authors have sent to you will assist you in cutting through the distortions, and that you will conclude, as have we, that the rights of women, of minorities and, indeed, of all Americans will be in very good hands with the confirmation of Judge Bork to the Supreme Court.

I thank you.

[Prepared statement follows:]

TESTIMONY OF

CARLA A. HILLS

WEIL, GOTSHAL & MANGES

BEFORE THE

SENATE JUDICIARY COMMITTEE

SEPTEMBER 22, 1987

Formerly: Assistant Attorney General
Civil Division 1974-1975
Secretary, Housing and
Urban Development 1975-1977

My name is Carla Anderson Hills. I am appearing before you today at the request of Judge Bork.

I have known and admired Judge Bork for a long time. His years as a professor were at my law school, Yale, and I have shared his interest in the antitrust laws as a student, author, professor and practitioner. I have known him personally since 1973, when Elliot Richardson asked me to head the Civil Division of the Justice Department. The day after I accepted, Mr. Richardson resigned. Thereafter, Judge Bork persuaded me that the turbulence of those times should not dissuade me from government service. His selfless devotion to the Department and his unabashed respect and affection for his colleagues were determining factors in my decision.

Those were highly charged days: the last months of President Nixon's administration and the first of President Ford's. We grappled with a broad menu of complex and controversial legal issues--many of them matters of first impression. During that period, Judge Bork displayed an uncommon capacity to listen with an open mind, a relentless fairness in all of his actions, and an enormous dedication to intellectual effort.

Given my deeply held views of Judge Bork's splendid character and capacity, I am startled and saddened by the proliferation of reports from interest groups contending that his presence on the Court threatens that group's particular interest. Rather than reason with his considerable intellect, too many have used highly selective quotations from his writings and skewed tabulations of his opinions to brand him "anti-labor," "anti-First Amendment," "anti-feminist," and, in particular, "anti" the social objective of the writer.

Troubled by the quality of the debate that preceded the commencement of these hearings, a number of distinguished legal scholars, some Democrats, some Republicans, prepared essays to analyze these alleged shortcomings of Judge Bork. Four of the authors are here with me today. As far as I know, this is the only scholarly study of Judge Bork's opinions made by wholly independent scholars, none of whom belong to any lobbying organization. I have collected them, ten in total, and delivered them to the members of this Committee in the belief that those who, to borrow the words of Learned Hand, "take the trouble to understand" Judge Bork's work will conclude that the Senate should celebrate this Bicentennial year of our Constitution by consenting to his nomination.

I would like to spend my few minutes before you with the essay of Professor Glendon, responding to those who contend that Judge Bork's confirmation threatens legal gains made by women in this century.

Professor Glendon says it best when she writes, "Judge Bork is likely to be a strong supporter of women's rights." Two aspects of Judge Bork's judicial philosophy are germane to her conclusion.

First, judicial activism has badly harmed women in the past and could harm them in the future. Our greatest gains as women have been made and, I believe, will be made in the future through the legislative process. When the Supreme Court has imposed its values on the Constitution in an activist fashion, it has had a track record of invalidating legislation favorable to women. An activist court spent the first third of this century overturning federal and state laws that were designed to protect women in the marketplace. Remember Lochner v. New York, Adkins v. Children's Hospital, and Moorehead v. New York. The Supreme Court simply annulled legislation with which it disagreed, claiming that the laws violated the "rights" of employers to discriminate against women in hiring and pay. Surely, we do not wish to resurrect a jurisprudence that did so much harm to women's fight for equality. Judge Bork, with Justice Black and a great number of other distinguished Constitutional scholars, who have criticized the logic, not the result, in the Roe and Griswold cases, seek to avoid precisely that type of activism.

Second, Judge Bork's view of gender equality under the equal protection clause advances, not retards, women's rights. Judge Bork has suggested that equality between the sexes ought not to be treated in precisely the same way as equality between races. Laws that make some fine distinction in some circumstance in the treatment of sex could assist women and thereby be tolerated in Judge Bork's view, whereas there can be no distinctions based on race.

Judge Bork's view is similar to that of many feminists like Herma Hill Kay, Lucinda Finley, and Mary Becker. As Professor Kay writes:

> The focus has shifted from a recounting of similarities between women and men to a re-examination of what differences between them could be taken into account...to achieve a more substantive equality.

As Professor Glendon notes, "excessively rigid notions of equality that require women and men to be treated precisely the same under all circumstances" harm women. Take, for example, divorce law. Many feminists note that the worsening economic condition of women after divorce is partly due to rigid application of an abstract notion of equality that ignores women's special roles in procreation and child raising. Yet, some of Judge Bork's opponents would impose rigid equality through the courts.

Judge Bork would, in interpreting the Fourteenth Amendment, allow state and federal legislatures to pursue a nuanced and differentiated concept of gender equality by letting them make fine distinctions on reasonable grounds between the sexes. This approach is consistent with his philosophy favoring judicial restraint. By allowing democratically-elected bodies to make these distinctions, Judge Bork is not being less serious about women's rights, as his opponents charge; rather, he is being more sensitive. In letting legislatures, which are directly responsive to female voters, take into account special needs of women, Judge Bork aligns himself with leading feminist legal theorists.

This Committee this past week has displayed commendable willingness to cut through distorted criticism to seek truth about Judge Bork's writings and his opinions. It is our collective hope that the ten essays we have sent you will assist in that effort and that you will conclude, as have we, that the rights of women, of minorities, and indeed of all Americans will be in very good hands with the confirmation of the nomination of Judge Bork to the Supreme Court.

Senator **Kennedy**. Who do you want to proceed second?

Ms. **Hills**. I believe that it would be appropriate to have Professor McConnell.

Senator **Kennedy**. Just introduce the order in which you want the panel to make their presentations.

Ms. **Hills**. It is our intention to start with Professor McConnell, then Professor Born, then Professor Campbell, and then Professor Stewart.

Senator **Specter**. Secretary Hills, where did you say the *Vincent* v. *Taylor* discussion appears in your materials?

Ms. **Hills**. It is at Tab J in the essays that have been submitted to you, Senator Specter.

Senator **Specter**. I do not have a Tab J.

Ms. **Hills**. Your staff should have all of the essays. They were delivered some considerable time ago, but I will be more than happy and, indeed, have a full set that if I could hand you this copy.

Senator **Specter**. That would be great.

Ms. **Hills**. I would like to do so. Professor Meltzer authored the essay dealing particularly with the distortions in *Vincent* v. *Taylor* and the *American Cyanamid* case.

Senator **Specter**. Thank you.

Senator **Kennedy**. Mr. McConnell.

TESTIMONY OF MICHAEL McCONNELL

Mr. **McConnell**. Senator, I do have a written statement, but perhaps in light of the short time——

Senator **Kennedy**. All the statements will be printed in their entirety in the record as if read, and then you can proceed whichever way you want. You can either read from it or summarize.

Mr. **McConnell**. Thank you, Senator.

It is my intention to speak primarily about Judge Bork's first amendment jurisprudence, but I would like to begin, if I may, with a word perhaps of reassurance. I know that the Senators are struggling with this very important decision, and this morning there was quite a lot of discussion of risk and the difficulties of prophesying about how a nominee to the Supreme Court will perform once he is on the Court.

Just as reassurance, a historical note: If you look at the Justices confirmed in this century whose nominations were the most controversial, you will be interested, I think, to find that they are not the Justices who are mediocre or who have been viewed as retrogressive in any way. Rather, it is quite the opposite. Almost without exception, the Justices who had the most controversy at the time of their nomination have proven to be the greatest Justices in this century. I speak of Louis Brandeis; I speak of Charles Evans Hughes; I speak of Harlan Fiske Stone.

Brandeis was accused of being a dangerous radical. Charles Evans Hughes was accused of being in the pocket of the corporate interests. These gentlemen, once on the Court, surprised their opponents and went down as truly great Justices.

I think there is a reason for this, which is that controversy swirls around nominees who have made a mark prior to their nomination, people who have made powerful statements, who have lived lives that generate some controversy. Those also happen to be the persons with the greatest capacity for leadership and growth once they are on the Court. I think the Senators might bear that in mind as they think about the controversy in general.

Now, there is a new twist in the controversy about Judge Bork. Some nominees in the past have been accused of being rigid ideologues who will have some set and unacceptable view of constitutional law. Others have been accused of being like shifting sands, changing their opinions all too often, and not being rooted in any firm principle at all. I think I can confidently say that Judge Bork is the first nominee ever to be accused of being both these things at the same time.

There is a reason for this, which is that the criticisms of Judge Bork have tended to be so extreme, so inflated as to create an impression coming into this chamber that the nominee is some kind of a monster, some kind of a threat to our civil liberties. And then when you see Judge Bork in the flesh and you find out that he is, in fact, a moderate, sensible, intelligent, liberal—in the sense of honoring individual liberties—sort of person, there is an inclination to assume that he is the one who is changed rather than to conclude that the monster picture was untrue. Although he has, indeed, changed his mind on some matters, I think that in general, if you follow his work through the 30 long years that he has been contributing in the field, you will find that on these broad themes have been far more consistent than his detractors say.

I would like to talk about the first amendment particularly in that respect, because he did write an article in 1971, which he said at the time was a tentative and speculative article. And I, for one, find some of the conclusions in that article quite unacceptable.

I should identify my own philosophic predisposition in this, to begin with, so that you know where I am coming from. I am an unabashed, although not absolute, civil libertarian in the areas of free speech, freedom of religion, freedom of the press.

I do not agree with some of the speculative conclusions, the tentative conclusions in Judge Bork's 1971 article. Neither, of course, does he today, and it has not been a recent change of heart on his part. It has been a progressive change beginning not long after the article itself was written, when he received criticism of its basic thesis by some of his colleagues at the Yale Law School.

But do not take my word for this. I would like to direct your attention to several opinions that Judge Bork has authored on the D.C. Circuit. And I am aware that some have said that these opinions on the D.C. Circuit are not very powerful evidence of Judge Bork's quality of mind, because, after all, he is bound by precedent.

I cite these particular opinions because they are not cases in which he has grudgingly applied Supreme Court precedent, but rather cases in which he has expansively recognized first amendment rights, going even beyond Supreme Court protection, doing so in eloquent ways, doing so in innovative ways. And I believe that this shows that Judge Bork's commitment to freedom of speech and freedom of expression is as strong, if not stronger, than current Supreme Court doctrine in virtually every important doctrinal area.

Let me begin with *Reuber* v. *United States,* in which a researcher employed by a contractor for the Federal Government conducted a study which contradicted the official position of both the contractor and also the government agency on the risks of using a substance called malathion. People will remember that malathion is the bug spray that was used to fight off the Mediterranean fruit fly in California a few summers back.

And he released this study, which contradicted the official government position. And U.S. officials urged the contractor, his private employer, to fire him.

Now is there a first amendment case that can be made out of this? Any scholar will tell you that this is a highly debatable case—this is like a law school exam. This is because a private person, a private employer is not bound by the first amendment and is able, barring various State law doctrines, to fire an employee under circumstance like this.

Judge Bork, however, and Judge Wald concurring on other grounds, found that the first amendment applied even without any statutory basis through what is called the *Bivens* doctrine. And in dissent was Judge Kenneth Starr, widely viewed as one of the most centrist members of the court.

The point here is that Judge Bork went well beyond any prevailing precedent, well beyond any statutes or anything that you could say was binding him in this area, and did so in the interest of protecting freedom of expression.

I think you are all familiar with *Ollman* v. *Evans,* which has been one of Judge Bork's most celebrated decisions, in which he went beyond Supreme Court precedent and supported freedom of the press for statements which fall in the never, never land between expression of fact and expression of opinion. His very strong opinion in that case—dissented by Justice Scalia, incidentally—has been justly praised even by Judge Bork's critics such as the ACLU and Tony Lewis and the New York Times. I will not belabor that because I assume that the court is familiar with that decision. If not, I would welcome some questions about it.

But I would like to talk about some of the other opinions which are probably less well known to you. In the area of broadcast speech, Judge Bork along with his very liberal colleagues, such as Judge Bazelon, and my former boss, Judge J. Skelly Wright, has been in the forefront of extending free speech protections to various electronic media. He is well ahead of the Supreme Court in this area.

Then there is the interesting *Lebron* case in which an artist from New York who is very anti-Reagan wanted to buy space on the transit signs to put up a poster which was a composite photograph that made it appear that President Reagan and his colleagues were laughing at a bunch of poorly dressed ordinary citizens. The transit authority refused to accept this advertisement on the grounds that it was deceptive. The district court agreed that this was deceptive; it would create the appearance of an actual photograph of the President mocking ordinary individuals.

But Judge Bork authored an opinion for the D.C. Circuit, reversing this decision and holding that even a malicious and even potentially deceptive advertisement of this sort is protected by the first amendment. Indeed, he went beyond his colleagues in holding that potential deceptiveness is not ever a basis for prior restraint of speech in this area.

I could go on, but the time is quite brief, and I shall not. But the important thing is that these decisions are reflective of a judge who has not come reluctantly to the faith of support for the first amendment. Rather these opinions show that Judge Bork is, if anything, ahead of current doctrine. I do not find this at all surprising because it fits in with Judge Bork's philosophy of judicial restraint, which I would remind you is not like the caricatures that the government always wins or that the judges are always deferring to whatever government does.

That is not what judicial restraint is all about. Judicial restraint is an attitude that a judge brings to the business of judging, under which he defers not all the time but it is a relative matter. A restrained judge is more like to defer to the decisions of elected branches, but not where there are established constitutional values which stand in the way.

I know of no better statement of the judges' role in this matter than Judge Bork's own, and I will conclude with that, if I may.

Judge Bork stated in the *Ollman* case that "the important thing, the ultimate consideration is the constitutional freedom that is given into our keeping. A judge who refuses to see new threats to an established constitutional value and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning fails in his judicial duty."

Thank you.

[Prepared statement follows:]

TESTIMONY BEFORE THE SENATE JUDICIARY COMMITTEE ON THE NOMINATION OF JUDGE ROBERT H. BORK TO THE SUPREME COURT OF THE UNITED STATES

September 22, 1987

Michael W. McConnell
Assistant Professor of Law
University of Chicago Law School

I appear with great enthusiasm to urge your support for the nomination of Robert Bork to the United States Supreme Court. First, a word about my background, and then my reasons.

I have had the opportunity to observe both the Supreme Court and the United States Court of Appeals for the District of Columbia Circuit, on which Judge Bork now sits, from every possible perspective. I served as law clerk to two outstanding judges, J. Skelly Wright and William J. Brennan, Jr., both considered in political parlance as "liberal activists." I have practiced extensively in the Supreme Court, principally in cases involving constitutional liberties. I now teach constitutional law and regulated industries at the University of Chicago Law School. These subjects are at the heart of the debate over Judge Bork's performance as a jurist. I can therefore claim expertise as a court "insider," as a practitioner and advocate of civil liberties, and as a scholar in the court's work. More recently, I have made a study of many of Judge Bork's academic and judicial writings.

My enthusiasm for the Bork nomination has nothing to do with predictions about particular decisions he may reach as a Justice. I believe that, partisan considerations aside, political "liberals" as well as "conservatives" should welcome this appointment. I believe, moreover, that to approve or disapprove a nomination on the basis of a prediction about particular votes (no matter how important the issues may appear today) would be shortsighted, inappropriate, and (history tells us) unreliable as well.

Judge Bork's qualifications of intelligence, experience, and personal integrity are not in doubt. Many believe, with reason, that there is no more eminent legal scholar and jurist in this generation. As one who deals regularly with the Court, I urge you strongly: do not underestimate the importance, to the Court and to the nation, of Justices of lively mind and intellectual integrity. Students of the Court over the last 15 years -- left, right, and center -- have been distressed about the vacillating decisions, imprecise holdings, divided opinions, and muddled jurisprudence that have characterized too many cases in the Supreme Court. For the vast preponderance of cases before the Supreme Court, "ideology" is far less important than quality of mind; and quality of mind is the best protector against rigid ideology. I suspect it is these qualities that led Justice John Paul Stevens (certainly no archconservative) to take the extraordinary step of speaking out on Bork's behalf.

Even political liberals should welcome the Bork nomination. Obviously, President Reagan is not going to nominate a Justice in the mold of a Brennan, Marshall, or Blackmun. Just as obviously, the Supreme Court cannot be left without its full complement for the next two years. If Judge Bork is not confirmed, President Reagan could well appoint someone just as "conservative," but less distinguished, less intellectually open, and less committed to judicial restraint.

Judge Bork's judicial philosophy is neither "liberal" nor "conservative." He is not committed to any political program, but to the proposition that the function of the Court is to interpret the law rather than to make it. In this he resembles political "liberals" like Justices Frankfurter and Black much more than political "conservatives" like Justices McReynolds or Van Devanter.

Judge Bork shares the traditional understanding of the role of the courts in our constitutional system: they are guarantors of the fundamental values expressed in the Constitution and not expositors of their own social and economic opinions. As a committed civil libertarian, I believe that this approach best accords both with individual rights and with democratic governance.

Judge Bork's commitment to civil liberties can be seen in cases such as Ollman v. Evans, which contains the fullest judicial statement of his approach to interpretation of the Bill of Rights. In Ollman, Judge Bork wrote (over a dissent by his then-colleague Antonin Scalia) that the First Amendment protects even what he termed "rhetorical hyberbole" in the expression of opinion. More importantly, he took the occasion to explain his judicial philosophy:

> Judges given a stewardship of a constitutional provision such as the first amendment, whose core is known but whose outer reach and contours are ill defined, face the never ending task of discerning the meaning of the provision from one case to the next. . . . In a case like this, it is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply in the world we know.

Judge Bork thus avoided the two opposing extreme views of constitutional interpretation. On the one hand, he rejected the notion that the Constitution is frozen in time, and that it carries no meaning other than the specific applications that its framers envisioned for it. "The fourth amendment," he observed, "was framed by men who did not foresee electronic surveillance. But that does not make it wrong for judges to apply the central value of that amendment to electronic invasions of privacy." Judge Bork's summation of the opinion is one of the finest statements of the judicial function that I have seen:

> The important thing, the ultimate consideration, is the constitutional freedom that is given into our keeping. A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty.

On the other hand, Judge Bork also rejected the opposite notion that judges are authorized to "creat[e] new constitutional rights or principles" based on their own economic, social, or political views. This, he has stated elsewhere, would amount to judicial "fiat," and "not to law in any acceptable sense of the word." Note, moreover, that this philosophy of judicial restraint applies equally to political positions of the right and left. He has castigated those who urge that the Constitution be used to impose laissez faire economics, as well as those who urge that it be used to promote egalitarianism. "The morality of the jurist," Bork has said, lies in the "abstinence from giving his own desires free play, the continuing and self-conscious renunciation of power."

Based on his stature and position of intellectual leadership, Judge Bork can be expected to exercise influence, far beyond his single vote, in favor of vigorous protection of constitutional civil liberties and against the temptation, apparently felt by some conservatives (as well as liberals), to use judicial power for their own political ends.

Some have charged that Judge Bork's unwillingness to go beyond the text, structure, history, and purposes of the Constitution would endanger civil rights and liberties as we now know them in the United States. I believe, to the contrary, that our system's admirable respect for civil rights and liberties is a product not of free-wheeling jurisprudence, but of careful, consistent, legitimate enforcement of the fundamental values of the Constitution. Judge Bork's consistent support for the result in Brown v. Board of Education is an example of this.

When the courts have gone beyond the Constitution, as they arguably did in the cases of abortion, busing, capital punishment (from which they later withdrew), pornography (from which they later withdrew), and, in an earlier generation, child labor, minimum wage laws, and the reach of federal antitrust laws, the legitimacy of the judicial function is called into question; the courts suffer a loss in the moral authority they need to protect constitutional rights. If the courts are in the habit of treating their own social, political, and economic opinions as if they were embodied in the Constitution, the law appears to be nothing more than politics. Then, if the courts are called upon, as in the school desegregation or the school prayer cases, to make controversial rulings that enforce the fundamental principles of the Constitution, their rulings can be dismissed as mere politics and resistance will be legitimated.

In addition to its consistency with civil liberties, Judge Bork's philosophy of judicial restraint has a more obvious connection to democratic governance. He has repeatedly stressed that the people have a right to govern themselves through their representative institutions, even if the policies they adopt are foolish or unwise. Only if the Constitution can fairly be interpreted as prohibiting a political choice are the courts entitled to step in. Similarly, when interpreting statutes, Judge Bork has exhibited a painstaking faithfulness to the congressional intent, even when the results are contrary to his probable political predilections. The "Baby Doe" regulations case is an example of this.

In confirming Judge Bork to the Supreme Court, the Senate will be reaffirming its own central place, along with the other state and federal representative institutions, in our constitutional framework. This may mean that the Congress has to "take the heat" on some contentious issues now resolved by the courts. But it also means that the constitutional balance will be restored.

Contrary to the rhetoric, Judge Bork is plainly in the mainstream of American law. No one can have generated the professional esteem he has enjoyed in such establishmentarian institutions as the Yale Law School and the District of Columbia Circuit, if he were an "extremist." His record as a judge -- unanimous decisions in 86% of his cases, dissents in fewer than 5% of the cases, not a single reversal by the Supreme Court in over 400 majority opinions in which he joined -- demonstrates without possibility of doubt that he is in the mainstream. The several studies of his voting record, based solely on the small fraction of the cases in which there was a divided court, give a grossly distorted impression. To focus only on those cases would make any judge, no matter how fair-minded, look result-oriented. Looking at his record as a whole, we see a judge who votes on either side of the issue, based on the legal merits, and who is able to reach consensus with his liberal colleagues an amazing percentage of the time.

In short, I believe that Judge Bork has the attributes that will surely make him a respected -- and I would not be surprised if an outstanding -- Supreme Court Justice. If we look for a person of intelligence, fairmindedness, experience, and a keen sense of the appropriate judicial role in a democratic society, there is no question that Robert Bork should be confirmed.

Senator KENNEDY. I thought Senator Biden would be back so we would not have to interrupt the hearing. But I think we better recess now. We have to vote and then we will commence as soon as Senator Biden will return.

[Brief recess.]

The CHAIRMAN. As I understand it, the next witness to testify is Mr. Born.

Professor Born.

TESTIMONY OF GARY BORN

Mr. BORN. Thank you, Senator.

During the last 2 months, opponents of Robert Bork's nomination to the Supreme Court have succeeded, largely succeeded in creating an inaccurate and unfortunate myth. According to this myth, Judge Bork is a conservative idealogue who is insensitive to the civil rights of minorities and women.

Because of this myth, some civil rights' groups, perhaps many civil rights' groups, have expressed considerable concern, even fear about Judge Bork's nomination. I believe that this fear stems from the myth and, in my judgment, the myth is just plain wrong.

A fair and objective reading of the historical record shows that Judge Bork's civil rights' views are squarely within the mainstream of U.S. legal thinking. The same record shows that Judge Bork has personally made substantial contributions to the civil rights of minorities and women in this country. Numerous examples illustrate these points and are contained in the statement that I have submitted.

I will only take the time to mention a few here, which I think are especially important.

First, Judge Bork has repeatedly said that the 14th amendment contains—and I quote from him: "a core value of racial equality, that the Court should elaborate into a clear principle and enforce against hostile official action."

Consistent with this principle that he has articulated, Judge Bork has praised numerous landmark decisions in the civil rights field. For example, he has consistently applauded *Brown* v. *Board of Education* as one of the Supreme Court's—and I quote again: "most splendid vindications of human freedom." Likewise, Judge Bork has wholeheartedly agreed with major civil rights' victories, including *Loving* v. *Virginia*, which struck down a State law that forbid interracial marriages.

He also agreed with *NAACP* v. *Alabama*, which held the State of Alabama could not gain access to the membership lists of the NAACP because it would chill the rights of NAACP members.

Judge Bork has also applauded the court's post-*Brown* decisions, ordering the desegregation of a whole range of public facilities all across the nation, including parks, swimming pools, buses, golf courses and the like.

Finally, Judge Bork has agreed with numerous remedial decisions by the Supreme Court which implemented this sweeping desegregation that *Brown* and its progeny ordered.

In my view, to suggest, as some of Judge Bork's critics have, that he has been hostile to civil rights, that he has consistently been insensitive to the interests of racial minorities and women, is simply wrong. The positions that Judge Bork has taken on central cases like *Brown* v. *Board of Education, Loving, NAACP* v. *Alabama* plainly demonstrate that he has not been guilty of the charges that his critics have leveled at him.

Second, Judge Bork's record as Solicitor General reflects—in my view—a genuine commitment to the civil rights of women and minorities. I know this committee has heard too many statistics. Let me add another.

As Solicitor General, Judge Bork participated in approximately 20 cases involving substantive civil rights' claims against a State or a company. In 16 of these cases, Judge Bork agreed with who? Not Justice Rehnquist, but Justice Brennan, the most liberal member of the court. In fact, Judge Bork was able to persuade Justices Rehnquist and Burger in only eight of those cases. That hardly strikes me as a record of showing a lack of sympathy or interest in the rights of minorities and women.

In fact, as Solicitor General, Bork frequently urged positions in civil rights' places that a majority of the court found too sympathetic to minority interests. He went too far in interpreting the civil rights' laws to afford protections for minorities and women for the court during the 1970's. I can give you a lengthy list of cases, but the more important include *Beer* v. *United States, Washington* v. *Davis, Teamsters* v. *United States, Pasadena Board of Education* v. *Spangler.*

In all these cases a majority of the court rejected Judge Bork's interpretation of the civil rights' views as too expansive.

Bork's positions as Solicitor General were equally supportive of the rights of women. In *Corning Glass Works* v. *Brennan,* for example, he successfully argued for a broad interpretation of the Equal Pay Act. In *General Electric Co.* v. *Gilbert,* the court rejected Bork's argument that title VII reached discrimination on the basis of pregnancy. And in *Vorcheimer* v. *Philadelphia,* Bork unsuccessfully argued that the equal protection clause forbid single sex State schools that provided poorer educational opportunities for women than for men.

Third—and I will make this point brief, since it appears to be conceded by many of Bork's critics now—Judge Bork's voting record as a court of appeals judge demonstrates his principled and sympathetic treatment for civil rights' claimants. To repeat another often cited statistics, in seven out of the nine substantive civil rights' cases that he faced, Bork voted for the claimant. In the remaining two cases the Supreme Court substantially adopted his view.

Judge Bork's critics have ignored this impressive history of support for civil rights' protections. Instead, in my view, they have focused narrowly on a few isolated aspects of Bork's academic record to support the myth of ideological extremism. In my view, the issues cited by Judge Bork's critics fall far short of justifying their conclusions.

Several issues are especially important. First, Judge Bork has been attacked for his criticism of *Shelley* v. *Kraemer,* a case that you have frequently heard mentioned. In my view this criticism is wholly unpersuasive. *Shelley* held that the 14th amendment forbade court enforcement of a racially discriminatory covenant in a private real estate agreement. Judge Bork criticized the *Shelley* decision on grounds that I am sure virtually every law professor in this country has repeated. He said that the rationale of the court's opinion would subject virtually all private conduct to the high standards imposed by the Constitution. He said that this was wrong. Judge Bork said this was wrong because it is well settled that the 14th amendment was meant only to apply to governmental action, to State action.

His views are no different from views that Larry Tribe, Archibald Cox and numerous other liberal or moderate thinkers have expressed. Indeed, the Supreme Court itself in subsequent cases has backed off the broad reading of State action that was adopted in *Shelley* v. *Kraemer.*

Second, contrary to the claims of his critics, Judge Bork's record indicates that he will afford women substantial protection under the equal protection clause, and that he will also afford substantial protection to other nonracially defined groups.

As a court of appeals judge, Judge Bork squarely held that the equal protection clause permits claims based on sex discrimination. As Solicitor General in *Vorcheimer* v. *Philadelphia,* he said that sex-based categories can only be sustained if they are substantially related to important government objectives.

More recently, as he elaborated before this committee, Judge Bork said that he reads the equal protection clause to impose a reasonable basis test. I understand that Professor Tribe told you this morning that this is a new standard and that it is unpredictable.

Both assertions are wrong. It is not a new standard. Justice Stevens—and I will be happy to explain in greater detail if you wish—has long expressed exactly the same standard. It is not an unpredictable standard either. Not only do we have what Justice Stevens said about it, but we have Judge Bork's consistent record in other equal protection cases. We have his views in *Brown* v. *Education.* We have his views in the progeny of *Brown.* We have his views in *Loving* v. *Virginia.* We have his views on the court of appeals in *Cosgrove.* We have his position as Solicitor General in the *Vorcheimer* case.

All these cases tell us that he takes equal protection guarantees for all people—black, white, men, women—very seriously, and that he will enforce what the 14th amendment says, namely that all persons are guaranteed the equal protection of the laws.

Finally, Bork has also been attacked for questioning the rationale of *Harper* v. *Virginia Board of Elections,* which struck down a nondiscriminatory $1.50 poll tax imposed equally on all voters in the State.

Bork's views about the rationale in *Harper* was shared by—and this is a lengthy list—Justices Hughes, Brandeis, Stone, and Cardozo, Black, Stewart and Harlan. All those Justices joined opinions expressing substantially the view that Judge Bork took.

Moreover, Judge Bork made it crystal clear in all his comments about this case that if *Harper* had been about racial discrimination—or sex discrimination, I believe—he would have come out the other way. He expressly said, "If this case had involved racial discrimination, I would have decided it differently." The case did not involve racial discrimination. It involves a neutral and nondiscriminatory tax on all persons.

Finally and perhaps most importantly, Judge Bork said he would have gotten to exactly the same result as the court based on a different clause in the Constitution. In my view, all the criticism that has been leveled at Judge Bork based on *Harper* is simply unpersuasive. It is not credible.

In summary, the historical record simply does not support the charge that Judge Bork is a conservative extremist on civil rights' issues. Bork's record as Solicitor General includes many important civil rights' achievements. His tenure on the court of appeals is a model of principle, temperate judicial decisionmaking.

If in these hearings we are going to consider ideology, I think we have a very weighty burden of considering Judge Bork's entire record. I do not think it is fair just to focus on a few out-of-context, isolated comments that he has made in his academic career. I do not think you need to consider the entire record.

And I believe that when you do look at that entire record, you will see that his position on civil rights is squarely within the mainstream of American legal thinking.

The CHAIRMAN. Thank you very much.

Professor Campbell.

TESTIMONY OF THOMAS CAMPBELL

Mr. CAMPBELL. I would like to try to do a favor for the committee by spending 5 minutes saying what you do not need to talk about any more. That is organized labor's rights as defined in the National Labor Relations Act and the Federal Labor Relations Act.

I am talking about a narrow set of issues here: organizational rights. The reason why I think you do not need to spend any more time on it is that there is really nothing much here to be a basis for criticism of Judge Bork, or for a lot of praise either. It is just not an area in which his expertise has been brought to bear. It would not be an issue, truly, if it had not been that the AFL-CIO has labeled him antiunion and pro-business in his opinions.

The AFL-CIO submitted a study based on cases chosen under very specific criteria, namely, those opinions as to which there have been dissents, or dissents from a rehearing en banc, and four criteria which are specified in their document.

The AFL-CIO hold that Judge Bork is antilabor, pro-business, in five out of seven cases. Now, the truth is that he has written 10 cases, and in their 5 out of 7, they only list 5 of the ones that he wrote, ignore the remaining 5 he wrote, and then add to that to bring up the total a bit, two additional opinions in which he merely participated.

What I tried to do was very simple. Instead of utilizing those four criteria that the AFL-CIO brief used, I simply read every opinion that Judge Bork wrote on the issue of organization rights—NLRA, FLRA—and it is on that basis that I offer this assessment today.

Just a couple of comments more about the AFL-CIO study and then I will tell you about my study. In the text of the AFL-CIO report, there is a commentary on one case. The criticism is made that Judge Bork in the *Restaurant Corporation of America* case, reached to overturn an administrative agency in order to hold for an employer.

Not mentioned in the AFL–CIO report is that in two other cases, Judge Bork overturned an administrative agency to hold in favor of an employee.

In fact there have been five cases in which Judge Bork has overturned the administrative agency. Twice, he did it to uphold the employee; three times he did it to uphold the management. This reflects a much more balanced view than that simple reference to the *Restaurant Corporation of America* case would have indicated.

There is only one other case mentioned in the text of that AFL–CIO report, and that is the *Amalgamated Clothing and Textile Workers* case. And here, if you just read their report, you would be of the view that Judge Bork had ruled against the union.

In fact he voted in favor. He concurred in the majority opinion written by Judge Skelly Wright. The focus of the AFL–CIO's criticism is that he wrote a separate concurrence, and he chided Judge Wright for putting in a little extra dicta—which is a sin to which many judges have fallen—and it is that commentary which shows up in the AFL–CIO report.

Last point on this: It is significant, I think, that in 33 pages, the AFL–CIO devotes precisely four lines, on page 5, and one paragraph, on pages 28 to 29, to the National Labor Relations Act/Federal Labor Relations Act cases.

Now the AFL–CIO is certainly entitled to present its opinion on constitutional law, on right to privacy, on a number of other issues, but on the point that is an area of their expertise—the National Labor Relations Act—in the 33-page report we have one paragraph and then four lines. This indicates what I said at the start: Labor law is just not a controversial issue.

To conclude, then, what did I do in my report? I looked at every case he wrote, and the word that describes the record is "blah." We have got cases for management, cases for labor. We have got cases upholding the administrative agency, cases overturning the administrative agency. Six times I count he comes out in favor of the management, four times in favor of a union, once he splits the difference.

I actually disagree with the reasoning of a few of these cases and I put that in my report. If the time ever comes that anybody suggests that my disagreement with a case means that I would not follow it—in the highly unlikely event that anyone suggests that I be put in such a position—I want the record to show that I would surely follow the established precedent of the D.C. Circuit.

But I criticize some cases because I am a law professor, and that is what law professors are supposed to do. But here is the point: None of them ignore precedent. None of them try to establish a new principle. None of them overturn the Supreme Court from the court of appeals.

They are simply very reasonable and rather dull cases.

In conclusion, then, I suggest, as I did at the start, that the committee's hearings might be advanced by removing from the debate the concept that Judge Bork is antiunion. That simply is not true, and there is plenty else to discuss. Thank you.

The CHAIRMAN. Thank you very much. Professor Stewart.

TESTIMONY OF RICHARD STEWART

Mr. STEWART. Thank you. I would like to submit for the record my prepared memorandum.

The CHAIRMAN. Without objection, it will be placed in the record.

Mr. STEWART. Thank you. My talk today, and my memorandum, deals with Judge Bork's performance as a judge on the D.C. Circuit in the areas of administrative and regulatory law. That is the law that governs the decisionmaking and powers of the great bureaucracies that run our regulatory welfare state, and the role of the courts in reviewing those decisions for consistency with law.

It is not as glamorous an area as the constitutional issues that you have focused on thus far, and, in some sense, it is ultimately less important than those great constitutional issues. But it is nonetheless very important. Indeed, many times the operation of our regulatory welfare state impacts citizens' interests more than constitutional cases.

Administrative and regulatory law is an important part of the jurisprudence, the business of the D.C. Circuit, and a very important part of the business of the Supreme Court. So, I think for that reason, it bears some scrutiny.

The reason that I have written this memorandum is to respond to charges have been made in a number of widely circulated reports that Judge Bork's opinions and record on the D.C. Circuit shows him to be a rigidly pro-business, that he favors business over government. In cases involving government versus public-interest groups, he assertedly favors the government.

It is claimed that he has a rightwing preconceived bias, and that his decisions are just fitted to comport with that bias. That charge is made in the Ralph Nader Public Citizen report, the AFL-CIO report that has been mentioned earlier, and in parts of the report commissioned from some consultants by the chairman of the committee to answer White House memoranda on Judge Bork's performance.

So there have been some serious charges made here. My memorandum and others in the briefing book show, that a semblance of these claims is made out by a highly selected culling, unrepresentative sample of cases, and by an outright distortion or highly misleading account of those cases when they are discussed in the reports.

I try to set the record straight. As my colleague, my Harvard colleague Larry Tribe said this morning, it is nesessary to look at the substance and quality of those opinions. They are very high indeed.

Judge Bork clearly examines carefully the arguments on all sides. His opinion is not fitted to a preconceived result. He often goes out of his way to state the position of the person against whom he rules in stronger terms than the advocate presented itself.

The cases are well-reasoned and careful. They give precedent their due, and they are of high professional caliber. A careful reading of those opinions shows very high-caliber professional work that belies the notion of any sort of preset biased formula.

The third reason I raise this issue of his performance on the D.C. Circuit relates to some things that were discussed this morning.

My colleague, Professor Tribe, conceded that Judge Bork's opinions in the area of statutory interpretation, and his other work on the D.C. Circuit was of high caliber. But he, like other critics of Judge Bork, have said, that as a D.C. Circuit judge you are bound by Supreme Court precedent, but once you get on the Supreme Court, you will be sort of freed of those restrictions. And therefore, the experience as a lower-court judge is simply not of great relevance in judging how a Justice on the Supreme Court will perform.

I do not think questions of intellect, of character, or temper can be that neatly divided up. I think the experience on the D.C. Circuit is very relevant. Let me just say, briefly, why.

One, judges on the D.C. Circuit, particularly in the areas of regulatory and administrative law, have a very large responsibility. The Supreme Court precedent is often murky, divided, unclear, and the D.C. Circuit is recognized as the second-most important court in the Federal courts system, particularly in this area of regulatory law.

Second, I think the qualities of character, and of professionalism, of honesty, of openness, that are reflected in his opinions will carry over. I do not think that you simply change your stripes when you move from one court to another, and I think that has been amply made clear in the case of many Supreme Court Justices.

I think the record confirms not only what you already know, that Judge Bork is a very bright man who cares about ideas, but also that he is an open man and has learned from experience.

Let me just take one case, as an example, and then I will close.

The case is *National Resources Defense Council* v. *EPA,* which involved the standard setting for hazardous air pollutants under the Clean Air Act.

Environmentalists argued that under the statute EPA can only take into account safety. You cannot take into account cost or technological feasibility. On the other hand, the EPA had said that these standards should be set on the basis of cost and feasibility. Judge Bork, in a panel opinion, formulated a middle ground between those two positions, said yes, safety, but in determining the margin of safety you can take into account cost.

Judge Skelly Wright dissented, and pointed out that the practical effect of Judge Bork's opinion might be to give EPA too much leeway to ignore health considerations.

On en banc rehearing, Judge Bork, who had ruled for the EPA the first time, authored a unanimous opinion for all judges on the D.C. Circuit, reformulating his position, and saying that more weight has to be given to safety, a little less weight to technological feasibility. He ruled for the environmental groups against the Government and industry.

Now that record shows learning, that shows openness, that shows statecraft. I think these and other opinions of his on the D.C. Circuit will repay your careful attention in trying to reach a judgment as to the qualities as a judge that he will continue to display if he is appointed and confirmed to the United States Supreme Court. Thank you.

The CHAIRMAN. Thank you very much. I appreciate the entire panel. I would like to suggest that we at least try to hold ourselves to 5 minutes in our round of questioning.

I have one question, because Professor Born, as you have pointed out, so much has been discussed about the civil rights area.

You have written a memorandum, and you have paraphrased it, or if not, spoken to it here today, defending Judge Bork's civil rights record, and you circulated, along with Secretary Hill's memorandum—take the time to understand—I believe that was—and I would like to know about how that was prepared.

Could you tell me when you prepared that memorandum, roughly.

Mr. BORN. Roughly? It is the outgrowth, Senator, of a month's work, basically when Judge Bork was nominated, and public criticisms of him began to surface. As a constitutional scholar and lawyer, I was very interested in these issues.

The CHAIRMAN. Don't get me wrong. I am not questioning at all your——

Mr. BORN. I am sorry. I paid attention to him, to what was being said about him during this process. At some point during that process—I do not know, two weeks ago or so—3 weeks ago, actually—Carla Hills contacted me. She knew I had been working in the field. She asked whether I could prepare a memorandum, and I did prepare the memorandum.

The CHAIRMAN. Did you speak to Judge Bork about——

Mr. BORN. To be honest, I do not know Judge Bork personally. I have never talked to him in person, or on the phone.

Nontheless I feel, to be honest, that I now know him very well. I feel like I have read more opinions, more articles, more speeches by him than I have of any other person in the world. But I did not speak to him personally, if that is your question.

The CHAIRMAN. Did you speak to Mr. Cutler about the memorandum?

Mr. BORN. Mr. Cutler works two floors above me. He and I chat.

The CHAIRMAN. I am not suggesting you should not. I am just trying to——

Mr. BORN. No, I agree, you should not suggest that I should not. He and I chat frequently. I talk to him about this, I talk to him about cases we work on. I talk to him all the time.

The CHAIRMAN. But did he review and concur in your recommendations? Mr. Cutler.

Mr. BORN. Yes. Definitely. Definitely.

The CHAIRMAN. Can you tell the committee approximately when you and Mr. Cutler discussed the memorandum?

Mr. BORN. The memorandum? Well, again, Lloyd and I talked——

The CHAIRMAN. The essay.

Mr. BORN. Lloyd and I talked on an ongoing basis about Bork for a number of days. We are interested in it. It is a topic of political and constitutional interest to both of us.

He looked at the memo—goodness—a couple weeks ago.

The CHAIRMAN. Did he look at it before the final version was submitted?

Mr. BORN. I am almost certain he did.

The CHAIRMAN. Now the second question I have is that as recently—as I am sure you know—June of 1987—because you have heard it here a hundred times mentioned—Judge Bork stated that he believed the equal protection clause should have been kept to things like race and ethnicity, and he has subsequently elaborated on that.

And in your memo on Judge Bork, you write—and I quote: "It is completely clear that Bork believed that the equal protection clause applies to sex discrimination claims by men and women."

When did you arrive at that conclusion?

Mr. BORN. To be honest, I suspect that was on the very first day that I heard the debate. It seems to me that the single-most baseless charge that has been leveled against Judge Bork is that he does not think that the equal protection clause applies to women.

The CHAIRMAN. You mean the debate here in the committee?

Mr. BORN. No. I mean the public debate.

The CHAIRMAN. Public debate.

Mr. BORN. Of course. The equal protection clause says no State shall deny any person the equal protection of the laws.

It seemed to me absolutely impossible, for somebody who pays attention to the original intent of the Framers, who wrote that word "person," to think that the equal protection clause does not apply to women.

Now I understand that in these proceedings various people have alluded to oral statements that Judge Bork has made at various times in the last 5, 10, 15 years. Some of those statements, I agree, could be read as suggesting that Judge Bork does not think women should be treated in the same fashion under the equal protection clause, as blacks.

The CHAIRMAN. But don't use up all my 5 minutes, because I understand the point, and you made it well earlier also.

Did your memorandum, or however I should characterize it—memorandum——

Mr. BORN. I think we called it an essay.

The CHAIRMAN. Essay. I beg your pardon.

Did your essay suggest that you believe that Judge Bork adopted the intermediate scrutiny test for sex discrimination cases?

Mr. BORN. To be honest, I do not think that I ever came to a conclusion about whether or not Judge Bork adopted an intermediate scrutiny test. It seems to me that in the decision that he argued as Solicitor General—in the case that he was involved in as Solicitor General, the *Vorcheimer* case, he relied on *Craig* v. *Boren,* which as you know, Senator Biden, adopted an intermediate scrutiny test.

Based on that, I think, before he elaborated in these hearings on his positions, the fairest inference was, based on his considered views, that he did indeed use something like the intermediate scrutiny test. Again, he has not written much in the protection field, and at the time, the best inference, based on what he had done in *Vorcheimer* and other cases, was that he had something like the intermediate scrutiny test.

The CHAIRMAN. I could not agree with you more. My time is up. Let me just quote from page 34 of your essay.

"While not dispositively resolving the issue, these materials strongly suggest that Judge Bork will apply some sort of intermediate scrutiny in sex-based equal protection cases. This is the same approach the Supreme Court has recently adopted. By all appearances, it is a more demanding test than that accepted by Justice Powell or other mainstream thinkers."

Mr. BORN. I said that then, and I continue to think that when one puts aside this complicated three-tier standard, that what Judge Bork will do in equal protection cases is exactly what I said in that memo.

The CHAIRMAN. Thank you very much. My time is up. The Senator from Utah.

Senator HATCH. Thank you, Mr. Chairman. I welcome all of you to the committee and appreciate the testimony that you have brought here.

Secretary Hills, over and over again during these hearings, we have heard how frightened women should be of this nomination, yet Judge Bork's record as Solicitor General, and as a judge over the last, almost 6 years, and his periods of public service I think suggest the opposite conclusion.

For instance, in *Laffey* v. *Northwest Airlines,* he granted airline stewardesses equal pay for equal work, and in *Palmer* v. *Shultz,* he held that sex discrimination in foreign-service promotions in the State Department.

So what are your views about Judge Bork with regard to these accusations?

Ms. HILLS. Senator Hatch, as I said in my opening remarks, I am very comfortable that Judge Bork's jurisprudence will not harm, but, rather, will help women achieve equality. His judicial restraint enables nuance differences to be created in our State and Federal legislative bodies, and it is there that women have achieved their gains in this century. Just look at the Equal Pay Act, the Civil Rights Act, and so forth. Women have not achieved rights through the courts, in the main, but rather, through the legislative bodies.

Accordingly I feel very comfortable that women are in good hands with Judge Bork.

With respect to the doctrine of equal protection, there is no doubt in my mind that he covers women with equal protection. He certainly so held that gender discrimination was covered in the *Cosgrove* case, and I feel very comfortable that his analysis of the 14th amendment is one that we should listen to.

As Attorney General Levi said so cogently last night, you know, some of the doctrine that the Supreme Court is grappling with needs a good lawyer, and one thing Judge Bork is is a superlative lawyer. Let me just read to you a concern expressed by Mr. Justice Powell, of whom I have the highest regard, in discussing the appropriate standard for equal protection, and I refer you to *Craig* v. *Boren.*

He says, "As is evident from our opinion, the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to a wide variety of legislative classifications. There are valid reasons for dissatisfaction with a two-tiered approach, that have been prominent in the Court's decisions for the past decade."

And so when Judge Bork is trying to help us formulate a doctrine that will apply more consistently, I think we should listen.

Senator HATCH. Well, I appreciate that testimony. Then what is your opinion? Women really do not need to worry about Judge Bork, then?

Ms. HILLS. Absolutely not. I think he will strongly support equality for women. There is not a scintilla of evidence in his record that he is antifeminist. To the contrary, he has been supportive of rights for women.

Senator HATCH. Then why do you think we have all of these comments that have been made by these outside groups who are so frightened by Judge Bork? We have had colleagues here on the committee say he is not frightening himself, but his views are frightening.

Ms. HILLS. I have read a number of reports that distort his record and have gotten wide circulation in the media. The reason that this effort that I have really just coordinated got started, was to counter some of the misrepresentations in those reports. Whether we are talking about labor law or the first amendment, or women's rights, or the administrative law decisions, or civil rights, what these essays that we have prepared—and I beg you all to look at them, because they are prepared by independent scholars, some Republicans, some Democrats—focus on, are the allegations that we feel are fundamentally unfounded on the record. I fear so much that when a strident report is issued, it is all too easy to take that 40- or 50-page report, and restate what has been wrongly stated. In these circumstances I think it is only fair to look at the independent work product of these essays.

Let me say, I have spent a lifetime working for equality of women, and, indeed, in the past I have been associated in helping some of the groups that have spoken. I will try very hard to right the record, but I can state unequivocally to you, that I have tremendous confidence in Judge Bork's capacity to carry forward, so that women will not be hindered in their fight for continued equality.

Senator HATCH. I notice my time is up, but I just want to tell you how much respect I have for you and for the fights that you have waged and for the comments that you have made here today. And I think women throughout the country ought to pay attention to you rather than some of these strident extreme misrepresentations that have been made by various special interest groups who have come down against Judge Bork.

Mr. Chairman, I would like to put into the record a statement that I have prepared, which also makes it clear that Mr. Katzenbach along with five other Attorneys General agreed with Judge Bork's position on the Human Rights Bill with regard to the Katzenbach application. And if I could put that in the record, I would appreciate it.

The CHAIRMAN. Without objection.

Senator HATCH. Thank you. Sorry I did not have time to ask all of you questions because I have a number of questions for each of you.

[Submissions of Senator Hatch follow:]

Katzenbach

We heard Senator Metzenbaum and Professor Tribe agree earlier this morning that Judge Bork's position in the *Katzenbach v. Morgan* case would limit Congress's power to protect rights. This case was the one I raised with former AG Katzenbach last evening. It allowed Congress to redefine the substantive terms of the Constitution, thus depriving the Courts of their power of judicial review. In fact, AG Katzenbach, in company with five other former AGs - Brownell, Clark, Richardson, Saxbe and Civiletti - agree with Judge Bork about the threat of allowing Congress to define the terms of the Constitution. In the context of the Human Life Bill - which attempted to define "person" in the 14th Amendment to include unborn children - these six AGs joined Judge Bork by saying:

> "...all of us are agreed that Congress has no constitutional authority to overturn [a] decision by enacting a statute . . . [the Human Life Bill] is an attempt to exercise unconstitutional power and a dangerous circumvention of the avenues that the Constitution itself provides for reversing Supreme Court interpretations of the Constitution."

The entire issue that Judge Bork addressed was that Congress should not change the Constitution by statute. On that point, he was joined by 6 AGs and a majority of this Committee. It is clearly a distortion to say that he attempted to limit Congress's valid powers. He was saying Congress had no valid power under the Constitution to change that document by statute. For that courageous testimony, for which he was criticized by many conservatives, he should be commended. He opposed *Katzenbach* on this principle - not, as has been suggested, out of insensitivity to minorities but because he understood the danger of making Congress, rather than the Supreme Court, the final word on the meaning of the Constitution.

This distortion should be corrected. I offer an excerpt of a report of this Committee which discusses the letter written by AG Katzenbach and his colleagues in agreement with Judge Bork.

Calendar No.

[COMMITTEE PRINT]

97th Congress }
1st Session }
SENATE
{ Report
No. ——

THE HUMAN LIFE BILL—S. 158

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

TO THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

MADE BY ITS

SUBCOMMITTEE ON SEPARATION OF POWERS

December ——

U.S. GOVERNMENT PRINTING OFFICE
87-467 O WASHINGTON: 1981

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MINORITY VIEWS OF SENATOR MAX BAUCUS

Seldom in this nation's history have the public policy questions surrounding an issue been as complex or controversial as they are with abortion. Abortion has divided Americans for decades. I fully appreciate the depth of feeling on all sides of the abortion question.

While there are many activists in favor of or opposed to S. 158, I believe there also are many more Americans who—like me—are wrestling in the deepest part of their souls with the questions raised by abortion. The issue involves highly intimate and personal decisions. As we discuss the constitutional and legal arguments we should not forget that millions of individual lives are touched by this issue.

In the final analysis, the issue presented by S. 158 is not the controversy surrounding abortion or *Roe* v. *Wade*. Rather, it is whether the Congress wishes to end run the constitutional amendment process and undermine the central role of the judiciary as the final arbiter for defining the terms of the Constitution. In my view, that is what is at stake—not abortion or *Roe* v. *Wade*.

THE CONSTITUTIONALITY OF S. 158

The abortion decision of 1973 was not the first controversial Supreme Court decision in our nation's history. The framers of the Constitution wisely provided within Article V a mechanism for Congress and the citizenry to respond to such decisions.

Several of the amendments to our Constitution have been direct responses to Supreme Court decisions. The Eleventh Amendment was a response to the Court's holding in *Chisolm* v. *Georgia* which subjected the states to law suits in federal courts. The Fourteenth Amendment was in response to the Court's holding in *Dred Scott* v. *Sanford* that the constitutional term "citizen" did not include Black Americans. The Sixteenth Amendment overturned the Court's interpretation of the constitutional term "direct taxes" in *Pollack* v. *Farmer's Loan and Trust Company*. And the Twenty-sixth Amendment was a response to the Court's holding in *Oregon* v. *Mitchell* that the Congress could not lower the voting age in state elections to 18 years of age.

Since the *Chisolm* case was decided in 1793, this country has had a long and consistent history of responding to constitutional decisions of the Supreme Court. The issue raised by S. 158 is not the correctness or wisdom of *Roe* v. *Wade*, but rather whether we should retain our historic tradition of utilizing Article V to amend the Constitution.

Our nation's most distinguished constitutional scholars who have analyzed S. 158 have come to the conclusion that it is an attempt to overturn a constitutional decision of the Supreme Court by simple statute. Even those who believe that *Roe* v. *Wade* was incorrectly decided, believe that S. 158 is an unconstitutional attempt to alter that decision.

Professor Charles Alan Wright of the University of Texas Law School, stated in a letter to the Separation of Powers Subcommittee:

> I find *Roe* unpersuasive. Nevertheless, *Roe* exists, it has been repeatedly reaffirmed and even extended, and I do not think Congress has authority by statute to overrule a constitutional decision of the Supreme Court. Whatever the arguments might have been if the matter where one of first impression, we have long since accepted the notion that "it is emphatically the province and duty of the Judicial Department to say what the law is," *Marbury* v. *Madison,* that the duty is now more specifically that of "this court," *United States* v. *Nixon,* and that "the federal judiciary is supreme in the exposition of the law of the Constitution . . ." *Cooper* v. *Aaron.*

Professor Phillip Kurland of the University of Chicago Law School wrote in his letter to the Subcommittee:

> The question is not whether the Supreme Court decisions are sound or unsound. The question is what is the meaning of the word "person" in the due process clauses of the Fifth and Fourteenth Amendments. The Supreme Court has decided that a fetus is not a "person" within the meaning of those provisions. If that constitutional determination is to be overruled, it can be done only by the Supreme Court or by constitutional amendment.

Former United States Solicitor General Erwin Griswold wrote the following to the Subcommittee:

> For the Congress to undertake to interfere with that decision, even under Section V of the Fourteenth Amendment, would, in my view, be an inappropriate legislative interference with the judicial power, and thus a violation of the separation of powers, which is one of the two major premises of the United States Constitution—the other being the appropriate division of powers between the states and the federal government.

Former United States Solicitor General Archibald Cox told the Subcommittee:

> Over the years, a few decisions have proved clearly wrong headed, and perhaps *Roe* v. *Wade* is such a case. I, myself, wrote critically of *Roe* v. *Wade* a little while after the decision came down.
>
> But wrong headed decisions can be changed by time and debate or by constitutional amendments. But the very function of the constitution and Court is to put individual liberties beyond the reach of both Congressonal majorities and popular clamor. Any principle which permits Congress, with the approval of the President, to nullify one constitutional right protected by the Constitution, as interpreted by the Court—that principle would sanction the nullification of others, and that is why I say that the principle of S. 158 is exceedingly dangerous, and I can only call it radical.

And finally, former United States Solicitor General Robert Bork told the Subcommittee:

> The question to be answered in assessing S. 158 is whether it is proper to adopt unconstitutional countermeasures to redress unconstitutional action by the Court. I think it is not proper. The deformation of the Constitution is not properly cured by further deformation. Only if we are prepared to say that the Court has become intolerable in a fundamentally Democratic society and that there is no prospect whatever for getting it to behave properly, should we adopt a principle which contains within it the seeds of the destruction of the Court's entire constitutional role. I do not think we are at that stage.

The views of these distinguished constitutional scholars was supported by the common view of former Attorneys General Brownell, Katzenbach, Clark, Richardson, Saxbe, and Civiletti.

The consensus position of the six former Attorneys General of the United States was communicated in a letter to the Subcommittee. They wrote:

> Our views about the correctness of the Supreme Court's 1973 abortion decision vary widely, but all of us are agreed that Congress has no constitutional authority either to overturn that decision by enacting a statute redefining such terms as "person" or "human life," or selectively to restrict the jurisdiction of federal courts so as to prevent them from enforcing that decision fully.
>
> We thus regard S. 158 and H.R. 900 as an attempt to exercise unconstitutional power and a dangerous circumvention of the avenues that the Constitution itself provides for reversing Supreme Court interpretations of the Constitution.

The proponents of S. 158 acknowledge that in most cases judicial independence and the doctrine of separation of powers would require Congress to respond to a constitutional decision of the Supreme Court by constitutional amendment. They argue that *Roe* v. *Wade* is a special case and an exception to this rule because the court in *Roe* v. *Wade* invited Congress to define when human life begins.

The passage of Justice Blackmun's opinion in *Roe* v. *Wade* that they rely on reads as follows:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

If the hearings on S. 158 held by the Separation of Powers Subcommittee were conclusive on any one point it is that in 1981 there remains no consensus among scientists, philosophers and theologians on the question of when life begins. The candid observation of the Supreme Court in 1973 is as accurate a description of the Subcommittee's record as it was of the record before the Court in *Roe*. The Subcommittee heard conflicting testimony from each of several disciplines. The testimony of the scientists, physicians, philosophers and theologians who appeared before the subcommittee made it apparent that our society is as divided on the question today as it was eight years ago, and that man's knowledge on the subject has not appreciably increased during the eight year period.

Congress to answer the question of when life begins. The proponents of S. 158 simply feel the Court abdicated its role in not addressing the issue. But that does not alter the status of the Court's constitutional holding in the case. Consititutional experts who are in sharp disagreement on the correctness of *Roe* v. *Wade* agree that the theory behind S. 158 is based on a misreading of *Roe*.

Sarah Weddington, who argued *Roe* v. *Wade* before the Supreme Court, in her statement to the Subcommittee, clearly explained the nature of the holding in *Roe:*

> The Court did not abdicate its role of defining constitutional terms. It said very clearly that in the Fourteenth Amendment, the term person does not—not "should not," nor "might not," nor "pending further information not," but does not refer to the unborn. The Court went on to say that there was no point in its engaging in philosophic or theological speculation on the beginning of life, since there was no consensus among those who concern themselves with such things, and since the constitutional meaning of "person" was already clear without the Court assuming a function which was foreign to it.

In support of this position, Professor Lynn D. Wardle of the Brigham Young University Law School, who is a strong supporter of a human life amendment, commented in his analysis of the constitutionality of S. 158:

> Contrary to the implication of Galebach, that holding (*Roe*) was not predicated or contingent upon a prior finding that the Court did not know when human life began. In fact, the Court did not address the question of when human life began until after it had separately analyzed and specifically concluded that the unborn are not "persons" protected by the Fourteenth Amendment.

And, finally on this point, the General Counsel to the U.S. Catholic Conference, Wilfred Caron, critiqued this point in his legal memorandum on the constitutionality of S. 158:

> In this regard, it should be noted that when the Court acknowledged the judiciary's inability to speculate as to when human life begins, it did so in the context of the state's interest in safequarding potential life—not in the context of the question of personhood under the Fourteenth Amendment. The Court's candid admission cannot reasonably be regarded as opening the way for what is contemplated by these bills.

The consititutional scholars who examined S. 158 in its original form generally took the position that the only possible argument supporting its constitutionality was that *Katzenbach* v. *Morgan* empowered Congress to "enforce" the Fourteenth Amendment by expanding the coverage of the due process clause. There is no constitutional doctrine or case law supporting the proposition that Congress has the authority to grant states a compelling interest in any activity that the Supreme Court explicitly stated the states had no interest in.

As the Supreme Court noted in the well known footnote 10 of *Katzenbach* v. *Morgan:*

> Section 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this court." We emphasize that Congress' power under Section 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.

The language of Section 3 of S. 158 cannot be supported under the authority of Congress' power to enforce the Fourteenth Amendment. There is no other Congressional power that can serve as the basis for Congress to overturn constitutional decisions of the Supreme Court.

The consequences of a decision by the Supreme Court to uphold the Congress' power to enact S. 158 would be disastrous for our system of government as we now know it. If Congress can alter the court's ruling on a constitutional term as basic as the interpretation of "person" under the Fourteenth Amendment, then there is virtually no constitutional protection that Congress couldn't dilute or eliminate by simple majority vote.

Additionally, if Congress can find today by statute that life begins at conception, then a future Congress can alter or reverse that result. This approach envisions a system of government where constitutional protections are more transitory or illusory than they are today. The basic terms of the Constitution are left to be determined by the shifting majorities in Congress.

It is for these basic reasons that most of the country's leading scholars and those who have served the nation as the highest ranking legal officers have publicly announced their view that S. 158 is unconstitutional. It is highly unusual to find agreement among six former Attorneys General, three former Solicitors General, and the nation's most distinguished constitutional scholars on such a controversial issue. In my view, the consensus among them provides significant evidence that the question of the constitutionality of S. 158 is not a "close call." Rather, the theory behind the legislation runs counter to principles of judicial independence and the separation of powers that lie at the very heart of our constitutional system. I oppose the bill on that basis.

IMPACT OF S. 158 ON STATE SOVEREIGNTY AND STATE ABORTION AND CONTRACEPTIVE POLICY

There is another aspect of S. 158 that should be considered carefully. That is the impact of S. 158 on the central role of our state governments as basic decision makers in our federal system.

Although S. 158 is touted as returning power to the states, its long term impact will be to set a precedent that will lead to increased federal intervention and an erosion of state authority.

As former Solicitor General Bork stated at the Subcommittee hearings in response to a question from Senator Heflin;

> Senator Heflin, if I may—I think the version of Section V of the Fourteenth Amendment that is being propounded here in support of this bill not only federalizes the question of life, but indeed, federalizes state police powers. Under the equal protection clause and the due process clause together, those are turned over to Congress, and there is no state legislation on any topic that I can think of that cannot be federalized if Congress so chooses.

And, in a letter to Senator Hatch, Professor William Van Alstyne of the Duke University School of Law, further expounded on this aspect of the bill by stating:

> If Congress can (a) determine authoritatively what affirmative obligations each state has in respect to the life, liberty and property of each person, and if Congress can (b) legislate to "enforce" such affirmative obligations as determined by Congress, then indeed the rudiments of federalism are dead, the Tenth Amendment is meaningless, and each state becomes but the instrument of a uniform, Congressional determined policy of social welfare.

More specifically, the hearings on S. 158 have brought to light the fact that with regard to state and local decision making over abortion and contraception questions, the current state latitude over these areas would be substantially restricted.

Today, states are free to make their own policy decisions about what abortions to fund or not to fund. However, the intent of S. 158 is to thwart that current authority. Supporters and opponents of S. 158 who testified before the Subcommittee agreed that without any additional legislation, S. 158 would have the effect of preventing any state from engaging in conduct that interferes with the development of the fertilized egg. In other words, states would not be free to fund abortions or fund hospitals or clinics that performed abortions.

Additionally, under S. 158, states could not fund or support any person or facility involved with the use or distribution of those contraceptives that intefere with the development of the fertilized egg (e.g., IUDs and morning-after pills). State action with regard to currently available contraceptives would be prohibited without any additional legislation.

During the Subcommittee hearings of May 21, 1981, the author of S. 158, Stephen Galebach, clarified these points in the following exchange:

> Senator BAUCUS. Mr. Galebach, I would like to clear up, if we could, your undestanding of how this bill would affect state action. My understanding is that the bill, if it is enacted without any additional state or federal legislation, would prohibit states from funding abortions. Is that your understanding, too?
>
> Mr. GALEBACH. In general, except where states had a justification as compelling as, say, to prevent the death of a mother.

> Senator BAUCUS. In those cases, too, would the bill also prohibit states from funding abortion clinics that distribute IUDs and morning-after pills in your view?
>
> Mr. GALEBACH. It could very well.
>
> Senator BAUCUS. That is, without additional legislation, this bill, if it passes, would have the effect of prohibiting the states from funding abortion clinics engaged in the distribution of IUDs and morning-after pills?
>
> Mr. GALEBACH. There might be some tough legal questions that would come up as to whether the state could fund other operations of the clinic, but the state could not fund any device that would terminate a human life after conception.
>
> Senator BAUCUS. Because that would be state action prohibited under the bill?
>
> Mr. GALEBACH. Yes.

State legislatures could no longer make basic abortion funding decisions that they are free to make today. S. 158 precludes states from funding any abortion unless they have a "compelling" state interest. Most experts on both sides of the question agree that such an interest would only exist where the life of the mother was at stake. Therefore, states could no longeer fund abortions in the case of rape or incest if they determined that was appropriate public policy.

Professor Robert Nagel of Cornell, a supporter of S. 158, criticized the bill for its curtailment of state authority at the Subcommittee hearings of June 1:

> Senator BAUCUS. Insofar as this bill would prohibit states from funding action, in a sense that is not returning the determination to the state but is establishing a national policy which prevents states from taking certain action. That is, the effect of this bill is not to throw the question of abortion back to the states—generally, it certainly is not—and it sets a national policy insofar as the bill will prevent states from funding abortions. That is correct, is it not?
>
> Mr. NAGEL. In my view, that is an unfortunate aspect of the bill—yes.
>
> Senator BAUCUS. It is an unfortunate aspect? Why is that?
>
> Mr. NAGEL. Because I think it ought to be a matter for states in their own judgment to decide on.

Following that exchange, I wrote Professor Nagel and asked him his analysis of the degree to which state conduct would be limited by S. 158. I asked him whether states would be permitted to fund abortions in the case where the life of the mother was threatened. I also asked him whether a state would be permitted to fund abortions in the case of rape or incest or the detection of serious genetic defects.

By letter of July 2, Professor Nagel responded to my letter as follows:

> Although you state that there seems to be agreement that states would be permitted to fund abortions where the

> life of the mother was threatened, I must say that I believe the matter is far from certain . . .
>
> In any event, it seems clear to me that even if a state does not violate due process standards when it encourages the destruction of fetuses in order to save the lives of mothers, it does not follow that a state would be permitted to perform or fund abortions in cases of rape or incest or genetic defect. In such situations, the states' aid, whatever its justification, would amount to the destruction of "persons" (in the statutory sense) and thus violate the statute. There is not general doctrine that a state may encourage the destruction of persons for "compelling" reasons.

The majority report remains silent on these important questions. The report states that the courts should decide these matters on a case-by-case basis. It is my view that it is irresponsible to pass this bill without the Senate stating its own view on whether this bill is likely to result in the substantial curtailment of state authority over abortion funding. Leaving such matters to the discretion of the courts runs counter to the spirit of those who offer this legislation as an antidote to judicial activism.

Furthermore, when legislating, it is irresponsible to leave basic questions on state authority like these unanswered:

1. Would S. 158 prohibit the states from funding clinics and hospitals that distribute drugs or devices that interfere with the development of the fertilized egg, such as IUDs and morning-after pills?
2. Would the state have a "compelling interest" in funding abortion in the case of rape that would override the fetus' protection as a person under the Fourteenth Amendment?
3. Would the state have a compelling interest in funding abortions in the case of incest?
4. Would the state have a compelling interest in funding an abortion in the case of a detectable genetic disease of the fetus?
5. Would the state have a compelling interest in funding abortions when the life of the mother was at stake?

These are serious questions. The answers to them can profoundly affect state and local decision-making over basic health and safety issues. Those who support such state authority should not take these questions lightly.

S. 158 AND REMOVAL OF LOWER FEDERAL COURT JURISDICTION

Section 4 of S. 158 would remove the jurisdiction of the lower federal courts over certain types of abortion cases. The reason that has been cited by advocates of S. 158 for inclusion of this provision in the bill is that a limitation of the available remedies in federal court will encourage prompt review of the statute in the Supreme Court. A report issued by Senator East's office entitled Questions and Answers on S. 158 offers the following explanation for the provision:

> *Question.* Why should Congress be so concerned to prevent review of the Act by lower federal courts?
>
> Answer. The anti-injunction clause of the bill is designed to prevent lower federal courts from interfering with the

> enforcement of the Act. An example of this problem arose in Judge Dooling's injuction against the Hyde Amendment respecting federal funding of abortion. That injunction remained in effect for approximately two years before the Supreme Court reviewed the case and upheld the legislation. The anti-injunction provision of the bill assures the continued enforcement of the State law outlawing abortion until the Supreme Court has had an opportunity to interpret it.

Section 5 of S. 158, as amended, contains a provision that directly addresses this concern for speedy review by the Supreme Court. It specifically provides for an expedited review of the legislation by the Supreme Court. This addresses the primary concern articulated by those who supported the section of S. 158 which limits lower federal court jurisdiction. In my view, it addresses those concerns in a manner that is less controversial and less threatening to our system of government.

Many questions have been raised about the constitutionality and wisdom of attempts to limit lower federal court jurisdiction. Several leading constitutional scholars have raised serious concerns about the specific provision contained in S. 158.

Professor Charles Alan Wright of the University of Texas Law School observed in his letter to the Subcommittee:

> I think Congress has very sweeping power over the jurisdiction of the inferior courts . . . At the same time, I feel certain that Congress must exercise its power over federal jurisdiction, as it must its other powers, in a fashion consistent with constitutional limitations . . . Under such cases as *Hunter* v. *Erickson* and *United States* v. *Klein,* I do not think Congress has authority to close the federal court door in suits arising under laws that prohibit, limit or regulate abortions, while allowing access to federal court for challenges to statutes that permit, facilitate, or aid in the financing of abortions.

Even if Congress has the power to remove lower federal court jusrisdiction over constitutional matters, it must do so neutrally. It would have to remove lower federal court jurisdiction over all abortion cases. The provision in S. 158 effectively keeps out litigants on one side of the issue and allows in litigants from the other. Challenges to statutes that restrict or prohibit abortions would not be permitted to be brought in the lower federal courts. Attempts to enjoin abortions from occurring, or challenges to statutes that fund abortions, could be brought in the lower federal courts.

This aspect of Section 4 of S. 158 not only raises constitutional questions, but it underscores the true intent of the provision. The provision is designed to restrict the jurisdiction of the lower federal courts so as to prevent them from enforcing certain rights fully. In my view, in such an instance, the Congressional attempt to remove lower federal court jurisdiction is violative of that provision of the Constitution from which the right flows.

Additionally, we ought to consider the public policy implications of attempts to remove constitutional issues from the jurisdiction of the lower federal courts. My own view is that while the creation of the lower federal courts was initially within the discretion of Congress, the growth of our nation has significantly altered the role of the lower federal courts in our federal system. Certainly, in 1789 the Supreme Court was able to handle its role as the primary vindicator of federal rights.

But the Supreme Court case load has increased dramatically since the birth of our nation, and this has had significant consequences for the lower federal courts. For a litigant who desires to vindicate his federal constitutional rights, access to the lower federal courts is an essential element in giving those rights true meaning. It is my view that we do great damage to our structure of government if we deny the central role of the lower federal courts in modern times.

It is because of these arguments that I think we should use the Congressional power to limit the jurisdiction of the federal courts over constitutional issues quite sparingly. If it is invoked at all, and I personally do not think that it should be, it should only be utilized where no other alternative is available and where it can be shown to have results that are helpful to society.

Because of the expedited Supreme Court review provision now contained in S. 158, I believe that a large portion of the rationale in favor of a section to remove lower federal court jurisdiction has been removed. Furthermore, I believe the section itself is unconstitutional and I oppose it on that basis.

THE INTENT OF THE FOURTEENTH AMENDMENT

There is an implication in the majority report that the Fourteenth Amendment was intended to protect the unborn. While it is clearly appropriate for Congress to state its opinion on whether the Fourteenth Amendment ought to apply to the unborn, that is far different from suggesting that the framers of the Fourteenth Amendment intended for the amendment to apply to the unborn.

Distinguished historians who appeared before the Subcommittee addressed this issue. It is clear from their testimony that during the long debate on the Fourteenth Amendment in the 39th Congress, and during all debates in the states on the ratification of the Fourteenth Amendment, there was never any explicit mention made of the unborn, nor any reference to the issue of abortion. This is undisputed.

In his testimony before the Subcommittee, Professor Carl Degler of Stanford University disputed the thesis propounded by Professor Witherspoon with regard to this finding. Professor Degler stated:

> Professor Witherspoon then links this discussion of the amendments concerned with the protection of life to the laws then being passed in a number of states to limit abortion. He professes to see in these state laws an extension of the concern for the freedom of the former slaves. Yet there is no mention in the discussion in Congress of these laws, nor is there any reference to abortion or to the unborn in the course of the debate on the Fourteenth Amendment.

In his testimony before the Subcommittee, Dr. James Mohr of the University of Maryland at Baltimore stated:

> I am also troubled by the phrase "all human beings." The Fourteenth Amendment does not, in fact, refer to human beings, but rather to "citizens" and "persons." I know of no direct evidence that the framers of the Fourteenth Amendment ever intended that either of these words should apply to the preborn.
>
> None of the leading historians of the Reconstruction Era whom I was able to contact, including several who have done painstaking research both on the drafting and on the ratification of the Fourteenth Amendment, knows of any.
>
> The rights of the preborn were simply not at issue. Moreover, there is compelling evidence that they were never intended to be.

Finally, the Congressional Research Service has issued a report entitled, "Examination of Congressional Intention In The Use Of The Word 'Person' In the Fourteenth Amendment: Abortion Considerations." The report concludes with this analysis:

> A reading of the legislative history of the Fourteenth Amendment does not reveal any references to the unborn. There are no statements in the debates of the 39th Congress indicating that the framers ever considered the unborn in connection with the Amendment's protection . . .
>
> Beyond this examination of the legislative history, one enters the realm of speculation and theorizing concerning what the framers of the Fourteenth Amendment actually intended when they used "person" in the langage of this Amendment.

The record created by the Separation of Powers Subcommittee is very clear on this point. The majority report may express the views of the majority of the Subcommittee on the coverage of the Fourteenth Amendment, but that should be distinguished from the concrete evidence available to the Subcommittee on the intent of the framers of the Amendment.

SCIENTIFIC TESTIMONY ON S. 158

The majority report implies that there was substantial agreement among scientific witnesses on the question of when an individual human life begins. The report attempts to minimize the diversity of views expressed by the scientific witnesses. I would simply suggest that the testimony of the scientific witnesses underscored the real complexity of the issues involved.

Dr. Lewis Thomas, Chancellor of the Memorial Sloan-Kettering Cancer Center and formerly Dean of Yale Medical School told the subcommittee:

> The question as to when human life begins, and whether the very first single cell that comes into existence after fertilization of an ovum represents, in itself, a human life, is not in any real sense a scientific question and cannot be answered by scientists. Whatever the answer, it can nei-

> ther be verified nor proven false using today's scientific knowledge.
>
> It is therefore in the domain of metaphysics: it can be argued by philosophers and theologians, but it lies beyond the reach of science.
>
> Such a cell does not differ, in its possession of all the genes needed for coding out a whole human being, from any of the other, somatic cells of the body, nor indeed from any of the billions of human cells now being cultured in research laboratories all around the world. The difference is that the progeny of a fertilized ovum develop systems for differentiation and embryogenesis; we do not yet understand this system. But the fact remains that all human cells contain the same full complement of human DNA.
>
> There are two criteria that I can think of for determining the stage of an embryo's development when the essential characteristic of a human being begins to emerge. One is the start-up of spontaneous electrical activity in the brain; this could be interpreted as the beginning of human life just as we take the cessation of such activity to indicate the end of human life. The second is the appearance of those molecular signals (antigens) at the surfaces of the embryonic cells which are the unequivocal markers of individuality and selfness. There is, in this immunological sense, a stage in embryonic development at which the fetus becomes a specific individual.
>
> This is as far as I can see science making a contribution to the question of the point at which an embryo becomes a human self. It is a limited contribution at best, and tells us nothing about the "personhood" of a single cell.

Dr. Frederick Robbins, President of the Institute of Medicine of the National Academy of Sciences, wrote the following to the Subcommittee:

> Even the most elementary understanding of biology suggests that, from the moment of conception, the human zygote is biologically alive in that it is capable of dividing and growing. That there is biological "life" is not in dispute for the fertilized egg or for other cells of human origin. What is at question is at what point the growing mass of cells—that is, the product of conception—takes on the attributes of "personhood." That is, at what point in the sequence of development do we choose to say that the organism is a person, and therefore, of special value? Clearly, the answer to such questions rests not on scientific judgments, but solely on what we choose to define as the qualities and attributes of being a person. Is it the capacity to sustain life on one's own? To think or reason? To feel? Or is it some intangible quality that we cannot quite specify?
>
> In my view, it is social, philosophical, and religious values that provide the guidelines for making such determinations, not science. Science can answer such questions as, for example, when does an embryo's nervous system develop the capacity to sense pain, but science cannot

> answer the question of whether that particular developmental attribute therefore makes that organism a person. Science can outline the steps of prenatal brain development, but it is the broader society that evaluates such information and chooses to label one stage of life as "personhood" and another as not.

Dr. James Ebert, President of the Carnegie Institution, stated in this letter to the Subcommittee:

> I do not believe that the statement in Chapter 101, Section 1 can be supported. This Section reads "The Congress finds that present day scientific evidence indicates a significant likelihood that actual human life exists from conception." This statement embodies and expresses a dogmatic and dangerously narrow definition of "actual human life", for human life cannot properly be said to begin at any single moment fixed in time.
>
> Indeed, human life is a continuum, proceeding generation after generation. The eggs contained in the ovary of a very young girl ripen and are shed over her reproductive lifetime. These eggs like the other cells of the woman's body are living. The sperm maturing in the human male are no less alive. The union of living egg and living sperm results in a living zygote, no less alive than its parental predecessors, but differing from both of them. But the zygote is but one fleeting morphologic and physiologic entity in the panorama that is human development. When does "personhood begin?" In my opinion, the question cannot be answered scientifically. Some might argue for the moment of conception, others for the moment at which the heart first begins to beat, or the face takes shape, or the brain begins to function. Some physiologic functions do not come into play until after birth; and as Peter Medawar has written "birth is a moveable feast in the calendar of development."

Dr. Robert Ebert, President of the Milbank Memorial Fund and former Dean of Harvard Medical School, wrote the Subcommittee as follows:

> I know of no ". . . current medical and scientific data . . ." that supports the contention ". . . that human life in the sense of an actual human being or legal person begins at conception." Life in the biologic sense does not begin the moment that an ovum is fertilized by a sperm, since both have life prior to that event.
>
> In my view, the question of human personhood is neither a medical nor a scientific question. In one sense it is a philosophical question which can be debated endlessly and has to do with how one defines a person and "self." But in the context of the present legislative proposal, I believe it can best be described as a religious question.

Dr. Clifford Grobstein, Professor of Biological Science and Public Policy Science and former Dean of the School of Medicine at the University of California at San Diego listed for the Subcommittee what he considered to be the consensus views of science and then concluded:

> The implication of these statements is that at fertilization a new generation in a genetic sense is constituted, but that two weeks later a new and stable biological entity or individual is not yet certainly present. Exactly when such an entity arises is not known for certain in the human species but it is probably not many days later. The development of such an entity, therefore, is gradual and involves a number of transitions and stages. No single moment nor event is known scientifically to mark its initiation, rather it emerges steadily out of the developmental process as an additional characteristic beyond being alive and biologically human.
>
> Returning to the language of *Roe* v. *Wade* and S. 158, it would be scientifically more accurate to say that "human life does not begin with fertilization (conception) but hereditary individuality does. Individuality in the sense of singleness and wholeness, however, cannot be said to be established until more than two weeks after fertilization."

And finally, the National Academy of Sciences forwarded to the Subcommittee the following resolution passed by its membership at its annual meeting on April 24, 1981 concerning the original text of S. 158:

> *Resolution.*—It is the view of the National Academy of Sciences that the statement in Chapter 101, Section 1, of the U.S. Senate Bill S. 158, 1981, cannot stand up to the scrutiny of science. This section reads "the Congress finds that present-day scientific evidence indicates a significant likelihood that actual human life exists from conception." This statement purports to derive its conclusions from science, but it deals with a question to which science can provide no answer. The proposal in S. 158 that the term "person" shall include "all human life" has no basis within our scientific understanding. Defining the time at which the developing embryo becomes a "person" must remain a matter of moral and religious value.

CONCLUSION

I cannot support S. 158 because I believe it is an attempt to end run the constitutional amendment process. The legislation undermines the central role of the judiciary as it has existed in this country since *Marbury* v. *Madison*. The theory underlying the bill envisions a system of government where constitutional protections are illusory and where the basic protections of the Constitution can be diluted or eliminated by simple majorities of the Congress. In my view, the legislation runs counter to principles of judicial independence and the separation of powers that lie at the very heart of our constitutional system.

Additionally, I am deeply concerned that S. 158 will lead to an erosion of the central role of the states in our federal system. Not only could the theory behind the bill lead to an expanded federal role in almost every area of the law, but S. 158 eliminates a state's authority to set policy on state funding of abortions and distribution of contraceptives (e.g. IUD's and morning after pills) at state supported hospitals.

Finally, I believe the provision eliminating lower federal court jurisdiction over certain abortion cases is unconstitutional. I personally am opposed to efforts to remove federal court jurisdiction over constitutional cases. However, even if Congress has the power to remove lower federal court jurisdiction over constitutional cases, it must do so in a neutral, even-handed manner. Section 4 of S. 158 effectively closes the federal courthouse to citizens on one side of the issue, while keeping it open to citizens on the other. It, therefore, represents an unconstitutional exercise of Congress' power to control the jursidiction of the lower federal courts.

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The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

I want to thank the witnesses for their presentations. They represent some of our fine academic institutions and, of course, Carla Hills was in the Cabinet.

But I just want to use my time, if I could, Mr. Chairman, to put something, or read something in the record. During the lunch break, I had the opportunity to read the two letters expressing the opposition to the Bork nomination that you placed in the record earlier this morning. The first letter was signed by 32 law school deans, representing a number of America's most prominent law schools.

We hear a great deal about strident presentations. This letter was by 32 law school deans. The second was signed by 71 professors of constitutional law. These law professors teach at 36 law schools in 24 States in all part of the country. I note that the letter was signed by nine professors from Yale Law School, six of whom served with Judge Bork on the Yale faculty. Three of the deans also signed the constitutional law professors' letter.

So in all, a total of 100 distinguished either constitutional scholars or deans of various law schools have expressed their opposition to the Bork nomination. And I will just use my time to put their letters in the record. Since we have heard from some academicians, I think it is also appropriate to consider what these law school deans have stated.

And I will read part of it. The rest of it has been included.

> As teachers of law and as citizens concerned with the preservation and enforcement of Constitutional rights, we ask that the Senate withhold its consent to the nomination of Robert Bork to be Associate Justice of the Supreme Court of the United States. None of us have reached this decision easily. Judge Bork is a highly-skilled lawyer. He has also been a colleague in the teaching of law where his skills and experience are widely respected. We have decided to oppose his nomination because of a substantive concern that we believe to be so important as to override matters of credentials or personal considerations.
>
> Our concern is this: Judge Bork has developed and repeatedly expressed a comprehensive and fixed view of the Constitution that is at odds with most of the pivotal decisions protecting civil rights and liberties that the Supreme Court has rendered over the past four decades. In many of the areas covered by these decisions, the court has become closely divided. If Judge Bork were to be confirmed, his vote could prove detrimental in turning the clock back to an era where Constitutional rights and liberties in the role of the Judiciary in protecting them were viewed in a much more restrictive way.
>
> While change in growth in Constitutional law are not opposed for their own sake, we believe that the changes threatened by Judge Bork's nomination would adversely affect the vitality of the Constitution, the fairness and justice of our own society, and the health and welfare of the nation. We also believe that most Americans are justly proud of our system of strong judicial enforcement, of basic rights, and that Senators should not consent to a nomination that threatens the major inroads into that system.
>
> Judge Bork's views also conflict with those of jurists like Felix Frankfurter, John Harlan and Lewis Powell, each of whom has contributed to the protection of liberties in critical areas, and who share Justice Powell's view that the liberties we enjoy to a greater extent than any other country in the world are, in effect, guaranteed by the Supreme Court enforcing the Bill of Rights.
>
> Indeed, in his readiness to read out of existence whole provisions of the Constitution and disregard longstanding bodies of law assuring personal liberty, the nominee has manifested an extraordinary lack of respect for traditional methods of Constitutional adjudication, and the development of the law.
>
> Perhaps most important, Judge Bork's views would deprive the nation of the critical, albeit limited, role that the Judiciary has played in helping to solve conflicts

that have threatened to divide our society. Nor are proponents of the nomination persuasive in explaining Judge Bork's views as reflecting a consistent philosophy of judicial restraint rather than personal values. While calling for deference to legislatures, where personal rights and liberties are at stake, Judge Bork has shown little regard for such consideration in other areas of the law and has, for example, openly stated that congressional intent may sometimes be disregarded in applying the antitrust laws.

Finally, we note that the issue before the Senate is not properly a partisan matter or one that may be summed up by labels such as liberal or conservative. Rather, the responsibility of all Senators is to assure that a member of the life tenured judiciary does not disdain the Bill of Rights or the Fourteenth Amendment's command for equal protection of the laws and due process.

Mr. Chairman, I believe these distinguished scholars have very eloquently summarized the case against the nomination, and I thank the Chair for the courtesy in allowing me to refer to that this afternoon.

Mr. McConnell. May I respond to that, Senator?

Senator Kennedy. Sure.

Mr. McConnell. As part of the academic community, first of all, I would like to acknowledge that this nomination is certainly controversial among law professors. I am not at all surprised that they were able to come up with 100 some odd law professors to sign a letter of that sort.

What I think is even more remarkable, however, given the very politicized nature of my profession, is how many moderate, liberal and even very liberal law professors whom I know who have declined to sign letters of that sort who are not appearing in opposition—not because they agree with Judge Bork, because they disagree with Judge Bork on many things—but because these charges that some people with the politicized portion of the legal community are making are so extreme, so outlandish, and so obviously partisan and political.

And, frankly, Senator, that is my opinion of that letter.

Mr. Campbell. Senator, with your permission just 10 seconds to say on that same point, it might be of interest to you. I teach at Stanford Law School, the finest law school in the United States.

Senator Kennedy. Does the rest of your panel agree on that?

Mr. Campbell. Undoubtedly, I am sure, but I went to a school in Massachusetts.

At the time of the confirmation of Chief Justice Rose Bird, 18 members, a majority of our faculty, signed a statement which read, and I quote in part, "Some of us believe we should hold ourselves to an even more restrained standard under which we should vote to retain a justice unless he or she has clearly engaged in misconduct in office." In other words, the very most lenient sort of analysis when the topic was Rose Bird and perhaps a higher level of scrutiny when the topic is Robert Bork.

Senator Kennedy. The Senator from Pennsylvania.

Senator Specter. Thank you very much, Mr. Chairman.

I would like to thank my colleague, Senator Grassley, for deferring to me because I need to go.

I have three questions and with little time I shall try to make my questions very brief and ask that the responses be brief.

I would like to start with you, Professor McConnell. You say that you disagree with some of the conclusions. Your language was that some of Judge Bork's conclusion in the first amendment area are unacceptable.

Do you agree with the clear and present danger test for freedom of speech?

Mr. McConnell. I agree with that in its basic outline. Senator, I said that some of the conclusions that he reached in that tentative article in 1971, I just do not agree with; neither does he.

Senator Specter. Yes. Well, that is what I was referring to. And one of his conclusions was that he disagreed with the Holmes' clear and present danger test. And as, you have stated, you agree with the Holmes' clear and present danger test.

Mr. McConnell. I agree with the basic outlines of it, and I would not exaggerate the degree to which Judge Bork has disagreed with that as well. His main comments have been addressed not to the clear and present danger test itself, but to some of the other rather extravagant language that you find in those Holmes' dissents.

Senator Specter. I have to disagree with you, Professor McConnell. He says in the Indiana Law Review that he finds the clear and present danger test unacceptable and he has written in the University of Michigan speech that *Brandenburg* and *Hess* are unacceptable.

But let me ask the question of you which I have, which does not depend upon your agreement with that analysis. My question to you is this: Assuming that he disagrees with the philosophy of the clear and present danger test—and I think the record will support that—he has made a commitment that he will apply the clear and present danger test as accepted law.

Now do you believe that it is possible to make a full application, an appropriate application of the legal test, the clear and present danger test, if there is a philosophical disagreement with its underpinnings in view of the fact that obviously the next set of facts will differ from *Brandenburg?*

Mr. McConnell. Definitely, Senator, and let me give you two reasons. One is that his disagreement was, I think, considerably narrower than you may believe. I am thinking principally of some of his remarks in his Michigan talk where he was complaining of the underlying relativism behind some of Justice Holmes' comments.

So, in the first place, his disagreement is relatively narrow. But in the second place, I would just cite to you historical precedent. For example, Justice Stewart dissented very strongly in the *Griswold* case and was never reconciled to the correctness of that decision, but nonetheless in *Roe* v. *Wade* followed that precedent. And that is an exceedingly common phenomenon on the Supreme Court.

Senator Specter. Well, there is a lot to follow up but let me move on within the confines of the 5 minutes.

Professor Born, you provided us with an outline saying that Judge Bork applies the equal protection clause of the 14th amendment to sex discrimination cases by men and women, and that was delivered to us before Judge Bork testified. And all of the materials which had been available to me—and I think I may have gotten to know Judge Bork about as well as you have in terms of reading his material—but I was surprised, as I previously said, defined in testimony before this committee that Judge Bork applied the equal protection clause to women or to illegitimates for that matter or to others in light of the fact that his writings had consistently said that the equal protection clause applied only to core value of race, and later he expanded that to ethnics.

And my question to you is: How did you find out before I found out that he applied it to women?

Mr. BORN. I think you are very right, Senator Specter, to focus on the issue of Bork's treatment of——

Senator THURMOND. Speak a little louder please.

Mr. BORN [continuing]. Women under the equal protection clause. I based my study on what Judge Bork had done as a court of appeals judge and as Solicitor General of the United States. As Solicitor General, in a case called *Vorcheimer* v. *Philadelphia,* Bork had argued that single sex schools that Pennsylvania operated violated the equal protection clause. He thought that they provided poorer educational facilities for women than they did for men and——

Senator SPECTER. Did you know that Judge Bork had said in 1987 that equal protection applied only to race and to ethnics?

Mr. BORN. I have read those same comments that you have, but I continue to believe that those were off-hand remarks that were directed to the issue of whether or not the equal protection clause's strict scrutiny standard ought to apply to women in the same way that it applies to race.

I do not think that anybody would argue that the equal protection clause simply does not apply to women. There are two distinct issues.

Senator SPECTER. But Judge Bork did.

Mr. BORN. No, I do not think that is right. There are two distinct issues.

Senator SPECTER. That is what he said.

Mr. BORN. No, I do not think that is right. There are two distinct issues. One, does the equal protection clause apply? And two, if it applies, what does it say?

On the first question, I think Judge Bork fairly read has always concluded the equal protection clause protects everybody. That is a line of precedent going back literally 100 years.

Senator SPECTER. How can you say that when he specifically said that the intent of the Framers of the equal protection clause was to apply only to race, and then he said later to race and ethnics.

Let me ask you this: Did Judge Bork know that you knew that Judge Bork applied the equal protection clause to women?

Mr. BORN. Let me give you two reasons why I know that he did. One, in *Vorcheimer,* he applied it to women. Two, in the case called *Cosgrove* v. *Smith,* he applied it to a sex discrimination claim by men. Surely, he is not going to say that men can bring a sex discrimination claim, but women cannot.

Senator SPECTER. All right. Professor Born, in line of your testimony I have quite a few other questions to ask you about Judge Bork's philosophy. You may know about his philosophy than he does.

Let me just close with a question to you, Madame Secretary. You testified that Judge Bork had criticized the law but not the result in the *Griswold* case and in *Wade* v. *Roe*. Do you have any reason to believe that Judge Bork approves the result in *Griswold* and *Wade* v. *Roe?*

Ms. **Hills**. I have no reason to know. I know that he regards the legislation in *Griswold,* I think in his terms, as "nutty". I know that his criticism of *Griswold* case was based upon its rationale. I know that he is concerned about judicial activism and with a vast undefined right of privacy, fearing that it removes the discretion from the elected bodies to a small group of judges who are unelected.

Now I think these themes run through his philosophy. That does not trouble me, and let me explain to you why. I read Judge Bork's jurisprudence as being supportive of women under equal protection. I just heard your colloquy with Professor Born, and I believe that the Cosgrove opinion written, while he was sitting on the D.C. Circuit, whereby he remanded a case to be decided on sex discrimination under equal protection gives you a basis to believe that he would apply the 14th amendment to gender discrimination.

I see for women a legitimate worry about encouraging a vast undefined privacy right, which is where women have been hurt in this century and where they could be hurt in the next century.

Normally speaking, the majority will not vote against themselves. That is, they are not going to vote that all people must beat their children because that will hurt the majority. Right? At the same time the equal protection clause will protect the minority, and I believe that that is within Judge Bork's philosophical construct. In fact, he testified before this committee that, if he had to think—and it was so difficult under the lights to come up with new theories—but if he had to think of a way to support a case like *Griswold,* he might very well think of using the equal protection clause which bars gender discrimination, and *Roe v.* Wade similarly so.

These are evolving theories, and Professor Bork, Solicitor General Bork, Judge Bork has been grappling with theories that we do not find offensive when we read similar "grappling" from a Justice. I read you a quote from Justice Powell saying: "We on the court had difficulty in this three-tiered theory. We need to grapple with it."

Senator **Specter**. That is very interesting, Madame Secretary, and my final comment is that Attorney General Levi suggested yesterday that Judge Bork might uphold *Griswold* and *Wade* v. *Roe,* and you have made the suggestion that, although he disagrees with the—although he criticized the law and not the results in those cases, I did not ask him what he was going to do in those cases because of my predilection not to ask about specific cases, but I would be glad to ask you what he is going to do about that case. And if there is some reason to think that he might go the other way in *Griswold* and *Wade* v. *Roe,* I think that could be very influential on the committee and on the Senate.

Thank you very much. I appreciate all the testimony.

Ms. **Hills**. Shall I answer that question?

The **Chairman**. Sure, go ahead, if you know the answer.

Ms. Hills. I do not think it is possible to say I know, but I would predict from his statements that he would respect the precedent of the Court and that, where public expectations and governmental arrangements have grown up in reliance upon a Supreme Court ruling, he would be loathe to set it aside. So if you are asking me to predict, I have no worry that he would have a problem with those two cases.

Senator Specter. Well, the essence of that is that you think he would uphold *Wade* v. *Roe*.

The Chairman. That is what I thought the Secretary just said. Is that correct, Madame Secretary?

Ms. Hills. I could not make an accurate prediction, but I would say that there have been certain expectations developed that would fall within that area of the law, as he has described it.

The Chairman. Thank you very much.

Senator DeConcini. Thank you, Mr. Chairman.

Professor Born, I wanted to ask you—I am trying to read some of this material and my staff is looking at it—a couple of statements in your position paper on Judge Bork's civil rights record troubled me and I think maybe you can clear them up.

First, on page 33, if you want to turn to that, you write that Judge Bork, "has not expressly addressed the precise standard of review that is appropriate in cases," meaning equal protection cases. I take it then that prior to Judge Bork's testimony here before this committee I think 5 days ago, 6 days ago, you were unaware that Judge Bork had adopted a reasonableness standard as appropriate in equal protection cases. Is that correct?

Mr. Born. As my research in all the various things that he wrote suggested—and there was a lot that he wrote—he had not.

Senator DeConcini. So the answer is you did not know until he testified here?

Mr. Born.

Senator DeConcini. Okay.

Mr. Born. I did

Senator DeConcini. How do you respond then to Professor Marshall's testimony yesterday that a reasonableness standard lessened judicial protection of groups which are now specifically protected? That troubled me yesterday. Though I was not here, I saw some of the testimony, and that troubled me.

Mr. Born. I understand, Senator.

Senator DeConcini. Did it trouble you? Are you aware of Professor Marshall's testimony?

Mr. Born. I am aware of it. I think it all depends on what one means, and particularly what Judge Bork means by reasonableness. There is a line of cases, *Williamson* v. *Lee Optical*, in which reasonableness means basically whatever you guys, the elected majority decide. Reasonableness in that sense does not provide much protection.

I do not think that that is at all what Judge Bork means by his reasonable basis test in the equal protection area. The reason that I do not think that that is what he means is because he bases his argument—because his argument grows out of a long line of positions on equal protection matters. It grows out of cases that I have already mentioned, like *Vorcheimer* and *Cosgrove*, where I do think he has taken seriously in terms of his conclusion the rights of women.

Senator DECONCINI. Yes; I heard your position on how you feel he protects the rights of women, but I am trying to grapple with what I consider—and I am not a professor as you are—precedents to apply the reasonableness test to the equal protection clause. I do not know of anything, as we heard before this morning, but Justice Stevens, I think, made reference to it but he did not apply it, nor did he define it, and just mention reasonableness, but he did not say this is a reasonableness test.

And of the other tests that have been applied to the 14th amendment, particularly as to race and to gender, reasonableness has not been applied. And what I am trying to find out is: Is this not new to you or is it old hat, that, oh, yes, that has really been hidden there all the time, or just what is it?

Mr. BORN. I think the latter. I have two points. I think the latter. Reasonableness—all kinds of reasonableness are well accepted principles in the law. Let me read——

Senator DECONCINI. That I understand. I went to the same law school that you taught at for a while. So I learned that, the reasonableness. What I am talking about specifically here——

Mr. BORN. Let me read you what Justice Stevens said about reasonableness. "In my own approach to these cases, I have always asked myself whether I could find a rational basis for the classification at issue. The term 'rational,' of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. The word 'rational', for me at least, includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially."

It seems to me that Justice Stevens and others, Professor Parry——

Senator DECONCINI. Any others on the Supreme Court?

Mr. BORN. Justice Marshall has articulated a sliding scale that I do not think——

Senator DECONCINI. Can you not draw a conclusion from that statement that the rational test on equal protection from Justice Stevens would be what he might consider as the reasonableness test?

Mr. BORN. I think that the rational basis test that Justice Stevens is talking about and that Judge Bork is talking about is not the old discredited——

Senator DECONCINI. That is a new——

Mr. BORN. It is not entirely new. It is——

Senator DECONCINI. Where does it fit in the three known tests, the strict, intermediate and the rational? Is that the fourth category or two-and-a-half or what?

Mr. BORN. Justice Stevens and Judge Bork and myself think that the three-tiered test really does not make much sense.

Senator DECONCINI. Yes. I understand that. I understand that Bork—you know, maybe he has struck on something really new and innovative here that ought to be used. I do not know. But it troubles me trying to find where you think it fits in. And I guess if you agree that, hey, this is a new way to go, and it can be substantiated, then that is what Bork figures, even though hardly anyone on the Court agrees with that. Stevens maybe—and I'm not sure, and we could argue back and forth, I guess. But we don't have any precedents for that test, but maybe—you know, I'm not stuck in the mud either that I cannot move on tests. But it troubles me when we have this long precedent of these three tests of equal protection clause at least in race and gender now to throw in something new.

It does not bother you, I take it?

Mr. BORN. To be honest, because of the very substantial concerns that have been voiced by the three-tiered tests by lots of people from all sides of the political spectrum—I was on a leave of absence from private practice and I taught there for a single year.

Senator DECONCINI. For a single year, so the adjunct professor means a temporary professor.

Mr. BORN. No, sir. I was a permanent professor there.

Senator DECONCINI. You were a permanent professor?

Mr. BORN. I am currently an adjunct professor there.

Senator DECONCINI. What does that mean?

Mr. BORN. That means that I am going to go back in 2 days and start teaching a course.

Senator DECONCINI. For a year?

Mr. BORN. No, sir. It is an intensive course which will last—I will go out a couple——

Senator DECONCINI. Have you been a resident of Arizona?

Mr. BORN. I was a resident for the year that I lived there; yes, sir.

Senator DECONCINI. You lived there, and you voted there, and paid your taxes?

Mr. BORN. I certainly paid my taxes, Senator.

Senator DECONCINI. Were you registered there to vote?

Mr. BORN. I did not register to vote, sir.

Senator DECONCINI. The only reason I raise it is because this is the third time that Arizona has been tossed up at me—you, and then Dean Marcus having supposedly supported Judge Bork, and he calls me and said that isn't the case. I am just concerned about it. Twice, rather, that Arizona has been tossed up in a little different frame than is really there. Then the White House puts out all these statistics about reversals and nonreversals of Judge Bork's cases, and that is okay, but we find out that not even one case that he wrote the majority opinion ever has gone to the Supreme Court. The credibility—it is not enough for me to vote against him based on that, but I don't like it. I just don't like it, and I object to you being here as an adjunct professor, University of Arizona. It seems to me that you are a scholar on your own. You are a partner or whatever your relationship is in the Cutler firm, and well and good. But you are being put here as though you were a permanent professor of the University of Arizona.

Thank you.

Mr. BORN. I'm sorry, Senator. I really hope that that is not the impression that you have taken away because I thought very carefully about the title that I ought to use, and I did not want to attribute my views to my law firm. My law firm has people in it who have different views. I was making an academic statement about constitutional issues, and I really believe that the most appropriate way for me to do that was as an academic. Finally, I obtain the specific approval of Dean Marcus of the University of Arizona to use the Adjunct Professor title.

Senator **DeConcini**. Have you taught other places besides the University of Arizona?

Mr. **Born**. No, sir. An "Adjunct" Professorship is a common title in academics for part-time professors. In 1986–1987, for example, the University of Arizona Law School had adjuncts. My use of the title was not only approved; it means nothing more than the fact that I taught a part time course at the University of Arizona Law School. Thank you.

Senator **DeConcini**. Thank you.

The **Chairman**. Unless you are going to take time to go register to vote, I would——

Senator **DeConcini**. That certainly would improve his credibility.

The **Chairman**. It may improve his credibility but I am not sure it would help you.

The Senator from Iowa?

Senator **Grassley**. Professor McConnell, let me start with you. I would like you to comment on a statement that Professor Tribe asserted this morning, that not one of the prior 105 Supreme Court Justices agrees with Judge Bork that Constitutional rights should be derived only from the text, history and structure of the Constitution.

Mr. **McConnell**. Senator, I would find that statement, frankly, baffling to come from a professor of constitutional law. To begin with one, Justice Hugo Black, that was clearly and obviously his position—repeated I don't know how many times. So, in fact, at that level, it is just obviously untrue.

At another level, however, I think the point of that statement was to create a black and white situation when, in fact, the real question is how one views the text structure, history, and purposes of the Constitution. Virtually every Justice of the Supreme Court believes or has stated that he believes—that this is the source from which all legitimate constitutional decisions derive.

Outside the theories of a few legal academics, there are no other potential sources of constitutional law. The question is how explicitly the right must be expressed in the bill of rights or elsewhere in the Constitution. That is the real question, and it is a question of degree. It is not a question of they are all there or they aren't all there. And Judge Bork's position is that rights must be rooted in some sense in the fundamental values of the Constitution. That view is not only not novel; it has been the orthodoxy for a full 200 years.

Senator **Grassley**. Thank you very much for clearing that up.

I want to turn to another point, and this would be to ask all of you to comment on what we heard this morning. Again, another very strong statement from Professor Tribe. Quite frankly, a statement so strong that I think if it were true, it would cause me to be thinking in terms of not supporting Judge Bork.

This is from page 9 of Professor Tribe's testimony, and I would like to read six or seven lines. "Judge Bork's is a uniquely narrow and restricted view of liberty and of the Supreme Court's place in protecting it. It sets Judge Bork apart from the entire 200-year tradition of thought about the rights that underlies the American Constitution, and it suggests an incapacity to address in any meaningful way a whole spectrum of cases that we can expect will be vital in our national life during the next quarter century."

What is your reaction to such a statement? And I guess I would like to have you think in terms of could it possibly be just another statement by a law professor, who wants to be provocative?

Mr. McCONNELL. Senator, that statement is simply a hysterical overexaggeration. I would refer to Judge Bork's own words in this matter. I quoted them in my statement in chief but they are worth thinking about again. From *Ollman* v. *Evans*, when he was describing the process of interpretation of individual liberties in our system, where he says:

"The important thing, the ultimate consideration is the constitutional freedom that is given into our keeping. A judge who refuses to see new threats to an established constitutional value"—note that he is not talking about freezing the Constitution in time, nor, on the other hand, is he talking about judicial creativity, coming up with new theories that have no grounding in our constitutional history—"and hence provides a crabbed interpretation that robs the provision of its full, fair and reasonable meaning fails in his judicial duty. That duty, I repeat, is to ensure that the powers and freedoms the Framers specified are made effective in today's circumstances." That is the opposite of the sort of judge that Professor Tribe was describing.

Mr. CAMPBELL. Senator, a brief comment also in response. Just focusing on the privacy question, Judge Bork is a careful scholar and a careful jurist, and he says let's take this concept and be careful when we expand it. Professor Tribe has referred to an expansive concept of privacy going even to the question, not that he necessarily supports it, but to the question of the right to use drugs in the privacy of your own home.

And so, I think when you begin to talk about Professor Tribe's views you might be encroaching farther to the ends of reasonable debate than Judge Bork's.

Senator GRASSLEY. Professor Born?

Mr. BORN. Yes, I would like to speak very briefly to your point. As Senator Specter has pointed out in these hearings, there are two strong traditions in American constitutional thinking. At times there is a tradition that looks more to judicial activism. At other times there is a tradition that looks more to judicial restraint. I think Professor Tribe is more in the judicial activism school.

I have been struck by how many—how much criticism Judge Bork has encountered because of his own criticism of Supreme Court cases. Leafing through Professor Tribe's hornbook last night, I was—I can guarantee you that if you want to go through that and make a list of cases that he has criticized, you will come up with one that is at least as long, and probably four or five times as long, as Judge Bork's list.

The CHAIRMAN. Senator Metzenbaum.

Senator METZENBAUM. I don't have many. Thank you, Mr. Chairman.

Secretary Hills, as I understand it—I wasn't here because I had to be at another committee hearing, but it is my understanding that you testified that you thought Judge Bork, if he were confirmed and the issue of *Roe* v. *Wade* were to come before the Supreme Court again, that he would be likely to uphold the right to an abortion and therefore support *Roe* v. *Wade*.

Am I correct in my interpretation of the reports that I have had of your testimony?

Ms. **Hills**. Senator Metzenbaum, I was asked to speculate and I prefaced my remarks by saying that I did not know, but that if I were to speculate, I would only cite his statement, which I believe I accurately quote, that there are decisions that have been relied upon by governmental bodies and by individuals to the extent that even where a jurist may disagree, they cannot be set aside easily. On that basis I would say that, although the Court, itself, in the *City of Akron* case has been somewhat critical of its decision in *Roe* v. *Wade*, and thereby it also would not surprise me if there were some reflection upon doctrine, I would not expect the first case that Justice Bork set about to fix would be *Roe* v. *Wade*, But then, who am I. I can say no more than that.

Senator **Metzenbaum**. Didn't you say, though, Madam Secretary—I thought in a direct answer you said "yes, you thought he would sustain it."

Ms. **Hills**. I prefaced it.

Senator **Metzenbaum**. I know. But did you end with "yes, you thought he would sustain it?" Isn't that what you said?

Ms. **Hills**. I think that the answer I have given is the answer that I have to give, Mr. Chairman.

Senator **Metzenbaum**. I am not questioning—I just want to make sure. I will maybe have the clerk read it back. I thought you said "yes, he would sustain it." That is all I am trying to figure out. Maybe I misheard what you said. Did you say that?

Ms. **Hills**. Well, I don't want to quibble with where you start with my qualifications.

Senator **Metzenbaum**. I am just trying to figure out where you end.

Ms. **Hills**. All right. You know he believes that the underpinnings of the *Roe* case are incorrect, but I do not——

Senator **Metzenbaum**. Madam Secretary, I understand that. I am not arguing with you. I just want to make sure I understood you before. I thought you ended by saying in a direct response to a question from the Senator from Pennsylvania that, "yes, you thought he would sustain *Griswold* and *Roe* v. *Wade*.

Ms. **Hills**. I thought I also had my explanation.

Senator **Metzenbaum**. Oh, you did. I am not suggesting—I just want to know what you said to that question.

Ms. **Hills**. Well, you are asking for a statement separated from context, and it worries me because I have no way of knowing—I can only restate what I believe to be his judicial philosophy.

Senator **Metzenbaum**. I will drop the issue. I will just check the record. Thank you.

Ms. **Hills**. Let me stand, Mr. Chairman, with my answer to Senator Metzenbaum, if I may. If that helps you.

The CHAIRMAN. And withdraw the answer you made before or stand by that one also?

Ms. HILLS. I hope that it is consistent.

The CHAIRMAN. Okay, thank you.

Senator METZENBAUM. We know that he has said, I guess he did this in a speech at Catholic University on March 31—that the judiciary has a right, indeed a duty, to require basic and unsettling changes and to do so despite any political clamor when the Constitution, fairly interpreted, demands it.

Now, I appreciate the fact that you have a right to speculate, but I should point out that Bork in his testimony did not include either *Griswold* or *Roe* when he was referring to settled cases, where the law is settled in a particular area.

And I am really not as interested in zeroing in on *Roe* v. *Wade* as I am about the fact that I feel there is a deliberate effort, and I don't mean to make you part of any great conspiracy, but a deliberate effort on the part of the White House and Judge Bork to shift the position he has taken over a period of years with respect to speech, with respect to equal protection, with respect to precedent, and now with respect to abortion.

And I have trouble with the whole question of whether or not the true Judge Bork is the man that we have before us, or had before us in these 5 days of hearings. And now you come along and even though you make it clear that your view is just speculation.

I am still concerned about whether or not you are almost a party to this effort to change the image of this man. I think that Judge Bork would be stronger before this committee if he said this is my view, I said it and I stick by it. But we have seen change in the position of the nominee when he came up for confirmation to be Solicitor General, when he came up for confirmation to be a Circuit Court of Appeals judge, and now I feel we are getting the same change or movement of the real Judge Bork, here, in these proceedings. But then he explains to us that well, professors have a right to make speeches, to write articles, to be provocative, but that doesn't necessarily mean how they will decide cases. Judges have a right to change their views. I was a socialist. I was a liberal. I am now a conservative.

But when we sit here to vote upon his confirmation and we hear people as well-renowned as you coming forth and saying you think he will vote to support the Supreme Court's decision in *Roe* v. *Wade*, I am just sort of wondering how do you get there. How do you really feel so comfortable about that?

And maybe I will ask you first, do you support the decision in *Roe* v. *Wade*?

Ms. HILLS. Well, I think that I must find myself in agreement with some constitutional scholars that it reach beyond established constitutional doctrine, but I have not studied it to the extent that I could give you what I would like to sign as a legal opinion on the case.

Let me answer your earlier question, though, because I think in fairness to Judge Bork, there must be a recognition that he has been a prolific writer. He is a very thoughtful and aggressive thinker, and he has changed his views over his lifetime, which you should applaud, because it shows the kind of thing that I experienced with him at the Department of Justice: a mind that could listen and could accept suggestion and, in fact, encourage debate. And I think he has been very fair from those portions of the hearings that I have seen here, very fair in his views. We have supplied 10 essays that, believe me, they are nonpartisan in any kind of a political sense, evaluating his jurisprudence, and we, to a person, find him in the mainstream.

You mentioned his views on speech. Professor McConnell has addressed that and finds him in the mainstream. You expressed a concern about equal protection. Professor Born has evaluated that and found him in the mainstream. You asked about his predictability or his reverence for *stare decisis*. That, too, has been addressed and we find him in the mainstream.

You really mustn't harp upon my speculation. And I would like to say that with respect to *Roe* v. *Wade* I don't see it as one of those cases that he would rush to the Supreme Court and hope that he could immediately overturn it. He will undoubtedly deliberate on that case or some portion of that case to come up with a sound analysis again along with his colleagues. But I do think he will respect precedent.

Mind you that in *Griswold* you had a dissent by Black and by Stewart, I believe, and then when the Court addressed *Roe* v. *Wade,* again using a broad privacy right, for whatever you may think of that right, Mr. Justice Stewart chose to join the majority in *Roe* v. *Wade,* not because he had become so fond of a broad, undefined right of privacy, but because he thought, as I understand it, that the precedential value of *Griswold* must be respected.

So we have history; we have decisions that grow together and create the underbrush through which the Justice must travel. And I think that as Mr. Justice Stewart was cognizant that the *Griswold* case, initially unattractive to him, had to be given weight, I merely speculate, and I hope the chairman will understand how I am grappling with this—merely speculate that Judge Bork, too, will give respect to the precedent of his Court. That really is my position on the issue.

The CHAIRMAN. Thank you very much.

Senator Humphrey.

Senator HUMPHREY. Thank you, Mr. Chairman.

I would just throw this out at the panel, and ask whoever cares to respond to do so.

We have often been told, a number of times, that all of the decisions in—well, let me come back first, in the same area. Let me back up and go to a point that the Senator from Arizona made a moment ago, in which he at least left the impression that because none of Judge Bork's opinions have ever been reviewed by the Supreme Court—one is pending but it has not yet been decided, as you know—none of the opinions which he personally wrote ever reached the Supreme Court. Therefore, it is somehow invalid to suggest that Robert Bork's opinions are so well grounded, that they have not been successfully overturned.

Does someone want to address that?

Mr. STEWART. Well, Senator, I think the record will show that he has taken positions in dissent on cases where the Supreme Court has reviewed the contrary views of his colleagues, and the Supreme Court has endorsed his views.

Senator HUMPHREY. Yes.

Mr. STEWART. So the Supreme Court does reach out, especially in the case of the D.C. Circuit because it is a very important court in the federal system, to take up cases that are important cases, where it thinks it is wrong decided.

And I think contrary to my colleague Tribe this morning that the record on reversals is significant. Of course the Supreme Court is busy. But they have never—up until this one case that is pending—taken a case and reversed one of Judge Bork's positions, where they have agreed with him in quite a number of cases where he was in dissent.

So I think that is a significant fact.

Senator HUMPHREY. He personally wrote the dissent, correct?

Mr. STEWART. Yes. That is correct.

Senator HUMPHREY. So, in a sense, his reasoning has been directly examined by the Supreme Court six times, where he was in on the minority side of an opinion and sort of had stuck his neck out, as one does when one is in the minority in any sphere, and in six out of six times was found to have stuck his neck out properly.

Mr. STEWART. That is correct, Senator.

Senator HUMPHREY. And was upheld by the Supreme Court.

Mr. MCCONNELL. Senator, just an anecdote. I clerked for a D.C. Circuit judge whose views are much closer to Professor Tribe's than they are to Judge Bork's, and during that period he was reversed in every opinion of his that went before the Supreme Court.

We used to have a little victory party when the Supreme Court denied cert.

Senator HUMPHREY. All right. Now I want to go forward from there. What about the contention that—is it valid to observe that because, out of the 432—I think it is—cases in which he has participated, not one has been overturned, irrespective of whether he wrote it, or not.

I mean, it is pretty impressive, that you participate in 432 cases, only a small part of which were reviewed by the Supreme Court, to be sure, and I want to get to that in just a moment.

But is it valid to say that—as I do—that it is pretty darn impressive, when you participate in 432 cases at the appeals court level, and in no case, never, has the Supreme Court overturned a case in which he participated and joined?

Mr. STEWART. Oh, I agree with you, Senator. Based on my review in the areas of administrative and regulatory law, that I work on as a scholar, the notion, that Judge Bork is out of the mainstream, is totally fallacious.

He is very close to the dominant trend of Supreme Court jurisprudence over the past 10 years, and if anybody is out of step it is some of his more liberal colleagues on the D.C. Circuit.

Mr. CAMPBELL. I have one comment, Senator, if I may, on antitrust, because it is right on that same issue.

Judge Bork is an expert in antitrust, and in *Rothery Van Lines*, he did a very difficult job of construing previous Supreme Court law in that field, and he said he thought that the *Sealy* and *Topco* cases were no longer controlling. That is cert bait, for the Supreme Court to take the case and say no, you are wrong, and they did not.

Senator HUMPHREY. Well, why does the Supreme Court refuse to take a case on appeal? First of all, it is very busy and cannot do all of them. We know that.

Mr. STEWART. Yes. But that is of course only part of the story.

Senator HUMPHREY. Part of the story.

Mr. STEWART. Certainly, when I was a clerk, and others here were, we know that the Supreme Court reaches out to hear important cases where it thinks the result, and reasoning below were wrong.

Senator HUMPHREY. Where it feels the reasoning was wrong. And in no case in which Judge Bork has been involved has the Court found that the reasoning was wrong.

Now, what about the contention that that does not matter? That appeals court judges are just automatons who take briefs and stick them in slots?

I mean, if that were so, we could eliminate briefs. I do not know if the appeals court ever take arguments, but we could eliminate arguments. We could even eliminate judges.

All we would need is a computer operator who would tabulate these things, and the computer would compare it with Supreme Court precedents and spit out the decision.

Mr. STEWART. Obviously, as I remarked, there is a lot of range for judgment. Cases come up that have not been decided. The Supreme Court precedent is divided or confused.

Professor McConnell talked about some first amendment cases, and I think you can evaluate Judge Bork's temperament and his character in looking at those cases.

Senator Metzenbaum earlier asked whether he respects precedent where he had a strong contrary view. There is a case involving a public-interest challenge to a federal government agency, where Judge Bork thought that the public-interest group had not shown standing under article III of the Constitution, based on his views. But there was a D.C. Circuit precedent that said it had, and he followed that, notwithstanding his contrary views on a rather basic constitutional point.

So, I think there is much to be learned about his capacity for taking into account precedents, respecting the views of colleagues, and being open from his performance of over 5 years as a judge on the second-most important federal panel in the system.

The CHAIRMAN. Senator, you are a little over time. Go ahead, if you insist. We are trying to keep everyone in. Just so we all know, we have about 10 more witnesses today and we are stopping at 6 o'clock, come heaven or high water, so——

Senator HUMPHREY. Well, much as I would like to continue, I do want, at all costs, to avoid the situation yesterday where the witnesses hostile to the nomination got the major play, and the witnesses friendly got the short end of the stick. So, let's have equality, and I do not ask for further time.

The CHAIRMAN. I am all for equality. We have a panel that is, quote, "hostile," and we have Mr. Cutler who is, quote, "formidably for."

So, that is what is next. Okay? Thank you all very much. Appreciate it.

Senator THURMOND. Just a minute.

The CHAIRMAN. You have a question, Senator? We are not going to get anything finished at this point, so we might as well just sort of hang in here, all sit right there. Senator Leahy has questions which is his right, and then Senator Thurmond has questions, and I just want to tell all the witnesses who are here—and Senator Heflin is here. I am sorry. I did not realize you all came back.

It is amazing what wishful thinking will do at this hour of the day. We are going to stop at 6, so I will just tell all the other witnesses who are waiting, that you may very well not get on today.

We are going to go in the order we are listed here: the first amendment panel, then Lloyd Cutler, then Mary Jane O'Dell, and then the law enforcement panel, and we will go until we get to 6. Thank you very much.

I yield to the Senator from Vermont.

Senator LEAHY. Mr. Chairman, I appreciate the courtesy and I will try and be very brief.

Madam Secretary, there have been a lot of claims at these hearings that Judge Bork's decisions as a circuit court judge have put him in the forefront of equal protection.

Now, I understand—and I ask you if this is not a fact—that Judge Bork has written only one opinion dealing with a sex-based equal protection claim, and in that case he did not reach the merits. Is that correct?

Ms. HILLS. That is correct as to Judge Bork. Solicitor General Bork did grapple with some sex-discrimination cases.

Senator LEAHY. But I am going, first, on his decisions as a circuit court judge, because it has been sort of bandied back and forth. I want to make sure we had the record correct.

I took that of course from Professor Glendon's statement that you had quoted, and my understanding, also consistent with that, is that the decisions that Judge Bork has made on the circuit court that relate to women have virtually all involved the enforcement of antidiscrimination statutes as they were passed by Congress.

Is that your understanding as well?

Ms. HILLS. While he was Solicitor General?

Senator LEAHY. No. On the circuit court. His——

Ms. HILLS. Yes. That is a fair statement.

Senator LEAHY. Now, if you are enforcing a statute that has been written out, fitting the fact patterns and all, that is a different thing than looking for equal protection questions under the 14th amendment, is it not, as they apply to women?

Ms. HILLS. Statutory interpretation is somewhat different than constitutional interpretation, but I see that Professor Born is dying to state something.

Senator LEAHY. Well, maybe if I could just go one last question, Madam Secretary, and then if Professor Born would like to answer, too, it may bring the point out.

The work of Judge Bork as a circuit court judge does not, by itself, set out his analysis of the equal protection clause of the 14th amendment. That is the point I am making, and would you agree with that statement, and of course, Professor Born, if you would like to respond, too, please feel free.

Ms. **Hills**. Go ahead.

Mr. **Born**. I think that Judge Bork's one decision on the court of appeals indicates that contrary to what a lot of people have told this committee, that he believes the equal protection clause covers women. It answers that fundamental question which has so often been answered in a different way to this committee and I think that is highly important.

Second, I think his title VII cases are important to an extent. Title VII is not like every other statute in the world. It is not like the Internal Revenue Code which has a very detailed listing of how all kinds of different issues are to be resolved. Rather, it is drafted in broad—I think the Court has called it "majestic terms"—and it requires an enormous amount of interpretation by judges.

And I think based on the way Judge Bork has voted in title VII cases, you can draw some inference about how he is going to react in sex-discrimination cases under the equal protection clause.

Senator **Leahy**. So you would say that that decision, a circuit court of appeals case, sets out his concept of the equal protection clause of the 14th amendment as it applies to women?

Mr. **Born**. No, sir.

Senator **Leahy**. Then I misunderstood you.

Mr. **Born**. Yes, sir. It answers one fundamentally important question about his views on equal protection.

It tells us that he thinks the equal protection clause applies to women. You have been told very different things by lots of people. That is not true. He thinks it covers it.

I think in order to figure out the precise way in which he has concluded the equal protection clause does protect women, you have to go on and look at other things.

You have to look at his record as a Solicitor General. You have to look at his title VII record as a court of appeals judge, and you have to look at the very intellectually complex things that he told you.

Senator **Leahy**. I want to make sure we are talking about the same case. Which case are you talking about, sir?

Mr. **Born**. I am talking about *Cosgrove* v. *Smith*.

Senator **Leahy**. In which he said "At this time, in sum, it is impossible to say whether there is any significant difference in parole standards applied to males and females, let alone what any difference there may be is unconstitutional?"

Mr. **Born**. He was dealing with a situation where the district court had failed to develop a record. He told the district court, look, you have got to develop a record so we can find out whether or not men have been treated differently than women, because if they have, the plaintiffs have an opportunity to recover under the equal protection clause.

Senator **Leahy**. And you feel that he did reach the merits to the equal protection claim in this case?

Mr. **Born**. It is clear that he recognized that the complainant could state a claim under the equal protection clause. He did not decide the case.

It is a very important decision in my view.

Senator **Leahy**. And you could understand, though, when he says, in effect, that he does not reach it, that some people may feel that he did not reach.

Mr. **Born**. No, sir. I think we are talking about two different things. We are talking about the difference between reaching the issue whether or not a claim was stated and whether or not the claim is decided in a particular way on the merits. There is simply no question that on the first issue—whether or not a claim was stated—he reached and decided the issue that the equal protection clause covers sex discrimination claims. There is absolutely no question about that.

Senator **Leahy**. There is absolutely no question?

Mr. **Born**. That is right.

Senator **Leahy**. Let me make sure I understand your answer. There is absolutely no question that he reached—please give the rest of it. I want to make sure I understand.

Mr. **Born**. That he reached the question of whether or not the plaintiffs might be able to state a claim under the equal protection clause for sex discrimination.

Senator **Leahy**. And what did he get for an answer?

Mr. **Born**. That they may well have. We have got to go back and develop a record, because if men and women were treated differently, they could well have stated their claim.

Senator **Leahy**. You understand some may read it differently.

Mr. **Born**. I am sorry?

Senator **Leahy**. You understand that some people may read the case differently.

Mr. **Born**. I take it from the paper that you are looking at that some do. But——

Senator **Leahy**. No. I am just reading the decision itself. This is *Cosgrove* v. *Smith* from 697 Federal Reporter.

Mr. **Born**. To be honest, I do not think—I think if you ask a random sampling of legal scholars, they will not read it differently. I do not think there is a question about this, frankly.

Mr. **Stewart**. I guess, to turn it around, Senator, you might say, if it were clear in his mind that gender or sex-based differences were not covered by the equal protection clause, then let's throw the claim out, the case out right now; we do not need to go back for a record. It is only on the premise, but if there is some content in the equal protection clause that deals with sex discrimination, then it is worth having a trial of the facts.

Senator **Leahy**. Now, Madam Secretary——

The **Chairman**. Senator, your time is up by about 2 minutes.

Senator **Leahy**. I am sorry. Let me just ask this one question. It can be answered simply.

Notwithstanding what you said earlier, that Judge Bork had not reached the merits on that question, do you agree with Professor Born's answer?

Ms. **Hills**. I do.

Senator **Leahy**. Thank you.

The **Chairman**. The Senator from Alabama.

Senator **Heflin**. Mr. Chairman, I have no questions.

The **Chairman**. Thank you, and before I will yield to the Senator from South Carolina, I will put in the record the reports that were referred to by each of you. In addition to the ones written by you, the ones referred to, I will put them in the record as part of the testimony.

[Submissions for the record follow:]

CARLA ANDERSON HILLS
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September 10, 1987

Dear Mr. Chairman:

During the past weeks, a variety of reports that characterize Judge Robert Bork's views in extreme terms have issued from groups opposing his nomination to the Supreme Court of the United States. A number of respected law professors, some Republicans and some Democrats, have expressed their concern regarding the lack of scholarship in these reports and their desire to raise the intellectual level on the discussion. I have coordinated this volunteer effort to analyze Judge Bork's view in those areas of the law where to date the analysis has been most wanting.

The accompanying essays are the first product of this effort. Others, on such subjects as Judge Bork's views of the antitrust and administrative laws, will follow. All of the essays are written by distinguished educators in the areas of their legal scholarship. My accompanying remarks express our collective objective, which is to encourage this Committee, the Senate as a whole, and interested commentators to "take the trouble to understand" that the considerable intellect of Judge Bork will bring added distinction to the Supreme Court of the United States.

Respectfully submitted,

The Honorable
Joseph R. Biden, Jr.
Chairman
Judiciary Committee of the Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

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A

"TAKE THE TROUBLE TO UNDERSTAND"

BY CARLA ANDERSON HILLS
PARTNER, WEIL, GOTSHAL & MANGES

Since the nomination of Judge Robert Bork to the Supreme Court of the United States, considerable careless comment has issued from groups who believe his nomination to be a threat to their particular interests. Rather than reason with his considerable intellect, these critics have used conclusionary and selective tabulations of his writings to brand him "anti-labor," "anti-feminist," "anti-First Amendment," and, in particular, "anti" the social objective of the writer.

The shallow debate spawned by these "reports" has sparked a voluntary response from a large and wide-ranging number of legal scholars who seek to raise the intellectual level of the "Bork" debate, a debate that could become a far more constructive discourse about the unique role of the Supreme Court in this the bicentennial year of our Constitution.

To date, this group has delivered four essays to the Senate Judiciary Committee which analyzes the alleged shortcomings of Judge Bork with respect to the special concerns of certain of his critics.

For those Senators and commentators who are willing to "take the trouble to understand"--to borrow words of Judge Learned Hand--these essays can move the discussion to a higher plane. They will learn that Judge Bork's critique of Roe v. Wade does not make him a "radical, judicial activist." Rather, it places him with the great majority of legal experts who have commented on the case. Professor Mary Ann Glendon of the Harvard Law School faculty points out the decision has been soundly criticized equally by those who favor pro-choice and those who oppose abortions: by Judge Ruth Bader Ginsberg, Professor Paul Freund, Archibald Cox, and by the Deans of the Stanford and Yale Law Schools. Writing carefully about "The Probable Significance of the Bork Appointment for Issues of Particular Concern to Women," Professor Glendon more broadly opines:

> [I]t is clear not only that the fears expressed by some women about the Bork nomination are unfounded, but that Judge Bork is likely to be a strong supporter of women's rights.

Those in the labor movement who have accused Judge Bork of having an "agenda of the right wing" and "an overriding commitment to the interests of the wealthy and powerful" might ponder the careful analysis of Judge Bork's labor opinions prepared by Professor Thomas Campbell of the Stanford Law School in which he asks and then answers:

> Do Judge Bork's labor decisions place him within the mainstream of debate on American labor law? The answer is unequivocally yes.

Compare too the scholarship of Michael McConnell in his analysis of the "First Amendment Jurisprudence of Judge Robert Bork" with the strident advocacy on this subject done for Senator Biden and in the opposition published by the A.F.L.-C.I.O. In their highly selective use of targets to criticize Judge Bork, they ignore cases such as Lebron, where Judge Bork's opinion protects the First Amendment rights of an artist to post his "rather malicious anti-Reagan poster" in public buses. They and others prefer to criticize a 1971 article in which then Professor Bork expressed a "tentative" view that would limit First Amendment protection to "political expression" rather than tell us of his judicial opinions that, according to Professor McConnell, show that "Judge Bork's commitment to freedom of speech, even outside the political arena, now extends as far, or farther, than current constitutional doctrine."

By carefully analyzing Judge Bork's opinions, Daniel Polsby refutes the irresponsible allegations that Judge Bork is "out of the mainstream," an "activist seeking to deny individual rights claimants access to the courts." Professor Polsby concludes:

> Judge Bork's views of standing... are in close accord with those Judges of many different ideologies: Justices Frankfurter, Roberts, Black, Douglas and Scalia and Judge J. Skelly Wright.

The common cry of those who avoid reasoned analysis is that a Justice Bork would lead a wholesale reversal of prior constitutional decisions. Yet they can offer nothing in support of this extraordinary accusation. No opinion. No speech. No article. No one can reliably predict whether any Justice would be willing to reverse a particular decision like Roe v. Wade, but a fair reading of Judge Bork's published views place him among those who have demonstrated more, rather than less, respect for constitutional precedent.

Why then the fierce opposition to the Bork nomination? No doubt the anxiety level of many has been raised by the oft-repeated notion that somehow his appointment to the Court is far more likely to "turn the Court," more than the last three or the next three appointments. No doubt, too, many cannot move their focus from the articles written by young Professor Bork of the 1960's and the early 1970's. His biting and witty pen then advanced a number of controversial themes and apparently left scars in some segments of the academic community. His articulate challenges to conventional thinking set forth ideas considered radical by many. Although he called them "tentative and exploratory" then and has since expressly discarded several of them, he is perhaps thought by some to be carrying a secret agenda of his own.

Those earlier expressed views are, of course, relevant to the present debate, but his judicial fitness can be better judged by the more than 100 well-crafted opinions that he has rendered during his five years on the Circuit Court. It is to these opinions that the present debate should turn and to which the accompanying essays are directed.

What we should all fear in the weeks ahead is that the Senate confirmation process will be reduced to a call to arms by ideologues and partisan politicians who will use profession of support or opposition to Judge Bork's nomination as a litmus paper test for their individual causes or campaigns, rather than for an examination of the formidable qualities and experience that Robert Bork can bring to the Supreme Court.

As a long-time admirer of Judge Bork and a former colleague of his at the Justice Department, I suggest that the strong and inquiring mind that he displayed as a professor, together with the quality and restraint evidenced in his judgeship, hold the promise of new distinction for the Court. If only the Senate will now take the same "trouble to understand" the man, as he has taken over the years to develop his distinct, sometimes controversial, but intellectually sound judicial philosophy.

B

THE FIRST AMENDMENT JURISPRUDENCE OF JUDGE ROBERT BORK

By Michael W. McConnell
Assistant Professor of Law
University of Chicago Law School

Since discussion of Judge Bork's judicial philosophy is usually couched in terms of "judicial restraint," it is important to make clear what the label of "restraint" properly means. It does not mean that the government always wins; it is therefore not synonymous with pure majoritarianism. Nor, however, does it mean that judges are empowered to countermand the decisions of our representative institutions on the basis of the judge's own social, political, or economic philosophy. Rather, the term "judicial restraint" refers to an attitude toward judicial review as a means for protecting the fundamental values and principles expressed in the Constitution.

Civil liberties, in this country, have not been the product of the imaginations of high-minded judges, but of careful, consistent, legitimate enforcement of the Bill of Rights, the Fourteenth Amendment, and other provisions of the Constitution. The philosophy of "judicial restraint," in Judge Bork's words, means that the judge's responsibility "is to discern how the framers' values, defined in the context of the world they knew, apply in the world we know."[1] Judicial restraint thus entails vigorous enforcement of constitutional limits on governmental power (meaning limits that can emerge from a fair reading of the text, structure, history, and purposes of the document), coupled with a rigorous refusal to interfere with democratic government when no limits can honestly be found in the Constitution.

The First Amendment provides an ideal illustration of how Judge Bork's philosophy of judicial restraint protects our civil liberties, at the same time that it preserves the balance between representative government and judicial review.

Ollman v. Evans[2] contains the fullest statement of Judge's Bork's approach to interpreting the Bill of Rights. The case involved a defamation action filed against two newspaper columnists. As seen by most of his colleagues, the key issue was whether statements in the column were "fact" or "opinion"; if "fact" the statements were libelous, if "opinion" they were protected. The trouble is that the distinction between "fact" and "opinion" is so uncertain that even a distinguished panel of judges could reach nothing resembling a consensus on the question. The deeper trouble is that a newspaper columnist, faced with such an uncertain test and a potential penalty of

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[1] Ollman v. Evans, 750 F.2d 970, 995 (D.C. Cir. 1984) (en banc) (Bork, J., concurring).

[2] Id.

$1 million in compensatory damages and $5 million more in punitive damages if he guesses wrong, writes at his peril. And as Judge Bork commented, libel actions under such circumstances "may threaten the public and constitutional interest in free, and frequently rough, discussion."[3]

Judge Bork's solution was to turn to the "judicial tradition of a continuing evolution of doctrine to serve the central purpose of the first amendment."[4] In simpler terms, Judge Bork expanded the protections for freedom of the press beyond those yet recognized by the Supreme Court. In Judge Bork's view, certain instances of "rhetorical hyperbole," even if technically the statement of fact, must be protected as well as obvious statements of opinion. This "extraordinar[y]" degree of press freedom is not extended, Judge Bork says, because the press is "free of inaccuracy, oversimplification, and bias, but because the alternative to that freedom is worse than those failings."[5]

While this demonstrates that Judge Bork's protection of civil liberties can be aggressive,[6] how does it square with his posture of judicial restraint? To answer this question, we must observe what Judge Bork did not do. His Ollman opinion exemplifies Judge Bork's jurisprudence in its rejection of two common, but ultimately unsatisfactory, ways of reading the Constitution.

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[3] Id. at 993. See also McBride v. Merrell Dow & Pharmaceuticals, Inc., 717 F.2d 1460, 1466-67 (D.C. Cir. 1983) (Opinion by Bork, J.) (warning that "[e]ven if many [libel] actions fail, the risks and high costs of litigation may lead to undesirable forms of self-censorship," and recommending liberal use of summary judgment procedures to weed out meritless claims).

[4] 750 F.2d at 995.

[5] Id. at 995. For another decision in which Judge Bork voted for the defendant in a defamation suit, see Roland v. d'Arazien, 685 F.2d 653 (D.C. Cir. 1982).

First, Judge Bork did not engage in extra-constitutional creation of rights. As he puts it, "There is not at issue here the question of creating new constitutional rights or principles, a question which would divide members of this court along other lines than that of the division in this case."[7] This, he has stated elsewhere,[8] would be judicial "fiat," and "not law in any acceptable sense of the word." What distinguishes legitimate constitutional interpretation, according to Judge Bork, is the

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[6] It is a sign of the partisan lengths to which the controversy over Judge Bork's nomination has gone that one oft-cited study of his judicial record disparages the Ollman opinion's importance to civil liberties on the ground that in libel cases "the party advocating a broad view of the First Amendment is most likely to be a business." Public Citizen Litigation Group, The Judicial Record of Judge Robert H. Bork 73 (1987). So much for press freedom. (Compare id. at 16, where Public Citizen counts Judge Bork's vote in favor of a labor union as "pro-business" on the ground that a labor union engages in the "'business' of representing workers"). The same study, while purporting to find that Judge Bork invariably votes against assertions of constitutional liberties in split decisions, conveniently leaves Ollman out of its scorecard.

[7] 750 F.2d at 995.

[8] Robert H. Bork, "Foreword," at ix, in G. McDowell, The Constitution and Contemporary Constitutional Theory (1985).

"'insistence that the work of the political branches is to be invalidated only in accord with an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution.'"[9] In Ollman, there was no doubt that the First Amendment's freedoms of speech and press protect what the Supreme Court has called "uninhibited, robust, and wide-open" debate on public issues.[10] The issue in Ollman was not imposition of the judge's values, but how the core principles are to be protected.

Secondly, Judge Bork rejected the notion that the Constitution is frozen in time, and that it carries no meaning other than the specific applications that its framers envisioned for it.[11] "The fourth amendment," he observed, "was framed by men who did not foresee electronic surveillance. But that does not make it wrong for judges to apply the central value of that amendment to electronic invasions of privacy."[12] His description of the judicial function is one of the most powerful statements ever made on the subject:

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[9] Robert H. Bork, "The Constitution, Original Intent, and Economic Rights," 23 San Diego L. Rev. 823, 826 (1986), quoting J. H. Ely, Democracy and Distrust 1-2 (1980).

[10] New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

[11] This has been a consistent theme in Judge Bork's writings. See, e.g., 23 San Diego L. Rev. at 826 ("[I]ntentionalism . . . is not the notion that judges may apply a constitutional provision only to circumstances specifically contemplated by the framers. In so narrow a form the philosophy is useless."); see also "Foreword," supra, note 8, at x.

[12] 750 F.2d at 995.

> The important thing, the ultimate consideration, is the constitutional freedom that is given into our keeping. A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty. That duty, I repeat, is to ensure that the powers and freedoms the framers specified are made effective in today's circumstances.[13]

Judicial restraint, for Judge Bork, can therefore be summed up as giving a "full, fair and reasonable" interpretation to "established constitutional values." Innovation and social change are the task of the legislature, but aggressive, effective enforcement of our constitutional civil liberties is the duty of the judge.

Similar to Ollman is Judge Bork's concurring opinion in Reuber v. United States.[14] There, the D.C. Circuit was called upon to determine appropriate remedies for a free speech claim in "novel circumstances"[15] in which the actual violation was by a private company, at the instigation of federal officials.

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[13] Id. at 996.

[14] 750 F.2d 1039 (1985). It should be noted that although this was a split decision in which Judge Bork voted to uphold an individual's First Amendment challenge to executive action, it is not included in the Public Citizen's calculus. See note 6.

[15] Id. at 1063.

Declaring that the speech in question was "precisely the kind of speech the first amendment was designed to protect," Judge Bork voted to allow a suit for damages, despite the lack of a statute authorizing the suit or any direct precedent compelling it.[16] Judge Kenneth Starr dissented.

Not every case requires the level of jurisprudential explanation found in Ollman. More typical, perhaps, is Judge Bork's nonpartisan, straightforward protection of free speech rights in cases like Lebron v. Washington Metropolitan Area Transit Authority.[17] In Lebron, an artist opposed to the Reagan Administration sought space from the Washington, D.C. transit authority to display a poster that, according to the authority and the trial court, made the President and his colleagues appear to be laughing at a group of ordinary people. The transit officials declined to sell space to the artist on the ground that the poster was "deceptive." Judge Bork made short work of that argument. "[C]ourts ought not to restrain speech where the message is political and is 'sufficiently ambiguous to allow a discerning viewer' (or reader) to recognize it as" what it is.[18] Judges Bork and Scalia would have gone on to hold that "a scheme that empowers agencies of a political branch of government to impose prior restraint upon a political message because of its falsity is unconstitutional."[19]

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[16] Id. at 1065.

[17] 749 F.2d 893 (D.C. Cir. 1984). Again, it should be noted that this decision in favor of an individual's constitutional claim against executive action was not counted in the Public Citizen scorecard. See note 6. The Public Citizen report's claim that libel is "the one First Amendment area in which Judge Bork has voted on the 'free speech side'" (Public Citizen Report, at 73) is transparently false. The same can be said of the claim that "where anybody but a business interest challenged executive action, Judge Bork exercised judicial restraint either by refusing to decide the case or by deferring to the executive on the merits." Id. at 8.

As both legal scholars and the Supreme Court recognize, even First Amendment rights are not absolute. Judge Bork has participated in decisions rejecting free speech claims, both where the government's countervailing interest was sufficiently strong and where the speech crossed over into conduct that could be regulated on a content-neutral basis. While in some of these cases a different balance might have been struck, in each Judge Bork's position was supported by established precedent and joined either by his more liberal colleagues or by a majority of the Supreme Court.

Probably the most difficult case was Finzer v. Barry.[20] In Finzer, members of the Young Conservative Alliance of America sought to picket the Nicaraguan and Soviet embassies to protest their oppressive policies. Longstanding federal law, however, prohibits hostile demonstrations within 500 feet of embassies in

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[18] Id. at 898.

[19] Id. at 898.

[20] 798 F. 2d 1450 (D.C. Cir. 1986).

Washington. Uncontradicted declarations by State Department security officials in the case stated that enforcement of this provision is necessary to fulfill American obligations under international law and to receive protection for American diplomats in foreign countries. In a divided opinion, Judge Bork declined to hold the statute unconstitutional. Based on a scholarly analysis of the history of international law and the understanding at the time of the framing of the relation between international law and the Constitution, as well as the alternative avenues for protest available to the plaintiffs, Judge Bork concluded that the federal statute gives "first amendment freedoms the widest scope possible consistent with the law of nations."[21] Given the unfortunate experience with embassy security in recent years, it is difficult to fault a judge, even in a free speech case, for refusing to go against the combined judgment of the Congress and the officials charged with security precautions that a contrary decision "would endanger American diplomatic personnel who live and work in other countries."[22]

Finzer and Lebron also illustrate the admirable nonpartisanship of Judge Bork's First Amendment jurisprudence. In Finzer, Judge Bork declined to grant constitutional protection to anti-Soviet and anti-Sandinista speech, with which he presumably agrees, while in Lebron, Judge Bork voted to protect a rather malicious anti-Reagan poster, with which he presumably disagrees. Whether one concurs with the specific decisions or not, one cannot help but be reassured that Judge Bork decides such cases without regard to his own opinions on the content of the speech.

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[21] Id. at 1463.

[22] Id. at 1453.

In accord with current constitutional doctrine, Judge Bork has generally voted to uphold reasonable, content-neutral regulation of the use of public property, even when there is an incidental effect on speech. In Juluke v. Hodel,[23] Judge Bork joined an opinion by Judge Harry Edwards upholding regulations governing the size and construction materials of placards and the placement of parcels on the sidewalk in front of the White House. And in Community for Creative Non-Violence v. Watt,[24] Judge Bork voted to uphold National Park Service regulations prohibiting camping in Lafayette Square (in the center of Washington, D.C., across from the White House), in a challenge by people who wished to sleep in the park during a demonstration against homelessness. While Judge Bork was in the minority, his position was vindicated by the Supreme Court, which reversed the court of appeals.[25]

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[23] 811 F.2d 1553 (D.C. Cir. 1987). To similar effect is White House Vigil v. Watt, 717 F. 2d 568 (D.C. Cir. 1983).

[24] 703 F.2d 586 (D.C. Cir. 1983) (en banc).

[25] 468 U.S. 288 (1984).

Several specific First Amendment issues warrant further discussion: (1) free speech and press rights of broadcasters; (2) nonpolitical speech; and (3) religion. In each of these areas, Judge Bork is either as protective or more protective of civil liberties than current Supreme Court doctrine. In a sense, this is not surprising. The First Amendment is one of the most explicit and most basic of the constitutional provisions safeguarding individual liberty. In keeping with Judge Bork's commitment to constitutionalism, protection of First Amendment principles is one of the most vital of a judge's responsibilities.

Broadcast Speech

Judge Bork has been in the forefront of extension of free speech and press rights to broadcasters. It has long been an oddity that newspapers and other print media (and derivatively their readers) enjoy full editorial freedom under the First Amendment, while radio, television, and other broadcast media (and their listeners) are subject to editorial second-guessing by the Federal Communications Commission. The Supreme Court approved of this double standard in 1968,[26] on the theory that there is a "scarcity" of airwaves that justifies regulation of the content of broadcasting. While this theory has been much criticized by First Amendment advocates,[27] its empirical validity presumably agrees, while in Lebron, Judge Bork voted to protect a rather malicious anti-Reagan poster, with which he presumably disagrees. Whether one concurs with the specific decisions or not, one cannot help but be reassured that Judge Bork decides such cases without regard to his own opinions on the content of the speech.

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[26] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

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[26] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

In the meantime, Judge Bork has voted, with Judge J. Skelly Wright, that the scarcity rationale for regulation does not apply to cable television.[29] He also authored an opinion for the court affirming the FCC's decision not to apply content-based regulation to a new broadcast medium, called teletext.[30] In the

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27. See, e.g., Bazelon, "FCC Regulation of the Telecommunications Press," 1975 Duke L.J. 213; Karst, "Equality as a Central Principle in the First Amendment," 43 U. Chi. L. Rev. 20, 49 (1975); Krattenmaker & Powe, "The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream," 1985 Duke L.J. 151. Justice William O. Douglas, noted First Amendment proponent, opposed the Supreme Court's approval of FCC regulation of broadcast content and stated that the "Fairness Doctrine has no place in our First Amendment regime." CBS Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 154 (1973) (concurring opinion).

28. FCC v. League of Women Voters, 468 U.S. 364, 376 n.11 (1984).

29. Quincy Cable TV v. FCC, 768 F.2d 1434 (1985). This decision gains additional support from the Supreme Court's subsequent decision in City of Los Angeles v. Preferred Communications, Inc., 106 S. Ct. 2034 (1986).

30. Telecommunications Research & Action Center v. FCC, 801 F.2d 501 (D.C. Cir. 1986). The court held that the FCC's "fairness doctrine" need not be extended to teletext, though certain related provisions of the Communications Act apply.

course of that opinion, Judge Bork held that the FCC's "fairness doctrine" was a creature of administrative rule and not mandated by statute,[31] a holding which has stimulated efforts by congressional defenders of the fairness doctrine to amend the law.

Judge Bork's opinion also points out weaknesses in the Supreme Court's scarcity rationale for broadcast regulation, and suggests: "Perhaps the Supreme Court will one day revisit this area of the law and either eliminate the distinction between print and broadcast media,...or announce a constitutional distinction that is more usable than the present one."[32] Presumably this is a hint that Judge Bork will join the majority of the Supreme Court in responding to recent "signals" from the FCC that the fairness doctrine has been overtaken by technological change. If so, the decision is likely to be highly controversial. It pits together two divergent views of free speech and press. Under one view, free speech and press are guaranteed by the government leaving them alone; under the other, free speech and press are enhanced by government intervention to ensure that powerful speakers do not dominate the process. While each view has its supporters, it is fair to say that the former is the predominant view, both historically and among First Amendment scholars. Judge Bork thus reflects the predominant civil libertarian strain of thought on this contentious issue.

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[31] Id. at 517-18.

[32] Id. at 509. Compare Bollinger, "Freedom of the Press and Public Access," 75 Mich. L. Rev. 1, 10-12 (1976) (criticizing the scarcity rationale, while defending the results of the Court's decisions on other grounds).

Nonpolitical Speech

In one of the most important and often-cited articles in legal scholarship, Judge Bork, then a professor at the Yale Law School, defended the proposition that Constitutional protection should be accorded only to speech that is explicitly political. "There is no basis for judicial intervention," he argued, "to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic."[33] Since that article in 1971, Judge Bork says, "I have eaten my words time and time again."[34] More specifically, he has stated:

> I do not think...that the First Amendment protection should apply only to speech that is explicitly political. Even in 1971, I stated that my views were tentative and based on an attempt to apply Prof. Herbert Wechsler's concept of neutral principles.[[35]] As the result of the responses of scholars to my article, I

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[33] Bork, "Neutral Principles and Some First Amendment Problems," 47 Ind. L.J. 1, 20 (1971).

[34] Panel discussion on "The Political Process and the First Amendment," Stanford Law School, Mar. 7, 1986.

[35] In the article itself, Professor Bork characterized his views as "ranging shots, an attempt to establish the necessity for theory and take the argument of how constitutional doctrine should be evolved by courts a step or two farther." 47 Ind. L.J. at 1.

> have long since concluded that many other forms of discourse, such as moral and scientific debate, are central to democratic government and deserve protection.[36]

Judge Bork's decisions on the D.C. Circuit demonstrate conclusively how far he has come. In FTC v. Brown & Williamson Tobacco Corp.,[37] for example, Judge Bork wrote an opinion for the court protecting commercial advertising from an overbroad prohibition. Judge Bork noted that "[b]oth consumers and society have a strong interest 'in the free flow of commercial information.'"[38] In McBride v. Merrell Dow and Pharmaceuticals, Inc.,[39] Judge Bork wrote an opinion for the court extending constitutional protection against defamation suits to a scientific dispute over drug research.[40] His support for first amendment protections for broadcasters, already discussed, perforce applies beyond the area of political speech. It is fair to say that Judge Bork's commitment to freedom of speech, even outside the political arena, now extends as far or farther than current constitutional doctrine.

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[36] ABA Journal (Jan. 1984).

[37] 778 F. 2d 35 (D.C. Cir. 1985).

[38] Id. at 43, quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 7634 (1976).

[39] 717 F.2d 1460 (D.C. Cir. 1983).

[40] McBride is a good illustration of why Judge Bork was moved to expand free speech protections beyond explicitly political speech: the dispute in McBride, while scientific, had obvious ramifications for public policy.

This is not to say that Judge Bork has repudiated the underlying intellectual construct of his Neutral Principles article. On the contrary, both the constitutional theory and the crux of the First Amendment analysis remain important to his thought today. The statement of constitutional theory stands as one of the most influential in modern constitutional theory, stating, as it does, a comprehensive theoretical challenge to the noninterpretivist jurisprudence of the Warren Court era. Indeed, many of the ideas expressed in that article have become part of the new accepted wisdom in constitutional interpretation, whether as point of departure or as stimulus to critical reexamination. Similarly, the crux of Judge Bork's First Amendment analysis--that the most fundamental aspect of free speech is its relevance to political discourse and hence to democratic governance--is a continuing theme of First Amendment scholarship. Judge Bork's change of mind since 1971 has been to recognize that the protections of the First Amendment extend well beyond its political core.

Nor is this to say that all forms of expression are now constitutionally protected in Judge Bork's view. He remains persuaded, for example, that the government has the authority to regulate pornography. While this position is highly controversial in some circles, it commands wide acceptance on the Supreme Court and among the country. Moreover, recent research into the effects of violent and degrading portrayals of women and children in pornography has sparked increased efforts, on the part of feminists and traditionalists alike, to control pornography within constitutional bounds. It can be predicted that Judge Bork's philosophy of judicial restraint will not interfere with this effort.

Religion

One of the most confused and unsatisfactory areas of modern constitutional doctrine is that related to the problems of religion and government. Scholars, lower court judges, and even many of the current Justices have complained that the Court's doctrine is indeterminate and often inconsistent, and that it often ill serves the underlying constitutional purposes of religious freedom. Judge Bork could be any one of dozens of scholars--right, left, or center--when he observes, quoting Justice Antonin Scalia, that the law in the religion area is in "a state of utter chaos and unpredictable change."[41]

Judge Bork has not participated in any significant case raising issues under the Free Exercise or Establishment Clauses of the First Amendment. Judge Bork joined a unanimous per curiam judgment in Murray v. Buchanan,[42] which simply followed controlling Supreme Court precedent. He voted against rehearing en banc in Goldman v. Weinberger,[43] along with Judges Robinson, Wright, Tamm, Wilkey, Wald, Mikva, and Edwards. The Supreme Court ultimately affirmed by a vote of 5-4, with Justices Powell, Stevens, White, Rehnquist and Chief Justice Burger in the majority.[44] It is impossible to know whether or not Judge Bork's vote reflected his views on the merits of the case.

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[41] Bork, "Religion and the Law," address at the University of Chicago (Nov. 13, 1984), at 2.

Nonetheless, in several public appearances Judge Bork has offered comments on the Religion Clauses that, if adopted, might well bring greater coherence to this doctrinal area, as well as better protect religious liberties. He has not proposed specific alternative doctrine. Indeed, he has warned that "we ought to be wary of formulating clear rules for every conceivable interaction of religion and government."[45] Instead, he relies principally on a "relaxation of currently rigidly secularist doctrine." This, he says, would "permit some sensible things to be done."[46]

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[42] 720 F.2d 689 (D.C. Cir. 1983).

[43] 739 F.2d 657 (D.C. Cir. 1984).

[44] 106 S. Ct. 1310 (1986).

[45] Speech Before the Brookings Institution (Sept. 12, 1985), at 11.

[46] Id.

Judge Bork cites the example of Aguilar v. Felton.[47] Aguilar involved one of the cornerstone programs of the Great Society: Title I remedial education assistance for deprived children in inner city neighborhoods. In passing the program Congress specifically determined that remedial help was needed, and should be provided, to eligible poor children whether they attend public or nonpublic school. This was in recognition of the large numbers of needy children who, for reasons of religious choice or educational opportunity, choose to attend inner city parochial schools. The program allowed full-time public school remedial education specialists to travel from school to school, public and nonpublic alike, to provide special training in English, math, and related areas to eligible children on the premises of their own school. When challenged under the Establishment Clause as an aid to religion, Judge Henry Friendly, for the court of appeals, commented that the program had "done so much good and little, if any, detectable harm."[48] By a 5-4 vote, the Supreme Court held the program unconstitutional.

As Judge Bork commented, Aguilar illustrates the "power of the three-part test[49] to outlaw a program that had not resulted in any advancement of religion but seems entirely worthy."[50] In his critique of Establishment Clause doctrine, Judge Bork relies heavily on the work of Jesse Choper, Dean of the Law School at the University of California at Berkeley, as well as historical researchers suggesting that modern doctrine is at odds with the original purposes of the Religion Clauses. If renewed emphasis were placed on protecting religious choice, instead of the mechanistic three-part test, then programs like that in Aguilar would be permissible and even desirable. This jurisprudence would protect religious minorities, including those with no religious faith; but it would do so by accommodation of differences rather than by an artificial secularization of society.[51]

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[47] 105 S. Ct. 3232 (1985).

[48] 739 F.2d 48, 72 (2d Cir. 1984).

[49] This is a reference to the Supreme Court's three-part test for an establishment of religion: the statute must have a
(footnote continued)

Much of the constitutional problem, Judge Bork has suggested, stems from the "extra-constitutional intellectual tradition" that asserts that government has the power to act only to prevent physical harm to others.[52] In this, he joins an

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"secular purpose," must have an effect that "neither advances nor inhibits religion," and must not entail "excessive entanglement" between church and state. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

[50] "Religion and the Law," supra, at 4.

[51] Some commentators have asserted that Judge Bork would permit restoration of spoken prayer in the public schools, However, nothing in his record supports this assertion and, given his theoretical premises, it is at the very least highly implausible.

[52] "Religion and the Law," supra, at 11.

emerging majority of the Supreme Court, which in recent cases has rejected claims that laws are unconstitutional because they reflect the moral and religious beliefs of the community.[53] It is a mistake to attempt to separate moral beliefs from law, according to Judge Bork, since so much of what we value in the American legal tradition--not least its libertarian impulse--is a product of moral tradition. "Our constitutional liberties arose out of historical experience and out of political, moral and religious sentiment," he has stated. "They do not rest upon any general theory. Attempts to frame a theory that removes from democratic control areas of life the framers intended to leave there can only succeed if abstractions are regarded as overriding the constitutional text and structure, judicial precedent, and the history that gives our rights life, rootedness, and meaning."[54] In these brief remarks, Judge Bork shows the essential unity of three great themes in American constitutionalism: individual liberties, moral community, and democratic governance. Whether one agrees with his specific conclusions or not, it is impossible not to recognize the major contribution that Judge Bork has made to contemporary legal discourse.

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[53] Harris v. McRae, 448 U.S. 297, 319-20 (1980); Bowers v. Hardwick, 106 S. Ct. 2641 (1986).

[54] Bork, Tradition and Morality in Constitutional Law 8 (AEI 1984).

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THE PROBABLE SIGNIFICANCE OF THE BORK APPOINTMENT FOR ISSUES OF PARTICULAR CONCERN TO WOMEN

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In the media discussions that followed the announcement of the nomination of Judge Robert H. Bork to the Supreme Court of the United States, there have been frequent suggestions that the Bork appointment would be harmful to the interests of women. Indeed, a document published by the National Women's Law Center has gone so far as to claim that Judge Bork's presence on the Supreme Court would threaten all the legal gains that women in the United States have made in the 20th century. It is difficult to discover the basis for this disquiet about the Bork nomination. Judge Bork has written only one opinion dealing with a sex-based equal protection claim and, in that case, he did not reach the merits.[1] Nor has he devoted any of his scholarly writings to women's rights as such. Much has been made of a dissent in which Judge Bork criticized the majority for taking the positions that voluntariness can never be a defense in a sexual harassment case and that an employer is automatically liable for sexual harassment by a supervisor even if the employer knew nothing of the conduct and had a clear policy against it.[2] But Judge Bork's position on these questions, about which reasonable men and women differ, seems to afford a very slender basis for predicting how he would be likely to regard the vast range of legal issues affecting important interests of women.

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[1] Cosgrove v. Smith, 697 F.2d 1125 (D.C. Cir. 1983) (concurring in part and dissenting in part).

[2] Vinson v. Taylor, 753 F.2d 141, rehearing denied, 760 F.2d
(footnote continued)

The best way to make a reasonable assessment of what the Bork appointment is likely to mean for women is to examine the implications for these matters of his general approach to judicial decision-making. When this is done, it is clear not only that the fears expressed by some women about the Bork nomination are unfounded, but that Judge Bork is likely to be a strong supporter of women's rights. One can make this prediction with some confidence because the most important legal gains that American women have made in the 20th century have been through legislation. And the hallmark of Judge Bork's legal philosophy, as expressed both in his scholarly articles and judicial opinions, is his commitment and deference to the process of decision-making by the people through their elected representatives.

This memorandum examines, item by item, how Judge Bork's legal philosophy and judicial methodology bear upon those issues which have been of greatest concern to women who have expressed reservations about the Bork nomination.

Protection Against Sex-Based Discrimination. Women have obtained, and are continuing to gain, important protections

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1330 (Bork dissenting) (D.C. Cir. 1985); aff'd sub nom., Meritor Savings Bank v. Vinson, 106 S. Ct. 2399 (1986). On review, although affirming, the Supreme Court substantially agreed with Judge Bork's reasoning on the issue of the employer's liability.

against discriminatory treatment through the Civil Rights Act of 1964 and a host of other laws and ordinances at the federal, state, and local levels. These advances, which have grown out of a process of bargaining, education, and persuasion within legislatures, are safest with judges who, like Judge Bork, respect that process and decline as a matter of principle to substitute their personal views for those of the elected branch of government. As a judge, Robert Bork has consistently joined in opinions vigorously enforcing the Equal Pay Act and other statues forbidding discrimination on the basis of gender.[3] As a scholar, he has explained the philosophical basis for his commitment: individual rights are always most secure when they rest on consensus -- the kind of consensus that emerges in legislation in a vital and self-confident democracy.[4]

On the frontiers of sex-discrimination law, a battle is being waged over whether pornography is and should be treated as a form of discrimination against women. On this vital issue, women have an important ally in Judge Bork who has taken the position that pornography is not protected under the First Amendment to the Constitution.

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[3] Ososky v. Wick, 704 F.2d 1264 (D.C. Cir. 1983); Laffey v. Northwest Airlines, 740 F.2d 1071 (D.C. Cir. 1984); Palmer v. Shultz, 815 F.2d 84 (D.C. Cir. 1987).

[4] Bork, Styles in Constitutional Theory, 26 So. Texas L. Rev. 383, 395 (1985).

Affirmative Action. Some have seen Judge Bork's refusal to embrace formal, abstract, concepts of sex equality as a threat to women's struggle for equal treatment. In fact, however, Judge Bork's nuanced and differentiated approach to equality aligns him with leading feminist legal theorists who are insisting, with increasing vigor, that women have been harmed by excessively rigid notions of equality that require women and men to be treated precisely the same under all circumstances.[5] These scholars, many of them troubled by recent research which reveals how formal equality has contributed to the ever-worsening economic circumstances of women and children upon divorce, argue that in many situations meaningful equality requires that women's special roles in procreation and child-raising be taken into consideration. As a prominent feminist law professor, Herma Hill Kay, has put it, "The focus has shifted from a recounting of similarities between women and men to an examination of what differences between them should be taken into account under what circumstances in order to achieve a more substantive equality."[6]

Formal equality is now seen by many feminists as having benefited mainly business and professional women, and having taken insufficient account of the situations of the majority of American women who are struggling to combine family roles with labor force activity. In this view, legislative change, tailored to particular situations, is more likely to be effective in improving the lives of most women than the development of an abstract single standard of equal treatment regardless of circumstances.[7] What is needed from the judiciary is respect for legislative judgments in this area, not judges who are eager to impose their own views of what equality means.

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[5] E.g., Lucinda Finley, Transcending Equality Theory, 86 Colum. L. Rev. 1118 (1986); Herma Hill Kay, Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath, 56 U. Cincinnati L. Rev. 1 (1987); Mary Becker, Prince Charming: Abstract Equality, 1987 Supreme Court Review (forthcoming).

[6] Kay, note 5 above at 2.

Judge Bork's dissenting opinion in Franz v. United States, to the effect that visitation rights of a non-custodial father should not be elevated to constitutional status so as to justify forcing the revelation of the whereabouts of his former wife and three children who had been relocated under the Federal Witness Protection Program demonstrates his sensitivity to the needs of women in areas where continuing differences in family roles would make strict equality unjust and harmful.[8] As Judge Bork pointed out, constitutionalizing the visitation rights of a non-custodial parent would wreak endless havoc in ordinary divorce cases.

Abortion. Judge Bork, like the great majority of legal experts who have written about Roe v. Wade, from Ruth Ginsburg to Paul Freund to Archibald Cox, has criticized the reasoning of that decision.[9] Disapproval of Roe v. Wade among legal scholars spans the entire political spectrum, and is as strong among those who identify themselves as pro-choice as among those who oppose abortion. The basic criticism of Roe, in which Judge Bork has joined, is that the Supreme Court, without any constitutional basis for doing so, took the decision about the conditions under which abortion should be permitted away from state legislatures (which, as it happens, were rapidly moving toward replacing old strict abortion laws with new liberal ones at the time Roe was decided.)

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[7] Becker, note 5 above.

[8] 707 F.2d 582 (D.C. Cir. 1983); Judge Bork's partially concurring and partially dissenting opinion is reported at 712 F.2d 1428 (1983).

One cannot, however, infer from the widespread opposition of legal experts to Roe that the Roe critics would now favor overturning that decision. Judge Bork, for example, is committed to the view that even a wrongly decided case should not be overruled if it has become so firmly imbedded in the fabric of the legal system that a great number of governmental arrangements and private expectations have grown up around it.[10] It is thus by no means certain that Judge Bork would be in favor of overruling Roe 14 years after it was decided. He has in fact been an outspoken opponent of what he regards as impermissible attempts to overturn the abortion cases, testifying against a proposed Human Life Bill and against legislation that would deprive the courts of jurisdiction over such issues.

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[9] Archibald Cox, The Role of the Supreme Court in American Government (New York: Oxford University Press, 1976), 53-55, 114; Alexander M. Bickel, The Morality of Consent (New Haven: Yale University Press, 1975), 28; John Hart Ely, "The Wages of Crying Wolf: A Comment on Roe v. Wade," 82 Yale Law Journal, 223, 297 ff. (1973); Richard Epstein, Substantive Due Process by Any Other Name: The Abortion Cases, 1973 Supreme Court Review 159; Paul A. Freund, "Storms over the Supreme Court," 69 American Bar Association Journal 1474, 1480 (1983); Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 North Carolina Law Review 375 (1985).

[10] Philip Lacovera, A Talk with Judge Robert H. Bork, District Lawyer, May-June 1985, pp. 29, 32.

In the view of Judge Bork and most Roe critics, the problem with Roe is exactly the same as that with the now wholly discredited line of cases in which the Supreme Court in the early part of this century struck down state laws designed to promote the health and safety of factory workers, especially women and children. That problem is the readiness of judges to substitute their own views of good social policy for the decisions of the elected representatives of the people. In the case of Judge Bork, there is every reason to believe that he would scrupulously refrain from over-stepping the legitimate bounds of the judicial role. His record of service on the District of Columbia Circuit Court of Appeals shows that he is neither a judicial maverick nor a dramatic innovator. Not a single one of the more than 100 majority opinions he has authored has been reversed by the Supreme Court. Furthermore, in his five years on the Court of Appeals, during which he has joined in over 400 opinions, he has written only 9 dissents and 7 partial dissents.

Bork's Judicial Voice as a "Feminine" Voice. Since the appearance of psychologist Carol Gilligan's book, "In a Different

Voice,"[11] a number of legal scholars have been engaged in trying to discern whether and how the legal system is being or might be affected by the special insights and life experience brought to it by increasing numbers of female legal professionals.[12] As the question is usually put, it is whether a system traditionally dominated by individualistic, abstract, and formal ways of thinking is being opened up to modes of discourse which accord a greater place to the connections between people as well as their separateness and autonomy. A characteristic of the "different voice" is said to be that it tries to understand and appreciate the "other" through continuous dialogue. Whether or not one considers that this group of traits is distinctively feminine, it is worth noting that Robert Bork as a judge has adopted a somewhat different mode of discourse from that which predominates among the mainly white, male, American judiciary. In his separate opinions, Judge Bork, like Justice Sandra Day O'Connor, is ever restlessly seeking to engage other judges in dialogue, carrying out in practice the conviction he expressed in a 1982 speech that "intellect and discussion matter and can change the world."[13]

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[11] Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development (Cambridge, Mass.: Harvard University Press, 1982).

[12] E.g., Kenneth L. Karst, "Women's Constutition," 1984 Duke Law Journal 447.

[13] Catholic University Speech, March 31, 1982, p. 24 (unpublished). See, for an analysis of the modes of discourse on the current Supreme Court, Frank I. Michelman, Foreword: Traces

(footnote continued)

Where do Misconceptions about Judge Bork come from? It is not altogether clear why a judge whose career on the bench has been as uneventful and conventional as Judge Bork's has attracted so much criticism upon his nomination to the Supreme Court. Much of the opposition to Judge Bork seems to be based on a rather uncritical acceptance of the assessments of some of his law review articles by a few academics who are in the mainstream neither of American life nor American legal thought. In determining how much weight to give to these evaluations, it is worth noting that there is one group of individuals in American society towards whom Judge Bork has not been very deferential in his writings. That group is what he has called "the professoriate," a small but influential corps of constitutional law professors at leading schools who deeply mistrust popular government. As Judge Bork has pointed out many times with gentle humor in his law review articles, there is no group in America whose political and social attitudes are so faithfully mirrored in the Supreme Court's more controversial decisions than this professorial elite.[14]

It is not self-evident, however, that women's interests coincide with those of this group. The legislative -- as

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of Self-Government, 100 Harvard L. Rev. 4, 28-36 (1986). Michelman finds Justice O'Connor, more than her fellow justices, to be committed to resolving disputes by dialogue, by "open and intelligible reason-giving, as opposed to self-justifying impulse and ipse dixit." (Id. at 34). This is the mode to which Judge Bork, too, seems inclined.

[14] Bork, note 4 supra, at 394.

imperfectly representative, and as flawed it is at the present time -- is working well for women. Women will undoubtedly fare even better as legislatures become more and more representative. To preserve and consolidate their gains, they will need judges who, like Judge Bork, believe that the basic decisions in a democratic society ought to be made by the people through their elected representatives.

Judge Bork's academic critics have addressed themselves primarily to positions taken in his scholarly writings where he and they have been engaged in spirited debate over the years. But the best indication of what Robert Bork will be like as a Supreme Court Justice is the five-year career of Robert Bork as a Circuit Court Judge. On the District Court for the District of Columbia Court, day in and day out, he has carried out his duties to litigants in actual cases in a prudent and craftsmanlike fashion. As his record of zero-reversals shows, Judge Bork, unlike many of his critics, is able to distinguish between the role of professor in building theory and the role of judge applying practical reason to real-life situations.

D

ANALYSIS OF JUDGE ROBERT BORK'S LABOR OPINIONS
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I. Purpose and Sources

The purpose of this review is to analyze Judge Bork's labor law record as a judge on the D.C. Circuit. I analyzed every case meeting the following criteria: (1) Judge Bork issued an opinion (whether majority, dissent, or concurrence), (2) the word "labor" appeared in the opinion, and (3) the substance of the decision was labor law, broadly understood. I have not analyzed every labor opinion on which Judge Bork was a panel member. If he did not choose to express himself separately, I considered any inference to be drawn from his silent concurrence in another's opinion to be insufficient.

To this list of cases, I then added those which were identified by the AFL-CIO's memorandum of August 17, 1987, pages 4 and 5. That list provided two additional citations, opinions in which Judge Bork wrote, involving labor, but, oddly, without using the word "labor." I was grateful for having the AFL-CIO's memorandum, in that it allowed me to supplement my own research technique.

However, I do have a criticism of the AFL-CIO's listing. The AFL-CIO criteria for including a case were rather strict; as a result, five labor law opinions written by Judge Bork were not included. In my sequential discussion below, I note when a case was not on the AFL-CIO list. (Conversely, because I had the AFL-CIO list, no case on that list is omitted from my consideration.)

My criterion was rather simple: I included every opinion written by Judge Bork. The AFL-CIO criteria were quite complex:

> "all panel decisions in which Judge Bork participated and in which a full or partial dissent was written; (2) all panel decisions in which Judge Bork participated and which generated a dissent from the denial of a suggestion for rehearing en banc, even though there had been no dissent among

> the three panel judges; (3) all *en banc* decisions in which Judge Bork participated and in which a full or partial dissent was written; and (4) all denials of suggestions for rehearing *en banc* in which a dissent was filed and in which Judge Bork took a written position."

AFL-CIO memo, authored by L. Gould, W. Kamiat, August 17, 1987.

As a result of these criteria, the AFL-CIO list includes two cases in which Judge Bork did not write. *AFGE v. FLRA*, 778 F.2d 850 (D.C. Cir. 1985) (Bork joining Wald, R. Ginsburg dissenting); and *Simplex Time Recorder v. Secretary of Labor*, 766 F.2d 575 (D.C. Cir. 1985) (Bork joining Davis Fed. Cir.), Wald dissenting in part). In my view, these two cases provide no insight into Judge Bork's independent thinking. Yet they are listed as two of five cases identified by the AFL-CIO as "Cases in which Bork voted for employer and against union/employees."

One final note on the AFL-CIO dichotomy: "union/employee" suggests an identify that is not always present. The union does not always stand up for employees. Indeed, one of the cases the AFL-CIO memo lists as "in favor of union/employees," *NTEU v. FLRA*, 800 F.2d 1165 (D.C. Cir. 1986), discussed below, involved an employee's rights pitted against a union, which had denied the employee legal representation because he wasn't a union member. Judge Bork's opinion was pro-union, and anti-employee.

II. Survey Results

I addressed two specific questions in what follows. First, does the pattern of Judge Bork's labor writings demonstrate any clear bias along union, management, employee, or deference to administrative agency, lines? Second, do his opinions appear within the mainstream of American labor law jurisprudence?

In answer to the first question, ten cases fit the criteria outlined for my study. The numbers refer to my own sequencing of the cases in the description that follows.

OUTCOME PRO MANAGEMENT: Cases 1, 3, 5, 6, 7, 9.
OUTCOME PRO UNION: Cases 4, 8, 10.
OUTCOME PARTIALLY FOR MANAGEMENT,
PARTIALLY FOR UNION: Case 2.

MAJORITY OPINION WITH NO DISSENT: Cases 1, 2, 5.
MAJORITY OPINION FROM WHICH THERE
WAS A DISSENT: Cases 3, 4, 6, 10.
DISSENTING OPINIONS: Cases 7.
CONCURRING OPINIONS: Cases 8, 9.
CASES DEFERRING TO
THE ADMINISTRATIVE AGENCY: Cases 1, 6, 7, 8.
CASES OVERRULING THE
ADMINISTRATIVE AGENCY: Cases 2, 3, 4, 9, 10.
CASES DEFERRING IN PART TO,
OVERRULING IN PART, THE,
ADMINISTRATIVE AGENCY: Case 5.

Having offered this breakdown, I hasten to add that it must be approached with caution since the sample size is small. It would be quite unfair, for instance, to conclude that Judge Bork tends to overrule administrative agencies more than affirm them, since the cases presented might have been unusually deserving of being overruled.

With so small a sample size, only the most startling of patterns can be credited. And, as is apparent, there is no such startling pattern. There is a reasonable representation of opinions in each category.

The second question is much more important. Do Judge Bork's labor law decisions place him within the mainstream of debate on American labor law? The answer is unequivocably yes. As will be seen in what follows, I disagree with several of the opinions Judge Bork has written. But in every instance, his position was quite tenable. No unusual theories were created by Judge Bork; no inconsistent use of precedent, no ignoring of relevant decision law appeared in any of his opinions. Moreover, on more than one occasion, an opinion shows a real brilliance in statutory interpretation and reasoning far above the average of labor law jurisprudence.

III. The Labor Law Opinions of Judge Bork

1. United Transportation Union v. Bork, 815 F.2d 1562 (D.C. Cir. 1987). (NOT INCLUDED ON AFL-CIO LIST)

Judge Bork wrote the opinion for a unanimous panel consisting of himself, Judge Silberman, and Judge Friedman of the Federal Circuit, affirming the judgment of the District Court.

Under the Urban Mass Transportation Act of 1964, federal money may be allocated to municipal transit systems which have taken over private transit companies. However, the Secretary of

Labor must certify that "the interests of employees affected by such assistance" have been protected. 49 U.S.C. sec. 1609 (c). This degree of protection includes "the continuation of collective bargaining rights."

The labor union protested a certification that federal money could be provided to a local system under this statute. Seven years before, the union had been the collective bargaining agent of the employees of the private transit system. When the system was taken over by the local government, the union's representation status ceased, consistent with the fact that the National Labor Relations Act excludes local governments from the definition of employer. Thus, for seven years, the union had not been the bargaining agent for these workers. The union's complaint was that the Secretary of Labor should have insisted that the union be recognized as the collective bargaining agent before approving the federal funds.

Citing the legislative history, and the statute's language, (especially the word "continuation" in the phrase "continuation of collective bargaining rights"), Judge Bork found that the Secretary was under no compulsion to require the resumption of collective bargaining status that had been lost seven years before.

COMMENT:

The opinion seems entirely correct, and relatively mundane. It would have been exceptional to hold that, before any federal funds could be allocated to urban transit systems, a union that had, at one time, been the bargaining representative, had to be recognized once again. Such an onerous requirement would have gone quite contrary to Congress' intent to assist local transit systems in financial need. The reading of the word "continuation" appears correct. Congress was worried about private systems which were taken over by reason of the federal funds, and, then, once becoming municipal operations, lost their right to organize. Such was not the case here, since the right to organize had been lost seven years before.

The best argument the other way was that the union had new evidence of majority status, by reason of signature cards. Under the National Labor Relations Act, an employer is obliged to give evidence of such majority status serious attention, and to bargain if she or he believes the union truly to represent the majority of the employees. However, even the clearest evidence of majority status cannot compel a duty to bargain by an entity that is not an employer under the Act. Here, the city employer was not under the Act, and the receipt of federal funds did not make it so. It would be quite unusual to construe the receipt of UMTA funds as an implicit exception to the definition of employer under the National Labor Relations Act.

The decision, in my view, is utterly noncontroversial.

2. National Treasury Employees Union v. Federal Labor Relations Authority, 810 F.2d 1224 (D.C. Cir. 1987). (NOT INCLUDED IN AFL-CIO LIST)

Judge Bork wrote the opinion for a unanimous panel consisting of himself, Judge Ruth Bader Ginsburg, and Judge Gesell of the U.S. District Court, District of Columbia. The opinion affirms in part, reverses in part, and remands to, the Federal Labor Relations Authority.

The Federal Service Labor-Management Relations Act, 5 U.S.C. sec. 7103 (a)(12) (1982), establishes a duty to bargain by federal employers, but excludes certain specified management rights, among them the right to assign work.

The union representing the auditors of the IRS proposed two rules for deciding how office audits should be assigned. (Office audits are conducted at IRS offices; filed audits are conducted at taxpayers' offices. Filed audits have priority.) First, the union proposed that office audits be assigned on the basis of volunteers, then inverse seniority. The IRS refused to bargain, saying that such an absolute rule could lead to an office audit falling to an individual already busy on a field audit, with the result of delay. This, the IRS claimed, would interfere with its management prerogative to assign work.

The Federal Labor Relations Authority agreed with the IRS on this claim, and Judge Bork's opinion affirmed. Caselaw had developed to sustain the interpretation that the management prerogative to assign work included the right to see to when the work would be done. Hence, the union's proposal lacked the flexibility necessary to preserve the management prerogative.

The union proposed a second rule. "Absent just cause," the rule read, certain union officials were to have preference for office audits. The IRS refused to bargain on this proposal as well, for the same reason; and the Federal Labor Relations Authority held for the IRS. Here, Judge Bork reversed the FLRA. The provision for "just cause" allowed the IRS sufficient flexibility to ensure that work would be done on the timely basis desired; hence, the management prerogative to assign work was not unduly infringed.

The IRS had raised other defenses based on other management rights clauses in the Federal Service Labor-Management Relations Act; as these had not been considered by the FLRA, Judge Bork remanded the case.

COMMENT:

The outcome appears correct on the first ground, bearing in mind that the Federal Service Labor-Management Relations Act affords employers a substantially greater scope for management rights than does traditional labor law under the National Labor Relations Act. Judge Bork affirmed the finding of the agency most expert in the area, consistent with principles of administrative law, where there was adequate caselaw support for that agency's interpretation.

On the second ground, Judge Bork's opinion could be faulted as leaning over backwards in favor of the union. The demand that certain union officials always be given preference in the assignment of office audits appears on its face to diminish management's right to "assign work." Management could still have its way, but only after finding "just cause" to overcome the proposed presumption in favor of union officials.

In remanding, Judge Bork left to the FLRA the opportunity to hold that such a clause infringed management's right to "direct" employees, a separate management guarantee under the Act. Hence, the outcome might eventually be in favor of management.

Nevertheless, on my analysis, the opinion read the phrase "assign work" in a rather restrictive way, so as to afford fewer management rights than Congress may have intended. I would have given more deference here to the FLRA. However, this criticism is slight, and Judge Bork's interpretation is certainly within the realm of respectable opinion on this point of law.

3. Restaurant Corporation of America v. NLRB, 801 F.2d 1390 (D.C. Cir. 1986).

This is a difficult case, in which the majority opinion was authored by Judge Bork for himself and Judge Scalia, with a partial dissent by Senior Judge MacKinnon. The majority refuses enforcement of an NLRB finding that the employer had violated sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act.

Two employees were discharged for violating the company's absolute no-solicitation rule. One employee had engaged in extensive on-the-job solicitation on behalf of the union. The other employee had engaged in only one instance of on-the-job solicitation, lasting less than five minutes, and the soliciting employee himself was off hours. The company had tolerated six instances of on-the-job solicitation among employees for gifts to celebrate fellow-employees' birthdays, retirements, etc. The ALJ, and the NLRB itself, found that the tolerance of these non-union solicitations made the employer's application of the no-solicitation rule to the two employees in question discriminatory and thus in violation of the Act.

Judge Bork overruled the NLRB. He held that the Board had erred in failing to undertake an analysis of the potential for disruption between the two kinds of solicitation. Secondly, he held that social solicitations are by their nature different and a normal incident of humans working together. Third, he pointed out that all of the Board's cases involved much more extensive non-union solicitation, such as for Tupperware, Avon products, or anti-union propaganda. Judge Bork cited NLRB decisions holding that some non-union solicitation is not enough to prove discriminatory application of a no-solicitation rule. The basis for overturning the Board, therefore, was an erroneous legal standard, and the absence of substantial evidence to sustain its finding.

Judge MacKinnon agreed with Judge Bork as to the employee who had engaged in greater solicitation. But as to the employee who had engaged only in one on-the-job solicitation, Judge MacKinnon would defer more to the NLRB and its Administrative Law Judge. The legal standard is actual disruption, not potential for disruption, in Judge MacKinnon's view. He accuses the majority of creating the potential for disruption standard by relying on dicta from Central Freight Lines, Inc. v. NLRB, 653 F.2d 1023 (5th Cir., 1981). In terms of actual disruption, this employee's actions were equivalent to the birthday, etc., kinds of solicitations. Hence, the Board should be affirmed as to this employee.

COMMENT:

The first question is whether the standard for interpreting section 8(a)(3) of the NLRA is actual disruption or potential for disruption. Judge MacKinnon appears to have the better argument that actual disruption is the standard. He is correct that the Central Freight opinion's statement is dicta (the Board had charged an overly broad no-solicitation rule in that case, not discriminatory enforcement of a facially acceptable no-solicitation rule). And his citations of NLRB case law indicate a concern with treating equal cases equally in terms of actual effect.

Nevertheless, there is merit to Judge Bork's view. The comparison cannot be entirely one of counting minutes. There is force to his view that certain solicitations, such as for birthday cakes, is of a different kind, almost unavoidable in workplaces. Judge MacKinnon does not rebut that logic, although Judge Bork has no cases to cite in support of it.

Evidently, in Judge MacKinnon's view, an employer who allows birthday cake contribution solicitations on work-time is building a record against himself or herself in the event a union organizer wants to take the same amount of time. This rule would require some careful monitoring of actual time expended. And it involves other difficult questions: are such solicitations to be added together, or on an employee-by-employee basis, in deciding how much time a union organizer must have?

By contrast, Judge Bork's view is clear and easy to apply. Social solicitations are different.

The heart of the problem, however, is that this is probably not a call for the D.C. Circuit but for the NLRB to be making. The statute does not say whether actual or potential disruption is to be measured in determining whether a no-solicitation rule is being enforced discriminatorily. It speaks only of discrimination. If the NLRB wishes to interpret this as treating equal cases differently in view of actual disruption, I would not see that as clearly erroneous. And certainly Judge MacKinnon is right that Judge Bork had only the weakest legal authority to so hold.

Once the legal rule is settled, the issue of substantial evidence poses no serious problems. Judge Bork is entirely correct that, if potential disruption is at issue, the Board's finding lacked any evidence. Of course if the Board's standard of actual disruption is correct, a further inquiry is warranted: Judge MacKinnon undertook such an inquiry and faulted the board with respect to one of the employees, but Judge Bork did not have to take this step.

Hence, I do not critize Judge Bork for his holding that the NLRB's decision lacked substantial evidence. That was a correct decision, given his view of the legal standard. This opinion is to be faulted, rather, for its establishment on the basis of one other case's dicta, of a legal standard contrary to a reasonable alternative view of the agency most expert in the field. In partial defense, however, this appears to have been a case of first impression on this point. And it is noteworthy that Judge Bork's position was concurred in by Judge, now Justice, Scalia.

4. National Treasury Employees Union v. Federal Labor Relations Authority, 800 F.2d 1165 (D.C. Cir. 1986).

Judge Bork authored the majority opinion for himself and Judge Robinson; Senior Judge Swygert of the Seventh Circuit dissented. The opinion reverses a ruling by the Federal Labor Relations Authority.

The Federal Service Labor-Management Relations Act permits a nion to establish itself as the exclusive bargaining agent for a group of employees. This case deals with the duty of fair representation attendant upon that status.

In the private sector, the duty of fair representation was read into the National Labor Relations Act by the Supreme Court as a necessary inference from exclusivity. But the union was responsible under this duty only in so far as it was the exclusive representative; i.e., on matters under the collective bargaining agreement. On other matters (e.g., participation in internal union affairs) the union could distinguish between members and non-members.

The Civil Service Reform Act provides federal employees with a right to appeal a disciplinary action. This right exists wholly apart from what rights might be available under a contract negotiated by management and a union pursuant to the Federal Service Labor-Management Relations Act.

In this case, the union refused to provide a non-member employee with counsel in pursuing his appeal through the procedures of the Civil Service Reform Act. It was the union's policy to provide such counsel for its members, however. The Federal Labor Relations Authority held that the union had violated its duty of fair representation. The union appealed, arguing that it had no such duty as to the statutory right of appeal under the Civil Service Reform Act, since that process was outside of the collective bargaining context. It is not disputed that, in the private sector, a union's failure to provide counsel in such a setting would not violate duty of fair representation. Thus, the issue was whether the Federal Service Labor-Management Relations Act imposed a greater duty upon a union than was the case under the National Labor Relations Act.

Overruling the FLRA, Judge Bork held that it did not. His reasoning began with the words of the statute, which he found not enlightening either way. He next considered the structure of the statute, which, like the NLRA, distinguished between matters arising under the collective bargaining relationship and otherwise. He continued by exploring the origin of the duty of fair representation, finding that its premise was the inability of employees to speak for themselves in those areas where the union's representation was exclusive. Next, he reviewed legislative history. Finding it rather empty, Judge Bork derived more support for his interpretation, since so major a change as to impose duties beyond the commonly understood duty of fair representation would have entailed some debate. Finally, he found support for his interpretation in the difficulty of the test adopted by the FLRA: whether an issue was employment-related, as opposed to whether it was governed by the collective bargaining agreement (the question under traditional duty of fair representation doctrine).

Judge Swygert dissented. He believed the case was controlled by National Treasury Employees Union v. Federal Labor Relations Authority, 721 F.2d 1402 (D.C. Cir. 1983), which held a union to a duty of fair representation in providing an attorney through a collective bargaining grievance procedure. Although the grievance in the earlier case was being pursued under the collective bargaining procedures, Judge Swygert felt the opinion was not premised on this distinction. (In the majority opinion, Judge Bork quoted extensively from this case to demonstrate that it did not make frequent reference to the collective bargaining context.)

COMMENT:

Judge Bork freed federal employees' unions from a major burden, one that would have gone far beyond what their private market counterparts must bear. In so ruling on behalf of the union, Judge Bork refused to give deference to the Federal Labor Relations Authority.

But the issues was one purely of law, so the deference entitled to the FLRA was at its minimum. I believe this was a correct case in which to overrule the FLRA. It is hard to conceive that Congress intended to impose a greater burden on federal employees' unions than on private employees' unions, without any discussion on the point. And Judge Bork's distinguishing of the earlier D.C. Circuit case seems entirely correct: Judge Swygert's dissent on this point merely states that the earlier case is controlling. It makes no attempt to rebut

Judge Bork's extensive quotations from that opinion. It is significant, on this point of dispute, that Judge Robinson joined Judge Bork's opinion.

The structure of Judge Bork's opinion is particularly compelling here. On a difficult issue of statutory compelling here. On a difficult issue statutory interpretation, he goes first to the wording of the Act, then to its structure, then to its legislative history, and then to a practical consideration of the enforceability of alternative constructions.

5. International Brotherhood of Electrical Workers v. NRLB, 795 F.2d 150 (D.C. Cir. 1986). (NOT INCLUDED ON AFL-CIO LIST)

Judge Bork authored the unanimous opinion for the panel consisting of himself, Judge Scalia, and Senior Judge MacKinnon. The decision affirmed the NRLB's dismissal of a union's unfair labor practice complaint.

The company had for many years granted a Christmas bonus. At its last contract negotiation, the company requested a "zipper clause," containing an integration and a waiver. The integration clause stated that the entirety of the agreement between the two parties was contained in this written document. The union queried what other rights might thus no longer exist, the company refused to supply a list but said it meant absolutely all other agreements or understandings. The union wrote back expressing that it understood this but that it was entitled to a list nonetheless. The issue of the list was taken to the NLRB, but the General Counsel rejected the union's point of view.

Thereafter, the union signed the zipper clause. The contract contained no mention of a Christmas bonus. Later that year, the company unilaterally eliminated the Christmas bonus. The union alleged this was a breach of the employer's duty to bargain before changing terms or conditions of employment; the company pled the zipper clause. The ALJ found for the union, claiming that any waiver had to be clear and unmistakable The NLRB reversed, finding for the company because of the breadth of the integration part of the zipper clause.

In upholding the NLRB, Judge Bork relies upon the clearly expansive language of the integration clause, and the bargaining history. He holds that the question of waiver really is not at issue, hence the NLRB was correct in overturning the ALJ's decision. Waiver would be important only if some rights to a Christmas bonus remained; after the integration clause, they didn't.

COMMENT:

This is a straightforward case. The analysis is correct and well structured, relying first on the words of the agreement, then on the bargaining history. Two small points remain, one slightly troubling, one comforting. First, Judge Bork states he does not need to opine on the correct degree of deference to the Board since his interpretation of the contract is identical. This is a minor departure from the more correct practice of deferring to a fact finding by the NLRB. Second, Judge Bork does not reach in this case for the latent legal question: was the company under an obligation to provide the union with a list of extant agreements that it considered to be covered by the integration clause? This question was not properly presented in the appeal, but many courts would have reached out to decide it, since it is a matter of legal interest and would clearly control the outcome. Judge Bork resisted the temptation to reach out for an issue not presented, and that is commendable.

6. Meadows v. Palmer, 775 F.2d 1193 (D.C. Cir. 1985).

In an unusual structure, most of the majority opinion for this panel was written by Judge Mikva, joined by Judges Starr and Bork. Only the last portion was written by Judge Bork, joined by Judge Starr, and Judge Mikva dissented from that portion.

The issue on which Judge Bork wrote, therefore, is precisely the issue in controversy. The case involved the reassignment of a federal employee, without loss of grade or step. The employee alleged that the work was, nevertheless, substantially less in content and responsibility, thus constituting a de facto reduction in rank (although salary remained the same). Judge Bork, joined by Judge Starr, read the Civil Service regulations to require that rank be determined only by reference to numerical grade and actual organizational standing. Judge Mikva read the same regulations to allow reference to responsibility and job description. The regulation at issue reads:

> In law and the Commission's regulations, the term rank means something more than a numerical grade, or class, or level under a classification system or its equivalent in the Federal Wage System. Basically, it means an employee's relative standing in the agency's organizational structure, as determined by his official position assignment. Federal Personnel Manual Chapter 752.1, cited in 775 F.2d at 1200.

COMMENT:

On Judge Mikva's side of the issue stands one decided case, Fucik v. United States, 655 F.2d 1089 (Ct. Cl. 1981). In distinguishing Fucik, Judge Bork merely states that its "reasoning is contrary to the pertinent regulation and would involve courts in deciding the appropriate grades for particular jobs. We think it better not to follow that course." Judge Mikva argues that content of a job is a necessary part of assessing an employee's relative standing in the agency, as provided for in the Federal Personnel Manual.

Whereas Judge Bork is undoubtedly correct that judges ought not be involved in determining equivalence of job assignments, it is not an unreasonable inference that Congress allowed the Civil Service Commission (and its successors) to do so. Nor need the review be very detailed: one could simply look for gross differences in responsibility and job content, for instance. Then, if there were substantial evidence for the Commission's judgement, a reviewing court could simply affirm.

On Judge Bork's side of the argument is the wording of the regulation. While the first sentence promises to go beyond mere rank, the second sentence says exactly how far beyond mere rank one is to look: no farther than "official position assignment." Hence, I believe Judge Bork was correct that Fucik was wrongly decided. However, given the force of Judge Mikva's reasoning, more elaboration of Judge Bork's majority opinion would surely have been desirable.

7. Prill v. National Labor Relations Board, 755 F.2d 941 (D.C. Cir.), cert. denied, 106 S. Ct. 313, 352 (1985).

The majority opinion in this case was authored by Judge Edwards and concurred in by Judge Wald. Judge Bork dissented. The majority opinion remanded a decision by the NLRB that reversed a recent position of the Board. The majority's basis for remanding was that the Board appeared to believe its new position was mandated by the Act, rather than simply a position more in tune with the Board's expert opinion of how best the Act should be enforced. Since the majority believed the Act did not mandate the new view, SEC v. Chenery Corp., 318 U.S. 80 (1943), required a remand.

The legal issue dealt with what constitutes concerted activity for purposes of section 7 of the National Labor Relations Act. Originally, the Board had required some evidence of activity undertaken on behalf of more than the employee himself of herself. In 1975, the Board altered its position to say that concerted activity could be presumed whenever an employee exercised a right guaranteed under law to protect safety. In the present case, the Board returned to a standard requiring some evidence that the conduct was engaged in with or on the authority of other employees.

Judge Bork dissented. He believed that the Board had not said the statute compelled this outcome, only that it was consistent with the statute. And even if the Board had so said, remand was unnecessary since the error was harmless. The activity at issue here could never be considered concerted under any reasonable interpretation of the statute.

The conduct here involved an employee truck driver who, after numerous mishaps with a particular tractor, refused to drive it any more, or to have it come back due to defective linkage and breaks. He was discharged for his complaints and refusal. There was evidence the driver knew another driver had similarly complained about this tractor.

COMMENT:

There is little doubt that the Board can change its position on what constitutes concerted activity. The majority admits this:

otherwise, the interpretation of the law could not have changed in 1975. The entire issue in the case turns on whether that is what the Board did.

Identical language of the Board's decision is debated between the majority and dissent. My own reading is that the Board held that the statute only required a finding that activity be both concerted and protected. With this no one disagrees. The majority interprets the following excerpt to mean that the Board believed the statute compelled its own interpretation that proof of common or representative action was needed.

"For all the foregoing reasons, we are persuaded that the per se standard of concerted activity is at odds with the Act. The Board and courts always considered, first, whether the activity is concerted, and only then, whether it is protected. This approach is mandated by the statute itself, which requires that an activity be both 'concerted' and 'protected.' A Board finding that a particular form of individual activity warrants group support is not a sufficient basis for labeling that activity 'concerted' within the meaning of section 7.

"Based on the foregoing analysis, we hold that the concept of concerted activity first enunciated in Allelulia does not comport with the principles inherent in Section 7 of the Act. We rely, instead, upon the 'objective' standard of concerted activity--the standard on which the Board and courts relied before Allelulia. Allelulia and its progeny."

115 LRRM at 1028-1029, cited in Prill, 755 F.2d at 949-950.

It is scarcely likely that any administrative agency would ever reverse its view of a legal matter without saying that the new interpretation was more in keeping with its governing statute. That is all I read the NLRB to have done in this case. Hence, I find Judge Bork's dissent to be persuasive on its first point.

A second point of difference exists on whether the rule now adopted by the NLRB actually was the rule before Allelulia or not. In NLRB v. City Disposal Systems, 104 S. Ct. 1505 (1984), the Court upheld a presumption of concerted activity when a single employee asserts rights granted under a collective bargaining relationship. Both majority and dissent grapple with this case.

The majority argues that this case prevents a return to the pure test of evidence of acting on authority for others. Judge Bork argues that the pre-Allelulia standard never excluded such a presumption, since Allelulia did not deal with collective bargaining rights. Undeniably, City Disposal Systems has had some effect on the law. Hence, the Board (and Judge Bork) may have been too glib in saying all the Board was doing was returning to the pre-Allelulia standard. But Judge Bork carries the day in holding at that this is surely no grounds for remand since the present case does not implicate collective bargaining rights.

The last point is whether the action at issue here could ever be held to be concerted. Judge Bork holds no; thus, any Chenery error by the NLRB would be harmless, error. But I believe Judge Bork was in error.

If a presumption is permitted without proof of actual collaboration in one area (collective bargaining rights), it could be permitted in another area. The logical leap in the first case is that the exercise of bargaining rights will encourage the bargaining process. So too, it seems to me, the exercise of safety rights by one employee could encourage it by others. It may not be that OSHA explicitly encourages collective activity, but the encouraging effect is as inferable in the one case as in the other. Hence, I would fault Judge Bork's analysis on this issue.

Overall, the case appears as a rather tedious attempt to slow down the NLRB from changing its decision law. The particular device used here, Chenery, was really not implicated, and Judge Bork deserves high marks for establishing that quite clearly. Also apparent in this opinion is a clear deference to the expert agency, lacking in some of Judge Bork's other labor opinions.

8. Amalgamated Clothing & Textile Workers v. NLRB, 736 F.2d 1559 (D.C. Cir. 1984). (NOT INCLUDED ON AFL-CIO LIST).

The opinion for the court was written by Judge Wright, joined by Judge Mikva. Judge Bork concurred separately. The court's decision upheld the NLRB determination that a representation election in favor of the union had been valid and the Board's choice of remedies for management's failure to bargain.

Judge Bork's separate concurrence states no disagreement with the majority's holding. He raises only two points: (1) the majority announced, as though it were doctrine, the debatable proposition that delay in an election always favors management; and (2) the majority did not need to criticize the 4th Circuit's opinion in PPG Industries, Inc. v. NLRB, 671 F.2d 817 (4th Cir. 1982).

COMMENT:

On the first point, it is true that "lore" holds that delays favor management. Still, Judge Bork's warning is a valid one, that a decision after delay should not carry any presumption of invalidity. It could well be a more thoughtful decision. It is a useful contribution to prevent "lore" from becoming governing principles of law.

On the second point, Judge Bork is again correct. There was ample evidence to sustain the Board's finding that certain employee conduct was not attributable to the union. The majority did go out of its way to state its disagreement with a fourth circuit opinion which held that conduct sufficient to constitute an employee an agent for management would be sufficient to constitute an employee an agent for the union. The majority states this is not so, since management has less need of agents in a plant than does a union attempting organizing. Judge Bork does not opine on this proposition; he only notes it is not necessary to reach it to decide the case. In this he is quite right.

This is not a particularly instructive opinion. Judge Bork joins the majority in upholding the Board on a rather unexceptional set of facts, but uses a separate concurrence to chide Judge Wright for a bit of obiter dicta.

9. Yellow Taxi Co. of Minneapolis v. NLRB, 721 F.2d 366 (D.C. Cir. 1983). (NOT INCLUDED ON AFL-CIO LIST).

Senior Judge MacKinnon authored the opinion for this panel including himself, Judge Wright and Judge Bork. Both Judge Wright and Judge Bork wrote short concurrences. The decision reversed the NLRB's determination that taxicab drivers under lease were employees for the purposes of the national Labor Relations Act.

The basis for Judge Bork's separate concurrence was simply to urge restraint in Judge MacKinnon's criticism of the NRLB. The Board had, quite evidently, chosen to ignore controlling circuit court precedent in reaching the decision that it did. The company had sought a contempt citation against the Board, or some other sanction. The court refused such relief, but the majority opinion excoriated the Board's attitude toward circuit court precedent Judge Bork states that he has not studied with Board's conduct sufficiently to agree or disagree with Judge MacKinnon, But he does agree that the board was being disingenuous with the facts in this case.

COMMENT:

This case sheds only little light on Judge Bork's labor law philosophy. What can be extracted is that Judge Bork recognizes that an administration agency may disagree with circuit court precedent, though he does ally himself with the conclusion that the Board went too far in this instance.

10. York v. Merit Systems Protection Board, 711 F.2d 401 (D.C. Cir. 1983).

Judge Bork wrote the majority opinion in this case on behalf of himself and Judge Wright. Judge MacKinnon dissented. The majority opinion overturned the decision of the Merit Systems Protection Board upholding the dismissal of an employee.

The legal issue dealt with the standards for reopening a MSPB decision. The MSPB had originally decided in favor of the employee, mitigating his punishment for forgery and theft from dismissal to a 30-day suspension. The Office of Personnel Management petitioned for rehearing on several grounds, and the MSPB granted rehearing without specifying on which grounds it had acted. The MSPB then reinstated the termination order.

COMMENT:

The majority opinion is an unexceptional application of administrative law principles in the labor context. While several independent bases for reopening were available, and potentially justifiable, the reviewing court was not able to perform its function without knowing on which ground the agency had acted. Should the agency choose the position that it can reopen without giving any reason, that would present a contestable issue of administrative law; but Judge Bork considered it wiser not to rule on that issue unless it were clear that they agency had actually pitched its authority under it.

The dissent by Judge MacKinnon is unpersuasive here. He would draw the inference that the MSPB reopened because it thought its first decision was wrong. That would be an adequate basis; but it remains true that the MSPB might not have been acting on that premise.

The opinion offers an insight into Judge Bork's desire to hold administrative agency's tightly to an obligation of explaining their decisions; here, with an outcome favorable to the employee.

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ANALYSIS OF JUDGE ROBERT BORK'S OPINIONS ON STANDING

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A judge's views on standing -- whether the party before the court "has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy"[1] --are apt to be central to his constitutional philosophy. As Justice Powell has written, "[T]he question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. In both dimensions it is founded in concern about the proper -- and properly limited -- role of the court in a democratic society."[2] Standing is one of the crucial elements that differentiates the judicial from the legislative domain. It therefore implicates the separation of powers, which is, as Senator Moynihan has recognized, "the central principle of the Constitution."[3]

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[1] Sierra Club v. Morton, 405 U.S. 727, 731 (1972).

[2] Warth v. Seldin, 422 U.S. 490, 498 (1975).

[3] See, Daniel Patrick Moynihan, The "New Science of Politics" and the Old Art of Government, 86 The Public Interest 22, 23
(footnote continued)

Worries have been expressed, for example, by James Reston and Anthony Lewis in the op-ed pages of the New York Times, that Judge Bork's views on standing may be too restrictive, denying access to the courts where access ought to be allowed. It is perfectly proper to inquire whether a judicial nominee's views on adjudication are so restrictive that they might deprive an aggrieved person of relief to which he was entitled. But a serious question demands a serious methodology, and not the scatter-shot snippet here, snippet there criticism to which Judge Bork has been unfairly subjected. A judge is entitled to be judged by his reasons. Judge Bork has written a number of opinions[4] on the subject of standing, three of which are

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(1987).

As Antonin Scalia observed, "no less than five of the Federalist Papers [Nos. 47-49 (Madison), and 50-51 (Madison or Hamilton)] were devoted to the demonstration that the principle [of separation of powers] was adequately observed in the proposed Constitution." See The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk Law Review 881 (1983).

[4] E.g., Haitian Refugee Center v. Gracey, 809 F.2d 794 (D.C. Cir. 1987); Telecommunications Research & Action Center v. Allnet Communications Services, Inc., 806 F.2d 1093, (D.C. Cir. 1986) (Bork, J., concurring); Northwest Airlines, Inc. v. F.A.A., 795 F.2d 195 (D.C. Cir. 1986); Barnes v. Kline, 759 F.2d 21, (D.C. Cir. 1985) (Bork, J., dissenting, vacated as moot sub nom., U.S. ___); Crockett v. Reagan, 720 F.2d 1355, (D.C. Cir. 1983) (Bork, J., concurring); Vander Jagt v. O'Neill, 699 F.2d 1166, (D.C. Cir. 1983) (Bork, J., concurring).

sustained arguments concerning various aspects of the doctrine. To appreciate Judge Bork's views on the subject, one must, as Learned Hand remarked, "take the trouble to understand."

Judge Bork's most important contribution to the discussion of standing doctrine is to be found in his separate opinions in two cases involving efforts by members of Congress to use the courts to challenge the action of the executive branch or other members of Congress on the theory that these officers had diminished their effectiveness as legislators. The idea that members of Congress might have standing in such circumstances is a constitutional novelty, peculiar to the D.C. Circuit and dating only to 1974.[5] In Vander Jagt v. O'Neill,[6] Republican members of the House of Representatives brought a lawsuit complaining that their political influence had been wrongfully diluted by the majority Democrats, who allegedly had allocated disproportionately few committee and subcommittee seats to Republican members. The Court of Appeals held that federal courts could properly assert jurisdiction over such a complaint, but that in the exercise of what was called "remedial" or "equitable" discretion, the court would refuse to decide the question.

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[5] Kennedy v. Sampson, 511 F.2d 430 (1974) (upholding the right of a United States Senator to challenge the President's use of the pocket veto). The Supreme Court has never passed on this standing question.

[6] 699 F.2d 1166.

Judge Bork agreed that the complaint should be dismissed, but wrote separately to argue that the proper basis for doing so was not the "discretion" of the court but rather the failure of the plaintiffs to establish their standing to maintain the action.[7] In a lengthy, scholarly opinion, Judge Bork explained the complexities of the Supreme Court's developing standing doctrine. In order to be a "fit" person to try a claim, a litigant must have a "personal stake in the outcome of the controversy,"[8] which in turn requires that there be an "injury in fact,"[9] sometimes called a "judicially cognizable injury."[10]

But what is a "judicially cognizable injury"? Courts may take cognizance only of injuries of certain types," wrote Judge Bork, "and the limitations are often defined less by the reality of the litigant's 'adverseness' than by the courts' view of the legitimate boundaries of their own power."[11] It would be a mistake, Judge Bork argued, for courts to try to umpire the internal processes of the Congress, short, at least, of "a complete nullification" of a Representative's voting rights in contravention of "an objective standard in the Constitution, statutes or congressional house rules, by which disenfranchisement can be shown."[12] If courts attempt to assure intramural equity in the Congress, inevitably the judicial and legislative branches would be drawn into what Justice Powell called "repeated and essentially head-on confrontations . . . [which] will not in the long run, be beneficial to either.'"[13]

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[7] It should be noticed in passing that Judge Bork's result in this case cannot be squared with criticisms that have lately been heard against him that he is a partisan or result-oriented judge.

[8] Baker v. Carr, 369 U.S. 186, 204 (1962).

[9] See, Riegle V. Federal Open Market Committee, 656 F.2d 973, cert. denied, 454 U.S. 1082 (1981).

[10] Metcalf v. National Petroleum Council, 553 F.2d 176, 187 (D.C. Cir. 1977).

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[11] 699 F.2d at 1177.

[12] See, Goldwater v. Carter, 617 F.2d 697, 702 (D.C. Cir.), vacated on other grounds, 444 U.S. 996 (1979). Judge Bork's opinion in Vander Jagt argued that the court should have adhered to what he took to be the law of the circuit as established in Goldwater. It was unnecessary (and therefore inappropriate) to go further and inquire "whether a less permissive rule might be preferable." 699 F.2d at 1180.

In a subsequent case, Judge Bork concluded that this further inquiry was necessary and found the line drawn in Goldwater untenable: "not even the Goldwater 'nullification' test is adequate to the standing inquiry. When the interest sought to be asserted is one of government power, there can be no congressional standing, however confined." Barnes v. Kline, 759 F.2d at 68 n.18 (D.C. Cir. 1985) (Bork, J., dissenting).

[13] Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474 (1982) (quoting United States v. Richardson, 418 U.S. 166 188 (1974)).

Judge Bork emphasized that he and the Vander Jagt majority parted company over the role of federal courts in our government."[14] "My colleagues' disinclination to rest this case upon a jurisdictional ground -- whether that of standing or political question -- rests squarely upon the erroneous notion . . . that there must be judicial power in all cases and that doctrines must not be adopted that frustrate that power."[15]

In Barnes v. Kline,[16] Judge Bork explained why he found that theory of judicial power to be inconsistent with democratic principles.

> "Standing" is one of the concepts courts have evolved to limit their jurisdiction and hence to preserve the separation of powers. A critical aspect of the idea of standing is the definition of the interests that courts are willing to protect through adjudication. A person may have interest in receiving money supposedly due him under law. Courts routinely regard an injury to that interest as conferring upon that person standing to litigate. Another person may have an equally intensely felt interest in the proper constitutional performance of the United States government. Courts have routinely regarded injury to that interest as not conferring standing to litigate. The difference between the two situations is not the reality or intensity of the injuries felt but a perception that according standing in the latter case would so enhance the power of courts as to make them the dominant branch of the government. There would be no issue of

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[14] 699 F.2d at 1182.

[15] Id. at 1184.

[16] 759 F.2d 21. Judge Bork's opinion rightly emphasized the novelty of the D.C. Circuit's "members have standing" doctrine, which first appeared in the cases 187 years after the adoption of the Constitution.

> governance that could not at once be brought into the federal courts for conclusive disposition. Every time the court expands the definition of standing, the definition of the interests it is willing to protect through adjudication, the area of judicial dominance grows and the area of democratic rule contracts.[17]

Barnes involved the challenge by members of the Senate and House of Representatives of the President's asserted right to "pocket veto" certain legislation during a sine die, intersession adjournment of the Congress. As Judge Bork noted, however, the principle that gives members of Congress standing to challenge actions by other branches that assertedly impinge on congressional prerogatives must be a subset of a much larger power.

> This rationale would also confer standing upon states or their legislators, executives' or judges to sue various branches of the federal government. Indeed, no reason appears why the power or duty being vindicated must derive from the Constitution. One would think a legal interest created by statute or regulation would suffice to confer standing upon an agency or official who thought that interest had been invaded.[18]

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[17] Id. at 44.

[18] Id.

Where would the exercise of such a power stop? Indeed, probably it should not stop -- unless one believes that if courts allowed themselves such a power, the basic question of political science -- who governs?[19] -- might have to be answered in a way that would embarrass a self-respecting democracy.

It hardly requires an ultra-fastidious sensibility to perceive the possibility that judicial review of this character might be in tension with democratic practice and theory. Every judge on the D.C. Circuit who has had to face the problem has recognized it. The court has always appreciated that the "members have standing" doctrine is constitutionally ticklish. In most cases, it has sought refuge from the problem by the use of a questionable doctrinal expedient. Always pressing its claim to possess Article III jurisdiction over constitutional challenges brought by members of Congress, the court also claims a power, of no specific pedigree, which it calls "remedial" or "equitable" discretion, to decline to give judgment where doing so might be delicate because of the separation of powers.[20]

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[19] Robert A. Dahl, Who Governs? Democracy and Power in an American City (1961).

[20] See, e.g., Riegle v. Federal Open Market Committee, 656 F.2d 873; Moore v. U.S. House of Representatives, 733 F.2d 946 (1984) (Scalia, J., concurring); cert. denied, 469 U.S. 1106 (1985).

Judge Bork observed the longstanding authority for the proposition that federal courts must decide justiciable cases over which they have jurisdiction. 759 F.2d at 59. As he observed, in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404

(footnote continued)

It has been said that Judge Bork's view of standing are out of the main channel of doctrinal development. This is incorrect. His views are in close accord with those of judges of many different ideologies -- Justice Frankfurter, Roberts, Black, Douglas,[21] and Scalia,[22] and Judge J. Skelley Wright.[23]

In particular, Judge Bork's views on standing have been closely identified with those of Justice Lewis Powell,[24] whom he has been nominated to replace on the Supreme Court. This identity of views will be an important feature of the public debate on Judge Bork's confirmation, and deserves to be shown in some detail. In Flast v. Cohen,[25] Chief Justice Warren set forth the controversial view that, although other aspects of the case-or-controversy doctrine might serve to limit the role of the

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(1821), Chief Justice Marshall wrote: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."

As then-Circuit Judge Scalia scathingly wrote: "Had Justice Marshall only known the Turkish delights of remedial discretion [in Marbury v. Madison], he would have realized that this was not the unavoidable duty of the court at all ['to say what the law is.']" Judicial review of legislation might never have been invented.

[21] Coleman v. Miller, 307 U.S. 433, (1939) (Frankfurter, J., dissenting).

[22] 733 F.2d 946.

[23] See, Goldwater v. Carter, 617 F.2d 697.

[24] With due respect, Mr. Anthony Lewis's implication to the contrary in his August 27, 1987 column, is mistaken.

[25] 392 U.S. 83 (1968).

federal judiciary, the issue of standing "does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government."[26] According to Flast standing was about whether the lawsuit would be "presented in an adversary context and in a form historically viewed as capable of judicial resolution."[27]

Justice Powell was a forceful critic of this attempt to divorce standing doctrine from separation-of-powers concerns. In his concurring opinion in United States v. Richardson,[28] Justice Powell offered a powerful counterargument:

> Relaxation of standing requirements is directly related to the expansion of judicial power. It seems to me inescapable that allowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government. I also believe that repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the later may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches.[29]

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[26] Id. at 100.

[27] Id. at 101.

[28] 418 U.S. 166 (1974) (Powell, J., concurring).

[29] Id. at 188.

> [W]e risk a progressive impairment of the effectiveness of the federal courts if their limited resources are diverted increasingly from their historic role to the resolution of public-interest suits brought by litigants who cannot distinguish themselves from all taxpayers or all citizens. The irreplaceable value of the power [of judicial review] articulated by Mr. Chief Justice Marshall lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal government in the final analysis rests.[30]

Justice Powell's argument was immediately taken up by Chief Justice Burger in Schlesinger v. Reservists Committee to Stop the War,[31] "To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract," wrote the Chief Justice for the Court, "would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'"[32]

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[30] Id. at 192.

[31] 418 U.S. 208 (1974).

[32] Id. at 222.

The following year, Justice Powell's opinion for the Court in Warth v. Seldin[33] asserted that both the constitutional and "prudential" standing requirements are "founded in concern about the proper -- and properly limited -- role of the courts in a democratic society."[34] In similar vein, Justice Powell's opinion for the Court in Simon v. Eastern Kentucky Welfare Rights Organization[35] pointedly remarked that "[a] federal court cannot ignore this [standing] requirement without overstepping its assigned role in our system of adjudicating only actual cases and controversies."[36]

In Valley Forge Christian College v. Americans United for Separation of Church and State,[37] Justice Rehnquist, writing for the Court, repeated Justice Powell's earlier-expressed themes:[38] "Proper regard for the complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal

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[33] 422 U.S. 490 (1975).

[34] Id. at 498.

[35] 426 U.S. 26 (1976).

[36] Id. at 39.

[37] 454 U.S. 464 (1982).

[38] As Professor Abram Chayes observed, Valley Forge showed that Justice Powell had "persuaded the Court to adopt his view, and perhaps a little more." Public Law Litigation and the Burger Court, 96 Harvard Law Review 4, 12 (1982).

Government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury."[39]

It is in light of these developments in the Supreme Court that Judge Bork's opinion in Vander Jagt must be evaluated. Judge Bork relied on Valley Forge and on Justice Powell's leading standing opinions to argue that on separation-of-powers grounds, Republican members of the House of Representatives should not be able to summon the federal courts into their internecine war with the majority Democratic party. The majority of the D.C. Circuit, however, maintained that notwithstanding developments in the Supreme Court's jurisprudence since the Circuit's seminal case of Kennedy v. Sampson, Republican members of the House did have standing to assert a claim, which, however, the court would decline to entertain because of "concerns" about the separation of powers.

By asserting jurisdiction and then refusing to decide the case, Judge Bork argued in Vander Jagt, the court assumes "an unfettered discretion to hear a case or not,"[40] "an unconfined judicial power to decide or not to decide,"[41] thus indulging in

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[39] 454 U.S. at 474.

[40] 699 F.2d at 1184.

[41] Id. at 1185.

"rudderless adjudication."[42] Characteristically, he has said that if the power cannot be exercised in a principled way, the judiciary should not exercise it at all.[43] In Judge Bork's book, the unprincipled exercise of judicial power counts as a serious evil -- as serious as the unprincipled refusal to exercise the judicial power in a case where its use is required by the implications and traditions of the Constitution. This has always been, and remains, the overriding theme of his work.[44]

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[42] Id. at 1184.

[43] Indeed, Judge Bork's objection here cuts even deeper, for he considers that even if the judiciary could exercise power in a principled way in such cases, it would be destructive for it to do so:

> Our democracy requires a mixture of both principle and expediency. . . . If the federal courts can routinely be brought in to pronounce constitutional principle every time . . . the federal and the state governments contend, then we will indeed become a "principle-ridden" in fact a judge-ridden, society.

759 F.2d at 55.

[44] See, for example, Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Indiana Law Journal 1, 2 (1971):

> The requirement that the [Supreme] Court be principled arises from the seeming anomaly of judicial supremacy in a democratic society. If the judiciary really is supreme, able to rule when and as it sees fit, the society is not democratic. The anomaly is dissipated, however, by the model of government embodied in the structure of the Constitution, a model upon which popular consent to limited government by the Supreme Court also rests.

The Supreme Court has since indicated that Judge Bork, and not the Vander Jagt majority, was correct about the relationship between standing and the separation of powers. In Allen v. Wright,[45] Justice O'Connor, writing for the Court (and joined by Justice Powell), stated that "the law of Art. III standing is built on a single basic idea -- the idea of separation of powers."[46] In reaching this conclusion, Justice O'Connor quoted at length from Judge Bork's opinion in Vander Jagt:

> 'All of the [case-or-controversy] doctrines that cluster about Article III -- not only standing but mootness, ripeness, political question, and the like -- relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.'[47]

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[45] 468 U.S. 737 (1984).

[46] Id. at 752.

[47] Id. at 750, quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring).

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ROBERT H. BORK's CIVIL RIGHTS RECORD

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Robert H. Bork's civil rights record has attracted critical comment from several organizations during the past month. These groups have charged that Bork is insensitive to the interests of racial minorities and women, and that his interpretations of the civil rights laws are outside the mainstream of contemporary thought. These charges are typically based on a limited, often superficial analysis of a small number of Bork's positions.

This essay attempts to more thoroughly and intensively examine Judge Bork's entire civil rights record. It concludes that, while Judge Bork is a judicial conservative, he has consistently taken civil rights positions that are well within the mainstream of contemporary American legal thought. As described in this essay, Bork has emphatically condemned racial discrimination of all forms; as Solicitor General, he has argued for broad interpretation and enforcement of the federal civil rights laws; and, in cases raising substantive issues of civil rights law, he has almost always voted for civil rights claimants on the Court of Appeals. There are, to be sure, instances where Bork has opposed positions taken by civil rights groups. In all these cases, however, Bork's views were carefully reasoned and have been widely shared by other moderate or liberal commentators and by respected Justices on the Supreme Court.

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I. RACE DISCRIMINATION

Judge Bork has emphatically condemned racial discrimination of all forms. From the beginning of his career, Bork emphasized the "ugliness of racism" and his own "abhorrence of racial discrimination." Likewise, Bork has always vigorously espoused his view that the Fourteenth Amendment contains "a core value of racial equality that the Court should elaborate into a clear principle and enforce against hostile official action." [2]

A. Brown v. Board of Education

Judge Bork's position on Brown v. Board of Education[3], reflects the strength of his convictions about racial equality. Bork has consistently praised Brown as one of the Court's "most splendid vindications of human freedom."[4] He has said that

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[2] "The Supreme Court Needs A New Philosophy," Fortune, Dec. 1968, at 138,141 [hereinafter cited as "The Supreme Court"].

[3] 347 U.S. 483 (1954).

[4] Bork, "A History of American Justice: A Review," American Educator 25 (Winter 1982). In the same article, Bork condemned the Dred Scott decision as a "terrible mistake."

Brown was "surely correct"[5] and has repeatedly defended the Warren Court's desegregation of schools and other public facilities. In Bork's words:

> "[O]ne thing the Court does know: [the Fourteenth Amendment] was intended to enforce a core idea of black equality against governmental discrimination. . . [T]he Court cannot decide that physical equality is important but psychological equality is not. Thus, the no-state-enforced discrimination rule of Brown must overturn and replace the separate-but-equal doctrine of Plessy v. Ferguson."[6]

Or, as Bork said recently, Brown was clearly correct because "it has become perfectly apparent that as a matter of fact separate is never going to be equal in the area of race."[7]

B. Views on Post-Brown Decisions

Bork has also made it clear that the Fourteenth Amendment provides broad protection against state-sponsored racial discrimination in all contexts. Thus, he has applauded the Court's desegregation of public facilities throughout the South following Brown.[8] Likewise, he has agreed with landmark civil

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[5] The Supreme Court at 141.

[6] Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 14-15 (1971) [hereinafter cited as "Neutral Principles"].

[7] The Constitution and the Courts: A Bicentennial Discussion Guide, League of Women Voters Education Fund, May 24, 1987.

[8] Id. at 13-15. Bork, The Constitutionality of the President's Busing Proposals 13 (1972), citing with approval, Mayor and City

[Footnote continued next page]

rights victories like Loving v. Virginia[9] and NAACP v. Alabama.[10] In these and other contexts, Bork has written that racial classifications are "invidious" and therefore require exacting governmental scrutiny.[11]

C. Civil Rights Record as Solicitor General

Judge Bork's commitment to the principle of racial equality is also reflected in the positions he took during his tenure as Solicitor General. As Solicitor General, Bork successfully argued the rights of racial minorities in a number of landmark civil rights decisions. In Runyon v. McCrary, Bork's brief

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Council of Baltimore v. Dawson, 350 U.S. 877 (1955) (prohibiting segregation on public vehicles); Gayle v. Brawder, 352 U.S. 903 (1956) (prohibiting segregation on buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (prohibiting segregation on golf courses); New Orleans City Park Imp. Assn v. Detiege, 358 U.A. 54 (1958) (prohibiting segregation in parks).

[9] 388 U.S. 1 (1967). Loving struck down a state law forbidding interracial marriages. Bork has written that "[t]he equal protection ruling followed from prior cases and the historical purpose of the clause." Dronenburg v. Zech, 741 F.2d 1388, 1393 (D.C. Cir. 1983).

[10] 357 U.S. 449 (1958). In NAACP v. Alabama, the Court held that Alabama could not constitutionally force disclosures of a civil rights organization's membership lists because of the chilling effect this would have on the group's political activities. Bork has written that the decision was correctly decided and effectuated "a value central to the first Amendment." Bork, Neutral Principles at 8.

[11] See pp. 31-33 infra; Bork, The Unpersuasive Bakke Decision, The Wall Street Journal, at 8 (July 21, 1978); Dronenburg v. Zech, 741 F.2d 1388, 1393 (D.C. Cir. 1984).

successfully argued that section 1981 of the federal civil rights laws applied to racially discriminatory agreements between private persons.[12] In Virginia v. United States, Bork successfully defended the denial of Virginia's request to be exempted from the Voting Rights Act.[13] In United Jewish Organization v. Carey, Bork persuaded the Court that the Fourteenth and fifteenth Amendments permitted a race-conscious electoral redistricting scheme which was deliberately drawn to enhance minority voting strength.[14] In Lau v. Nichols, Bork persuaded the Court that California's failure to provide English language instruction to students of Asian ancestry violated the Civil Rights Act.[15] And Franks v. Bowman Transportation Co., and Albemarle Paper Co. v. Moody, Bork's brief successfully argued for broad civil rights remedies under Title VII.[16]

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[12] 427 U.S. 160 (1976). Justices White and Rehnquist dissented from the Court's decision in McCrary. They refused to accept Bork's argument and concluded that section 1981 did not apply to a private school that denied admission to racial minorities. Justices Powell and Stevens concurred, but also expressed grave doubts about the correctness of the Court's decision.

[13] 420 U.S. 901 (1975). Chief Justice Burger and Justices Rehnquist and Powell dissented from the Court's decision in Virginia v. U.S. upholding Bork's argument.

[14] 430 U.S. 144 (1977). Chief Justice Burger dissented from the Court's decision upholding New york's race-conscious redistricting in UJO.

[15] 414 U.S. 563 (1974).

[16] 424 U.S. 747 (1976); 422 U.S. 405 (1975).

Solicitor General Bork also urged positions on behalf of racial minorities that a majority of the Court found too sympathetic to civil rights interests. In Beer v. United States, the Court rejected Bork's argument that a New Orleans reapportionment plan diluted minority voting strength.[17] In Teamsters v. United States, Bork's brief unsuccessfully argued that a race-neutral seniority system violated Title VII by perpetuating the effects of prior racial discrimination.[18] In Washington v. Davis,[19] Bork's brief unsuccessfully argued that Title VII prohibited an employment test that had discriminatory effects.[20] And in Pasadena Board of Education v. Spangler, the Court refused to accept Bork's argument that a school district could be judicially required on an ongoing basis to achieve more perfect racial balances.[21]

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[17] 425 U.S. 130 (1976). Justices Stewart, Burger, Blackmun, and Rehnquist rejected Bork's view in Beer. Justices Brennan, White and Marshall dissented, accepting the position urged by Bork.

[18] 431 U.S. 324 (1977). Teamsters involved several issues. A unanimous Court agreed with Bork's argument that statistical evidence showed a system-wide pattern of discrimination against racial minorities. But Justices Stewart, Burger, White, Blackmun, Powell, Rehnquist, and Stevens rejected Bork's argument that the company and union's seniority system violated Title VII by perpetuating past discrimination. Justices Marshall and Brennan partially dissented, adopting the application of Title VII to seniority systems that Bork argued.

[19] 426 U.S. 229 (1976).

[20] 418 U.S. 717 (1974).

[21] 431 U.S. 324 (1977). Justices Rehnquist, Burger, Stewart, White, Blackmun and Powell joined in rejecting Bork's argument in Spangler. Justices Marshall and Brennan dissented.

Despite all this, it would be incorrect to suggest that Bork always took positions as Solicitor General identical with those urged by civil rights groups. In Milliken v. Bradley, Bork argued for limiting school desegregation relief in some instances.[22] He urged that judicial remedial orders be limited to school districts in which civil rights violations had occurred or in which the racial composition of schools had been substantially affected by discrimination in other districts. The Supreme Court accepted Bork's position.[23]

In City of Richmond v. United States, Bork argued that the annexation of a largely white suburb, coupled with a change to single-member wards, did not have the purpose or effect of abridging voting rights protected by the Voting Rights Act. Bork relied on the fact that minority voting strength was fairly reflected in the post-annexation city. The Supreme Court substantially adopted Bork's view.[24]

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[22] 418 U.S. 717 (1974).

[23] Justices Burger, Stewart, Blackmun, Powell and Rehnquist agreed with Bork's position. Justices Douglas, White, Marshall and Brennan dissented. See also Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977). The Department of Justice took positions substantially the same as that in Milliken in cases both before and after Bork's tenure as Solicitor General. E.g., Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977). Where system-wide discrimination occurred, Bork supported system-wide remedies. E.g., Ferguson Reorganized School District R-Z v. United States, 423 U.S. 951 (1975); Bowen v. United States, 421 U.S. 929 (1975).

[24] 422 U.S. 358 (1975). Justices White, Burger, Stewart, Blackmun and Rehnquist agreed with Bork's position. Justices

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Civil rights groups would, of course, have preferred Bork to have taken different positions in Milliken and City of Richmond. Nonetheless, his views plainly were principled, moderate interpretations of the civil rights law; indeed, in both cases the Court substantially agreed with Bork's arguments. More important, these cases should not obscure Bork's overall record as Solicitor General. In addition to the cases described above, my rough count indicates that the Supreme Court decided 20 substantive civil rights cases during Bork's tenure as Solicitor General, that did not involve suits against the federal government.[25] Justice Brennan agreed with Bork in 16 of the 20 cases, while Justices Rehnquist and Burger agreed with Bork in only 8 cases. While statistics like this cannot provide a complete picture, they do support the proposition, developed from individual cases, that Bork sympathetically interpreted and vigorously enforced the civil rights laws as Solicitor General.

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Brennan, Douglas and Marshall dissented. Justice Powell was recused.

[25] As Solicitor General, Bork was, of course, called upon to represent the U.S. government against civil rights plaintiffs, as his predecessors and successor have also done. See Califano v. Goldfarb, 430 U.S. 199 (1977); Mathews v. Lucas, 427 U.S. 495 (1976); Mathews v. Diaz, 426 U.S. 67 (1976); Hampton v. Mow Sun Wong, 426 U.S. 88 (1976); Hills v. Gautreaux, 425 U.S. 284 (1976).

D. Court of Appeals Record

As a judge on the Court of Appeals, Bork's voting record in civil rights cases has solidly supported minority rights. Bork has voted for one or more civil rights claims in seven out of the nine decisions he has rendered involving substantive interpretations[26] of civil rights laws protecting minorities or women.[27] In the two cases where Bork rejected the plaintiff's claims, the Supreme Court later reversed the Court of Appeals and adopted Bork's position.[28] Bork's judicial voting record on civil rights issues simply does not support the charge that he is insensitive to minority interests; rather, he has tended to vote for civil rights plaintiffs, even in cases where this required a broad reading of the civil rights laws.

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[26] In two cases involving procedural rules for Title VII claims, Judge Bork joined opinions liberally interpreting the statutory period during which complaints may be brought. Jarell v. U.S. Postal Service, 753 F.2d 1088 (D.C. Cir. 1985); Nordell v. Heckler, 748 F.2d 417 (D.C. Cir. 1984).

[27] Palmer v. Schultz, 815 F.2d 84 (D.C. Cir. 1987); Laffey v. Northwest Airlines, Inc., 740 F.2d 1071 (D.C. Cir. 1984), cert. denied, 469 U.S. 1181 (1985); Ososky v. Wick, 704 F.2d 1264 (D.C. Cir. 1983); Emory v. Sec'y of Navy, 819 F.2d 291 (D.C. Cir. 1987); Ethnic Employees of Library of Congress v. Boorstein, 751 F.2d 1405 (D.C. Cir. 1984); City Council of Sumter County, South Carolina v. United States, 555 F. Supp. 694 (1983) and 596 F. Supp. 35 (1984); Cosgrove v. Smith, 697 F.2d 1125 (D.C. Cir. 1983).

[28] Paralyzed Veterans of America v. Civil Aeronautics Board, 752 F.2d 694, 725 (D.C. Cir. 1985) (Bork, J., dissenting), reversed Department of Transportation v. Paralyzed Veterans of America, 106 S.Ct. 2705 (1986); Vinson v. Taylor, 760 F.2d 1330 (D.C. Cir. 1985) (Bork, J., dissenting from denial of rehearing en banc), reversed, Meritor Savings Bank v. Vinson, 106 S.Ct. 2399 (1986). Vinson is discussed in detail at pp. 27-30 infra.

II. SEX DISCRIMINATION

Judge Bork has also afforded women the full protection of the federal civil rights laws. Although his record in this area is not as extensive as it is in the race discrimination field, Bork's general views can be developed from his record as Solicitor General and on the Court of Appeals. As Solicitor General, Bork's brief unsuccessfully argued in General Electric Co. v. Gilbert, that Title VII's prohibition against sex discrimination applied to discrimination of the basis of pregnancy.[29] His brief successfully argued in Corning Glass Works v. Brennan, that the Equal Pay Act forbad paying males higher wages for night shift position than females received for substantially similar day shift positions.[30]

Judge Bork's voting record on the Court of Appeals also reflects his commitment to enforcing prohibitions against sex discrimination. For example, Bork agreed in Ososky v. Wick, that the Equal Pay Act applied to promotions in the Foreign Service's merit system.[31] Bork also joined an opinion allowing proof of sex discrimination (including intentional discrimination) solely through statistical evidence.[32] Similarly, Bork joined (or authored) a per curiam opinion in Laffey v. Northwest Airlines, Inc., upholding substantial back pay awards for violations of the Equal Pay Act.[33] Finally, as discussed in detail below, Judge Bork's opinion in Cosgrove v. Smith, indicates that he will afford women substantial protection against sex discrimination under the Equal Protection Clause.[34]

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[29] 429 U.S. 125 (1976). Justices Rehnquist, Burger, Stewart, White and Powell rejected Bork's argument, with concurrences from Justices Stewart and Blackmun. Justices Brennan, Marshall and Stevens accepted Bork's position.

[30] 417 U.S. 188 (1974). Justices Marshall, Douglas, Brennan, White and Powell upheld Bork's position; Justices Burger, Blackmun and Rehnquist dissented.

[31] 794 F.2d 1264 (D. C. Cir. 1984).

III. CRITICISMS OF JUDGE BORK'S CIVIL RIGHTS RECORD

Despite Bork's consistent condemnation of racial discrimination, his vigorous advocacy as Solicitor General for broad civil rights protections for minorities and women, and his solid civil rights voting record on the Court of Appeals, some opponents have criticized the Judge's civil rights positions. Emblematic of this criticism is Renata Adler's assertion is that Bork "find[s] in *any* decision that strikes down state enforcement of racial discrimination an unconscionable instrusion on some right or 'freedom' to discriminate on racial grounds."[35] These criticisms are typically superficial or misleading and ignore the substantial contributions to the rights of minorities and women that Judge Bork has made.

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[32] Palmer v. Schultz, 815 F.2d 84 (D.C. Cir. 1987) (Wald, Bork, H. Greene).

[33] 740 F.2d 1071 (D.C. C. 1984).

[34] 697 F.2d 1125, 1146-47 (D.C. Cir. 1983).

[35] R. Adler, Coup at the Court, The New Republic 37, 40 (September 14 & 21, 1987) (emphasis in original).

A. Shelley v. Kraemer

Bork's opponents have frequently cited his criticism of Shelley v. Kraemer, to support charges of racial insensitivity.[36] This criticism cannot survive fair-minded scrutiny.

In Shelley v. Kraemer, the Supreme Court held that the Equal Protection Clause forbad a state court from enforcing a racially discriminatory clause in a private land deed.[37] The Court's decision was politically and morally satisfying. Nonetheless, many academic commentators and public figures have been unable to reconcile the Shelley rationale with the Fourteenth Amendment's "state action" requirement.[38] As Bork wrote in 1971, Shelley's reasoning "converts an Amendment whose text and history clearly show it be to aimed only at governmental discrimination into a sweeping prohibition of private discrimination." (Emphasis added.)

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[36] E.g., ACLU, at 11; Adler, at 40-42.

[37] 334 U.S. 1 (1948).

[38] It is, of course, elementary that the Fourteenth Amendment only applies to the actions of the states or their instrumentalities. See L. Tribe, American Constitutional Law 1154 et seq. (1979); J. Nowak, R. Rotunda, J. Young, Constitutional Law section 12.1 (1986).

Bork's view that Shelley's rationale was overbroad has been shared by numerous constitutional scholars of all ideological persuasions.[39] Similarly, the Supreme Court itself has refused to follow Shelley's rationale in subsequent cases.[40] Finally, the practical import of Shelley has long since been severely confined. The enactment of Title VIII and the Court's interpretation of section 1981 have prohibited racial discrimination in a wide range of private agreements -- thus making it unnecessary to rely on the Fourteenth Amendment. Indeed, as described earlier, it was Solicitor Bork who successfully argued in Runyon v. McCrary, that section 1981 applied to racially discriminatory private agreements.[41]

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[39] Professor Lawrence Tribe has explained that "to contemporary commentators, Shelley appear[s] as [a] highly controversial decision" which "consistently applied, would require individuals to conform their private agreements to constitutional standards." L. Tribe. American Constitutional Law 1156 (1979). See also Pollak, Racial Discrimination and Judicial Integrity, 108 U. Pa. L. Rev. 1, 12-18 (1959); van Alstyne & Karst, State Action, 14 Stan. L. Rev. 3, 44-47 (1961); Choper, Thoughts on State Action, 1979 Wash. U.L.Q. 757, 762; Wechsler, Toward Neutral Principles of Constitutional Law, in Principles, Politics and Fundamental Law 3, 47 (1961); G. Gunther, Constitutional Law 879-80 (1985) ("The efforts to find principled limits on the broadest implications of Shelley have produced extensive commentary on and off the Court.").

[40] See Evans v. Abney, 396 U.S. 435 (1970); Lugar v. Edmonson, 457 U.S. 922 (1982); Flagg Bros. v. Brooks, 436 U.S. 149 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). See R. Kluger, Simple Justice 528 (1976) (Shelley "had no lasting impact").

[41] 427 U.S. 160 (1976).

B. Reapportionment

Opponents have also faulted Bork's views on the Supreme Court's reapportionment decisions.[42] Unlike some respected, mainstream thinkers,[43] Bork has consistently taken the position that was correct in holding that reapportionment decisions are justiciable in federal court.[44] But Bork also has taken the position that the Constitution does not dictate the "one-man, one-vote" rule adopted in Reynolds v. Sims.[45] In doing so, Bork echoes the view of Justices Harlan, Stewart and Clark:[46]

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[42] ACLU, at 14.

[43] Justices Harlan and Frankfurter vigorously dissented in Baker v. Carr, reasoning that reapportionment controversies were "political thickets" incapable of judicial resolution. See also Neal, Baker v. Carr: Politics in Search of Law, 1962 Sup. Ct. Rv. 252; Kelly, Clio and the Court: An Illicit Love Affair, 1965 Sup. Ct. Rev. 119; A. Bickel, The Supreme Court and the Idea of Progress (1970).

[44] 369 U.S. 186 (1962). See Bork, Neutral Principles, supra, at 18-19; Nominations of Joseph T. Sneed to be Deputy Attorney General and Robert H. Bork to be Solicitor General: Hearings before the Senate Committee on the Judidiary, 93 Cong., 1st Sess. 13-14 (1974) ("I think the Supreme Court was quite right in Baker against Carr in going into the reapportionment field.") [hereinafter cited as "1973 Hearings"].

[45] 377 U.S. 533 (1964). See, e.g., Bork, Neutral Principles, supra, at 19; Bork, The Legitimacy of the Supreme Court, in The Supreme Court and Human Rights, 327, 242 (1982); 1973 Hearings at 13.

[46] All three Justices dissented in whole or in part in Reynolds v. Sims, and its companion cases. See also Lucas v. Forty-fourth General Assembly, 377 U.S. 713, 753-54 (1964); Bickel, The Supreme Court and Reapportionment, in the 1970s, 57-59 (Polsby ed. 1971).

> "I think Justice Stewart had what I would consider the correct approach which would be to say 'Show me a rational apportionment plan, show me that the majority of the people in that State can change that apportionment plan when they wish to and I will approve it."[47]

This general approach to reapportionment cases was widely shared by academic commentators and public figures,[48] and has increasingly influenced many of the Court's more recent reapportionment decisions.[49] There is no basis for characterizing these views -- widely-shared by moderates and liberals on and off the Court -- as either extreme or insensitive to minority interests.[50]

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[47] 1973 Hearings at 13.

[48] Martin, The Supreme Court and State Legislative Apportionment: The Retreat from Absolutism, 9 Val. U.L. Rev. 31 (1974); Casper, Apportionment and the Right to Vote: Standards of Judicial Scrutiny, 1973 Sup. Ct. Rev. 1; A. Bickel, The Supreme Court and The Idea of Progress (1970); Dixon, the Court, the People, and "One Man, One Vote," in Reapportionment in the 1970's 7 (Polsby, ed.; 1971); Rae, Reapportionment and Political Democracy, in Id. at 91; Jewell, Commentary, in Id. at 46; Symposium: One Man-One Vote and Local Government, 36 Geo. Wash. L. Rev. 689 (1968); McCloskey, Foreward: The Reapportionment Case, 76 Harv. L.Rev. 54, 74 (1962); M. Shapiro, Law and Politics in the Supreme Court 227-30 (1964); Baker, One Man, One Vote, and "Political Fairness," 23 Emory L.J. 701 (1974); Clinton, Further Explorations in the Political Ticket: The Gerrymander and the Constitution, 59 Iowa L. Rev. 1, 4-8 (1973) (rigid one-man, one-vote rule may facilitate gerrymandering); A. Cox, The Court and the Constitution 301-04 (1987) (criticizing Sims although noting it has not produced the difficulties Cox feared).

[49] E.g., Abate v. Mundt, 403416 U.S. 182 (1971) (11.9% deviation from equality permitted); Mahan v. Howell, 410 U.S. 315 (1973) (16.4% deviation from equality permitted); Brown v. Thomson, 463 U.S. 835 (1983) (60% deviation from equality permitted); Gaffney v. Cummings, 412 U.S. 735 (1973) (no justification at all required for "minor deviations" from equality).

[50] As described earlier, Bork successfully argued as Solicitor General that Virginia should not be exempted from section 5 of

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C. Harper v. Virginia Board of Elections

Some critics have also faulted Judge Bork's reservations about the Court's rationale in Harper v. Virginia Board of Elections,[51] Harper held that Virginia's nondiscriminatory $1.50 poll tax violated the Fourteenth Amendment's Equal Protection Clause. Bork has criticized the Court's reliance on the Equal Protection Clause, primarily because the Virginia tax was a relatively modest burden imposed in an equal, nondiscriminatory fashion to all voters.[52]

Importantly, Bork narrowly confined his criticism of the Harper rationale. First, he made it clear that he thought the Harper result might well be justified by other constitutional guarantees (particularly, the Republican form of Government Clause, Art. IV, section 4).[53] Second, Bork emphasized that the

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the Voting Rights Act. Virginia v. United States, 420 U.S. 901 (1975). He also unsuccessfully argued that a New Orleans reapportionment plan unlawfully diluted black voting power. Beer v. United States, 425 U.S. 130 (1976). See also County Council of Sumter County, South Carolina v. United States, 596 F. Supp. 35 (1984); 555 F. Supp. 694 (1983) (extending coverage of Voting Rights Act).

[51] 383 U.S. 663 (1963).

[52] 1973 Hearings, at 17 ("that case, as an equal protection case, seemed to me wrongly decided") (emphasis added).

[53] Id. ("It might have been decided the same way . . . . It seems to me that a lot of those cases are really essentially

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Harper tax did not present any question of racial discrimination, and that if it had, it plainly would have been unconstitutional. In Bork's words:

> "There was *no evidence or claim of racial discrimination* in the use of the poll tax. *If there had been, of course, it would be properly an equal protection case* and the result would have come out just the way it did."[54]

Third, Bork's views on the *Harper* Court's Equal Protection theory have been widely shared by jurists and commentators of all ideological dispositions.[55] Fourth, a number of the Court's subsequent decisions refused to follow the broad implications of *Harper*.[56] Finally, Bork's views on *Harper* have no practical

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republican form of government clause cases and maybe you can uphold that decision on a theory like that rather than on an equal protection theory . . . I think it is a question of degree. It depends on the size of the poll tax.")

[54] 1973 Hearings, at 17 (emphasis added).

[55] Justices Black, Harlan and Stewart dissented in *Harper* on the grounds that "it is all wrong for the Court to accept the political doctrines popularly accepted at a particular moment of our history and to declare all others to be irrational and invidious." *See Butler v. Thompson*, 341 U.S. 937 (1951 (Court rejects challenge to Virginia's poll tax); *Breedlove v. Suttles*, 302 U.S. 272 (1937) (Court rejects constitutional challenge to $1 poll tax; per Justices Hughes, Brandeis, Stone, Cardozo and Black).

[56] *San Antonio v. Rodriquez*, 411 U.S. 1 (1973) (Court, per Justice Powell, rejects heightened Equal Protection scrutiny for wealth-based classification); *Richardson v. Raminez*, 418 U.S. 24 (1973) (felons can be denied voting rights); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (minimum age requirement for voters).

implications. As Bork explained in 1973, "I do not think it is an issue of any sort today and I certainly am not interested in reviving it as an issue."[57] Some civil rights groups may prefer Justices who would broadly read the Equal Protection Clause to forbid all sorts of wealth-based classifications. But Bork's refusal to do so reflects the consensus view of mainstream thinkers and jurists. This position simply does not provide a fair-minded basis for criticizing Bork's civil rights record.

D. Katzenbach v. Morgan

Critics have also questioned Judge Bork's views on South Carolina v. Katzenbach,[58] and Katzenbach v. Morgan,[59] Bork has consistently agreed with and praised South Carolina v. Katzenbach, where the Court upheld the Voting Rights Act's across-the-board suspension of literacy tests for voting in states with histories of racial discrimination.[60] In Bork's view, section 5 of the Fourteenth Amendment grants Congress broad remedial authority to eradicate unlawful racial discrimination.[61]

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[57] 1973 Hearings, at 17.

[58] 383 U.S. 301 (1966).

[59] 384 U.S. 641 (1966).

[60] In contrast to Bork, Justice Powell has expressed reservations about the correctness of South Carolina v. Katzenbach. See United States v. Sheffield Board of Commissioners, 435 U.S. 110, 139 (1978) ("reservations as to the constitutionality "of the Act's selective coverage of certain states only and to the intrusive preclearance procedures") (Powell, J., concurring); City of Rome v. United States, 446 U.S. 156, 170 (1980).

While applauding South Carolina v. Katzenbach, Judge Bork has criticized the rationale of Katzenbach v. Morgan.[62] In Morgan, the Court held that section 5 of the Fourteenth Amendment empowered Congress to forbid the states from using English language literacy tests for persons who completed sixth grade in Puerto Rico.[63] Among other things, the Morgan Court apparently reasoned that the determination whether such literacy tests violated the Fourteenth Amendment could be made solely by Congress, rather than the Court.[64] Judge Bork has criticized this aspect of the Morgan decision. In Bork's view, "[u]nder American constitutional theory, it is for the Court to say what constitutional commands mean and to what situations they apply."[65]

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[61] See Bork, Constitutionality of the President's Busing Proposals 13, 16-17 (1972) ("It seems beyond doubt, then, that Congress has substantial power over the remedies used by federal courts, even in constitutional cases, and that the source of that power in desegregation cases is located in Section 5 of the Fourteenth Amendment."); 1973 Hearings at 16.

[62] 384 U.S. 641 (1966).

[63] The Court had recently held that nondiscriminatory literacy tests did not violate the Fourteenth Amendment. Lassiter v. Northampton County Board of Elections, 360 U.S. 45 (1959).

[64] In Archibald Cox's words:

> "The [Morgan] Court held that Congress effectively determined that a State [literacy] law violated the Fourteenth Amendment and set it aside even though the Supreme Court -- so often billed as the ultimate interpreter of the Constitution -- would have sustained the same State law." Cox, The Role of Congress in Constitutional Determination, 40 Conn. L. Rev. 199, 228 (1971).

Bork's criticism of the rationale of Katzenbach v. Morgan has been widely shared. Justices Harlan and Stewart dissented in Morgan, warning that the majority's decision came "at the sacrifice of fundamentals in the American constitutional system -- the separation between the legislative and judicial function."[66] Justice Powell has taken the same view.[67] Similarly, in Oregon v. Mitchell, a majority of the Court rejected the Morgan rationale and refused to uphold Congress' attempt to lower voting ages in state elections.[68] Finally, academic commentators have also voiced criticisms of Morgan rationale much like Bork's.[69] Other academics have questioned whether there is any

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[65] See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); United States v. Nixon, 418 U.S. 683 (1974).

[66] 384 U.S., at 659.

[67] City of Rome v. United States, 446 U.S. 156, 200 (1980) ("Under section 2 of the fifteenth Amendment, Congress may impose such constitutional deprivations only if it is acting to remedy violations of voting rights"), citing Katzenbach v. Morgan, 384 U.S. at 659 (Harlan, J., dissenting).

[68] 400 U.S. 112 (1970).

[69] Bickel, The Voting Rights Cases, 1966 Sup. Ct. Rev. 79, 80-101; Cf. Cohen, Congressional Power to Interprete Due process and Equal Protection, 27 Stan. L. Rev. 603 (1975); Burt, Miranda and Title II: A Morganic Marriage, 1969 Sup. Ct. Rev. 81 (historical evidence rejects Court's view of section 5 in Morgan);

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real difference between the Morgan Court's position tht section 5 grants Congress "substantive" power to interpret the Fourteenth Amendment and the Harlan/Powell/Bork position that section 5 grants Congress "remedial" authority.[70]

Judge Bork has applied his views about Morgan in a consistent, principled fashion. In 1981 the Senate Judiciary Committee considered a proposed "Human Life Statute."[71] The bill, which invoked Morgan's expansive view of Congress section 5 powers, would have defined human life as beginning at conception -- thereby "overruling" Roe v. Wade. Bork testified against the proposed legislation. He explained his view that a broad reading of the Morgan principle was not grounded in the Constitution because it "replaces the Supreme Court with Congress as the ultimate authority concerning the meaning of crucial provisions of the Constitution."[72] As a result, he concluded that the

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Engdahl, Constitutionality of the Voting Age Statute, 39 Geo. Wash. L. Rev. 1, 3 n.10 (1970) (listing authorities; describing Morgan as "unprecedented, ill-considered, destructive of the foundations of constitutional law"). See also Morgan v. Katzenbach, 247 F. Supp. 196, 204 (D.D.C. 1965) (McGowan, J. dissenting) (sustaining Voting Rights Act on narrow grounds relating to Puerto Rico's status as a territory).

[70] E.g., G. Gunther, Constitutional Law 960 (1985).

[71] S. 158, H.R. 900, 97th Cong., 1st Sess. (1981).

[72] Hearings on The Human Life Bill before the Subcommittee of Separation of Powers of the Committee on the Judiciary, 97th Cong., 1st Sess. 310 (1981) [hereinafter cited as "Human Life Hearings"].

proposed Human Life Statute was also unconstitutional because it infringed on "the Supreme Court's ultimate authority to say what the Constitution means."[73]

Bork also refused to rely on *Morgan* in his 1972 analysis of President Nixon's proposed busing legislation, although doing so would have readily permitted a conclusion that the proposals were constitutional.[74] Instead, Bork concluded that Nixon's proposals would be constitutional only if they could satisfy a number of demanding factual requirements derived from the Court's decisions in *Brown v. Board of Education (II)*,[75] *Swann v. Charlotte-Mecklenburg Board of Education*,[76] and elsewhere. Bork emphasized that Congress could not ban busing altogether and that any limits on busing would be permissible only if they could be shown to be carefully designed and, in fact, likely to remedy the problem of segregated schools.[77]

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[73] *Id*. at 309. Bork also testified that the *Morgan* principle would replace 'state legislatures with Congress for all matters now committed to state legislation." *Id*. at 310.

[74] Bork, *The Constitutionality of the President's Busing Proposals* 11 (1971).

[75] 349 U.S. 294 (1955)

[76] 402 U.S. 1 (1971)

[77] Bork, *The Constitutionality of the President's Busing Proposals* 16, 19-24 (1971). As other scholars have noted, see note 68 *supra*, Bork's interpretation of section 5 of the fourteenth amendment is solidly grounded in that provision's text: "Congress shall have power *to enforce*, by appropriate legisla-

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E. 1963 New Republic Article

Judge Bork's critics have also cited a 1963 article in The New Republic opposing the public accommodations provisions of the proposed Civil Rights Act.[78] Bork's article argued that debate over the proposed provisions should weigh the benefits of forbidding discrimination against the costs of regulating private conduct. While emphasizing the "ugliness of racism" and his "abhorrence of racial discrimination," Bork suggested that the proposed Act might unduly infringe on private autonomy.[79]

The New Republic article, written 25 years ago, came at an early stage in Bork's career, when he was experimenting with "libertarian" ideas. Bork has long since acknowledged the insensitivity of his 1963 statement and explicitly disavowed his earlier views:

> "I no longer agree with that article . . . I was on the wrong tack altogether. It was my

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tion, the provisions" of the fourteenth amendment. Likewise, Bork's interpretation is supported by the clear weight of historical evidence. See, e.g., Burt, Miranda and Title II: A Morganic Marriage, 1969 Sup. Ct. Rev. 81

[78] Bork, "Civil Rights -- A Challenge", The New Republic August 31, 1963, at 21.

[79] Bork also made it clear, however, that he thought the provisions in the proposed Civil Rights Act on voting rights and desegregation of public education [were] admirable." Chicago Tribune, March 1, 1964, section 1, p. 1.

> first attempt to write in that field. It seems to me *the statute has worked very well* and I do not see any problem with the statute and *were that to be proposed today I would support it*."[80]

The Senate did not raise the New Republic article in Bork's 198 confirmation hearings.

F. *The Bakke Decision*

Finally, some opponents have challenged Bork's views affirmative action. In particular, opponents have focused on a 1978 Wall Street Journal article[81] examining the Court's reaso ing in *Regents of the University of California v. Bakke*.

Bakke, of course, involved an Equal Protection challenge to a state university's affirmative action program by an unsuccessful white applicant to the university.[82] A splintere Court held that state universities could consider the race of applicants in making admission decisions, but could not use numerical racial quotas.[83] Bork acknowledged that the *Bakke*

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[80] 1973 Hearings, at 14-15 (emphasis added).

[81] Bork, "*The Unpersuasive Bakke Decision*", *The Wall Street Journal*, at 8, col. 4 (July 21, 1978).

[82] 438 U.S. 265 (1978).

[83] There was no opinion of the Court in *Bakke*. Four Justices held that the Fourteenth Amendment permitted fixed racial quota four Justices did not reach the constitutional issue, holding instead that Title VI forbid a race-conscious admissions progra

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result might prove to be "a statesmanlike solution to an agonizing problem." But he went on to say that "in constitutional terms, [the Bakke rationale] is not ultimately persuasive."

Bork accepted Justice Powell's conclusion that all racial classifications trigger "strict judicial scrutiny" requiring a "compelling governmental interest" to justify the state's action. Bork disagreed, however, with Powell's argument that "university freedom" and the goal of a diverse student body satisfied the heightened scrutiny of racial classifications required by the Fourteenth Amendment. Bork did not consider whether other governmental interests might satisfy the applicable constitutional standard, although his piece may fairly be interpreted as expressing considerable skepticism about government efforts to justify racial classifications.[84]

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Justice Powell held that the Fourteenth Amendment did not permit the numerical racial quotes that had been used by the defendant university, but that some consideration of applicants' race was permissible.

[84] Bork also disagreed with Justice Brennan's dissenting opinion, which would have permitted numerical racial quotas. Justice Brennan reasoned that minorities historically were not adequately represented at universities because of racial discrimination; Brennan concluded that, but for this discrimination, some minority applicant would have obtained the unsuccessful white applicant's position even without an affirmative action program. Bork responded that "the 14th Amendment's guarantee of equal protection [applies] to persons, not classes," and concluded that the Equal Protection Clause forbid the use of race as a general proxy for particular instances of discrimination.

The views advanced in Bork's 1978 article have been shared by jurists and commentators of all political leanings. Initially, it is important to recall that the constitutionality of affirmative action is a profoundly difficult, almost intractable problem. The Court, the academic community, and others have repeatedly grappled with the issue, without arriving at any meaningful consensus.[85]

Bork's 1978 article was directed at the *rationale* of *Bakke*, not the Court's ultimate result.[86] Constitutional scholars of all political leanings have expressed very similar difficulties with Powell's *Bakke* rationale.[87] Indeed, many

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85. *See Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). (Court splits 4-1-4, with 5 separate opinions); *De Funis v. Odegaard*, 416 U.S. 312 (1974) (dismissed on mootness grounds); *Fullilove v. Klutznick*, 448 U.S. 448 91980) (Court splits 3-1-1-3-1); *United States v. Paradise*, 480 U.S. __ (1987) (Court splits 4-1-3-1). *See also* note 66 *infra*.

86. Bork, The *Unpersuasive* Bakke Decision, *The Wall Street Journal*, at 8 ("the court's power must be justified by constitutional reasoning . . . in constitutional terms [the Court's] *argument* is not ultimately persuasive"; "[Powell's] vision of the Constitution [in *Bakke*] remains *unexplained*") (emphasis added).

87. Lavinsky, *DeFunis v. Odegaard: The "NonDecision" With A Message*, 75 Colum. L. Rev. 520 (1975); Griswold, *Some Observations on the DeFunis Case*, 75 Colum. L. Rev. 512 (1975); Scadia, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race*, 1979 Wash. U.L.Q. 147; Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. Chi. L. Rev. 775 (1979); A. Bickel, The Morality of Consent 133 (1975) ("The lesson of the great decisions of the Supreme Court . . . [has] been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of

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respected jurists and scholars have interpreted the Fourteenth Amendment as requiring wholly "color-blind" or race-neutral governmental action; this view, of course, flatly forbids affirmative action programs.[88] Bork has described, but not adopted,

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democratic society. Now this is to be unlearned and we are told that this is not a matter of whose ox is gored. Those for whom racial equality was to be demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution."); H. Wechsler, *Principles, Politics and Fundamental Law* xiii-xiv (1961); Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Actions*, 131 U. Pa. L. Rev. 907, 908-09, 929-30 (1983); Graglia, *Special Admission of the "Culturally Deprived" to Law School*, 119 U. Pa. L. Rev. 283 (1970); Brief of Anti-Defamation League of B'nai Brith as Amicus Curiae, *DeFunis v. Odegaard*, 94 S. Ct. 1704 (1974); Kaplan, *Equal Justice in an Unequal World: Equity for the Negro -- the Problem of Special Treatment*, 61 N. W. L. U. Rev. 363 (1966); Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 S. Ct. Rev 1; Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. Chi. L. Rev. 653 (1975).

[88] Thus, Justice Douglas has written that "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory of how society ought to be organized." Justice Stewart and Stevens have also expressed substantially the same view in some of their opinions. *Fullilove v. Klutznick*, 448 U.S. 448 522, 532 (1980). *See also* Scalia, *The Disease as Cure*, 1979 Wash. U.L.Q. 147; A. Bickel, *The Morality of Consent* 133 (1975); N. Glazer, *Affirmative Discrimination* (1975); Fitch; *The Return of Color-Consciousness to the Constitution: Weber, Dayton, and Columbus*, 1979 Sup. Ct. Rev. 1.

For example, Professors Philip Kurland and Alexander Bickel filed a brief in the Supreme Court arguing that:

> "A racial quota derogates the human dignity and individuality of all to whom it is applied. A racial quota is invidious in principle as well as in practice. . . . A

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this view; instead, Bork takes the more moderate, but also widely-held, position that a state might demonstrate a compelling interest in maintaining an affirmative action program. In short, it is clear that Judge Bork's affirmative action views are firmly in the center of public debate, and in many respects, to the "left" of many respected jurists and commentators.

G. Vinson v. Taylor

Judge Bork has also been criticized for his opinion in Vinson v. Taylor.[89] These criticisms rest on misreadings of Bork's opinion and of the Supreme Court opinion that upheld Bork's views.

Vinson involved a Title VII claim by a female assistant branch manager of a bank; the plaintiff alleged that a vice president of the bank had sexually harassed her for some four years, and sought compensatory and punitive damages from the vice president and the bank. The individual defendant denied any sexual relationship with the plaintiff. After an eleven-day trial, the

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> quota by any other name is still a divider of society, a creator of castes, and it is all the worse for its racial base."

Brief of Anti-Defamation League of B'nai Brith as Amicus Curiae in DeFunis v. Odegaard, 94 S. Ct. 1704 (1974).

[89] 760 F.2d 1330 (D.C. Cir. 1985) (Bork, J., dissenting from the denial of rehearing en banc).

district court refused to resolve the issue whether there had been sexual relations between plaintiff and defendant, holding instead that if sexual relations had occurred they were "voluntary" and thus not actionable. The district court also concluded that the bank had no knowledge of the dispute between its employees, and thus could not be held liable even if the vice president had sexually harassed the plaintiff.

A panel of the Court of Appeals reversed. It held: (1) the district court erroneously failed to consider whether the defendant had engaged in sexual harassment that created a hostile or offensive working environment;[90] (2) the district court erroneously admitted defense evidence of the plaintiff's willingness to engage in sexual relations and her solicitation of sexual relations;[91] and (3) the defendant bank was absolutely liable for any sexual harassment by the individual defendant, regardless whether the bank knew or should have known of the harassment.[92]

Judge Bork dissented from a denial of rehearing en banc. He squarely disagreed with the panel decision on two issues: (1) evidence that the plaintiff "solicited or welcomed" sexual advances by the defendant should be admitted;[93] and (2) a strict rule of absolute liability for employers was inappropriate in sexual harassment cases, and should be informed by traditional principles of respondeat superior.[94] In addition, Judge Bork questioned the panel's definition of sexual harassment in a "hostile environment" case. Particularly in light of the panel's evidentiary holding, Bork criticized a rule of sexual harassment that would encompass all sexual relationships between employees, "however voluntarily engaged in" and without regard to whether the plaintiff had "welcomed" or made "a solicitation of sexual advances" from the defendant.[95]

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[90] 753 F.2d 141, 145 (D.C. Cir. 1985).

[91] Id. at 146 & n.36. The evidence in question was "testimony regarding [plaintiff's] sexually provocative dress and personal fantasies." Id.

[92] Id. at 150.

The Supreme Court reversed the Court of Appeals from which Bork had dissented. Contrary to some suggestions,[96] the Supreme Court squarely adopted Bork's first two positions and substantially agreed with his third point. The Court squarely held that (1) "complainant's sexually provocative speech [and] dress . . . is obviously relevant to determining whether she found particular sexual advances unwelcome;"[97] and (2) in

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[93] 760 F.2d 1330, 1331. Bork cautioned that such evidence was "hardly determinative" and that it must "obviously . . . be evaluted critically." Id.

[94] Id. at 1331-1332 & nn.5 and 6.

[95] Id. at 1330.

[96] National Women's Law Center, at 27-30.

[97] Meritor Savings Bank v. Vinson, 106 S. Ct. 2399, 2407 (1986). Echoing Judge Bork, the Court held "the Court of

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determining the employer's liability "Congress wanted courts to look to agency principles for guidance," and "the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors."[98] These were precisely the points Bork urged in his Court of Appeals dissent.

Finally, the Court substantially agreed with Judge Bork's view that the definition of sexual harassment must exclude relationships that were "solicited or welcomed by the plaintiff." According to the Court, "the gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome'."[99] This is substantially what Bork had urged in the lower court.[100]

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Appeals' contrary conclusion was based upon the erroneous, categorical view that testimony about provocative dress and publicly expressed sexual fantasies 'had no place in this litigation.'" Id. at 2407.

[98] Id. at 2408. Four Justices (Marshall, Brennan, Blackman and Stevens, JJ) would have resolved the employer liability issue in greater detail, albeit while still recognizing the applicability of common law agency principles. Id. at 2410-11.

[99] 106 S. Ct. at 2406.

[100] The Supreme Court also held that the district court "erroneously focused on the 'voluntariness' of respondents' participation in the claimed sexual episodes." Id. The Court explained that "the fact that sex-related conduct was 'voluntary' in the sense that the complainant was not forced to participate against her will, is not a defense." Id. Although Judge Bork's opinion refers to "voluntariness" at several points, it is clear that Bork did not intend to define sexual harassment in the nar-

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H. Equal Protection

Some critics have charged that Judge Bork would not afford women the guarantees of the Equal Protection Clause.[101] This view is plainly wrong, as these critics' failure to cite to Bork's writings would suggest.

Although Bork has not had occasion to address directly the Equal Protection Clause's application to women, his works plainly indicate that women are guaranteed equal protection of the laws. Initially, by its very terms, the Fourteenth Amendment's Equal Protection Clause forbids states from denying "*any person* . . . the equal protection of the laws." Judge Bork's well-known respect for Constitutional text would hardly lead him to conclude that women somehow do not qualify as "persons." Moreover, Bork has never questioned the Court's numerous, well-established precedents affording Equal Protection guarantees to *all* citizens.[102]

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row manner rejected as a defense to sexual harassment by the Court. Like the Court, Bork plainly was excluding from the definition of sexual harrassment only situations where the plaintiff solicited or welcomed sexual relations. *Id*. at 1330, 1331 ("*however* voluntarily engaged"; "*solicitation* of sexual advances"; "*solicited or welcomed*") (emphasis added).

[101] ACLU, at 16.

[102] Indeed, Bork has held that the Equal Protection Clause applies to "discrimination" based *solely* on the place of custody.

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More importantly, Bork has expressly recognized that the Equal Protection Clause protects men against sex discrimination.[103] It cannot seriously be suggested that Bork would allow men to bring Equal Protection claims based on sex discrimination, while denying women the same right. Moreover, Bork has explicitly declared that "[t]he Constitution has provisions that create specific rights. These protect, among others, racial, ethnic, and religious minorities."[104]

While it is completely clear that Bork believes that the Equal Protection Clause applies to sex discrimination claims by men and women, he has not expressly addressed the precise standard of review that is appropriate in these cases. As discussed earlier, Bork has written that racial discrimination is

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Cosgrove v. Smith, 697 F.2d 1125, 1143 (D.C. Cir. 1983) (Bork, J., concurring and dissenting). Bork applied controlling Supreme Court precedent, calling for a rational basis test, to the plaintiffs' Equal Protection claims. McGinnis v. Royster, 410 U.S. 263 (1973).

[103] Cosgrove v. Smith, 697 F.2d 1125,1143,1145-46 (D.C. Cir. 1983) (Bork, J., concurring and dissenting). In Cosgrove Bork denied the Government's motion for summary judgment on Equal Protection claims by male prisoners who alleged that female prisoners were unconstitutionally treated more favorably. Bork concluded that the male prisoners had stated a constitutional sex discrimination claim and remanded to the district court for development of the factual basis for the plaintiffs' claims.

[104] Dronenburg v. Zech, 741 F.2d 1388, 1397 (D.C. Cir. 1984) (emphasis added).

"invidious"[105] and subject to strict scrutiny under the Equal Protection Clause.[106] He has also suggested that similar treatment is appropriate for religious and ethnic minorities, "among others."[107] Finally, Bork argued in *Vorchheimer v. School District of Philadelphia*, that the Equal Protection Clause prohibits the assignment of students to separate high schools, where the schools do not provide substantially equal educational facilities and professional opportunities.[108] Relying on language from *Craig v. Boren*, Bork argued that gender classifications must serve important governmental objectives and must be substantially related to achievement of those objectives."[109]

While not dispositively resolving the issue, these materials strongly suggest that Bork will apply some sort of intermediate scrutiny in sex-based Equal Protection cases. This is the same approach that the Supreme Court has recently adopted.[110] By all appearances, it is a more demanding test

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105. *Dronenburg v. Zech*, 741 F.2d 1388, 1393 (D.C. Cir. 1984).

106. Bork, *The Unpersuasive Bakke Decision*, The Wall Street Journal, at 8, col. 4 (July 21, 1978).

107. *Dronenburg v. Zech*, 741 F.2d 1388, 1397 (D.C. Cir. 1984).

108. Memorandum for the United States as Americus Curiae in No. 76-37, affirmed by an equally divided Court (April 19, 1977).

109. *Id*. at 21, quoting *Craig v. Boren*, 429 U.S. 190 (1976). Bork did leave open the possibility that a State might be able to demonstrate sufficiently important reasons for single-sex institutions. He urged the Court to remand for a fuller exploration of the differences between the schools in question.

110. *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

than that accepted by Justice Powell and other mainstream thinkers.[111]

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[111] Justice Powell's position on the standard of scrutiny in sex discrimination cases is much like Chief Justice Rehnquist's. *See* *Craig v. Boren*, 429 U.S. 190 (1976) (Powell, U.S. 718 (1982) (Powell, J., dissenting; joined by Rehnquist, J.).*See* J. Ely, *Democracy and Distrust* 164-70 (1980).

G

The Judicial Performance of Robert Bork In Administrative and Regulatory Law

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This memorandum analyzes Judge Bork's most important regulatory and administrative law opinions as a judge on the D.C. Circuit. Because of the large number of opinions he has written, and the somewhat amorphous character of the fields themselves, I have limited my inquiry to the following: In administrative law, I have reviewed Judge Bork's opinions dealing with standing to challenge administrative agency decisions; reviewability; agency decisionmaking procedures; and the scope of judicial review. In regulatory law I have examined opinions reviewing the decisions of federal economic, health, safety, and environmental regulatory agencies, excluding labor cases.

While my overall assessment of Judge Bork's work in these areas is based on a review of all of his opinions in these categories, I have limited detailed discussion in this memorandum to those opinions that are most important or have aroused greatest controversy. My criterion for selection was whether the opinion was singled out for discussion in one or more of the following: Public Citizen Litigation Group's Report on the Judicial Record of Judge Robert H. Bork; The AFL-CIO Ececutive Council Statement in Opposition to the Nomination of Judge Bork; and the Biden Report. There are 13 administrative and regulatory law opinions that meet this criterion.

I have undertaken to analyze these opinions and assess their quality in order to evaluate charges that Judge Bork holds and enforces radical views, is biased in favor of certain parties and against others, disregards proper principles of judicial decisionmaking in order to reach a foreordained result, and lacks otherwise appropriate judicial qualifications.

I have not attempted a quantitative analyses of his votes (regardless of whether or not he wrote an opinion) in all regulatory and administrative cases in order. The Public Citizen and the AFL-CIO report attempt to make out a case of bias by examining Judge Bork's votes in decisions where the court was divided. This technique suffers from seveal deficiencies. First, it tends to exaggerate differences between Judge Bork and his colleagues by ignoring votes in which the court was not divided. The record has shows that overall Judge Bork has agreed with his colleagues -- even those that are recognized as among the most liberal federal circuit judges in the country -- in a very high percentage of cases. Second, by simply tabulating votes, this approach ignores the most direct and valuable evidence of a judge's mind and character, his own written opinions.[1] A judge may join a colleague's result for a varity of reasons falling well short of full agreement with the views expressed in a colleague's opinion or even with the precise disposition of the case. It is for this reason that I have focused on Judge Bork's opinions. I must, however, note that even the unrepresentative sample of opinions that I have reviewed -- opinions singled out by critics of Judge Bork's nomination as establishing his bias -- demonstrate the falsity of the Biden Report's claim (p.39) that Judge Bork "defers to the government when an individual or public interest group brings suit, and he defers to big business when it is suing the government." In nearly a third of these cases, Judge Bork upheld the position of individuals or public interest groups against the government or the position of the government against industry.

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[1] The Public Citizen Report analyzes a number of Judge Bork's opinions, but in many instances the account of the case and of Judge Bork's position is incomplete, distorted, or otherwise seriously misleading.

My analysis of these opinions leads me to conclude that the overall quality of Judge Bork's judicial work is very high indeed. The principles of reasoning that he employs are sound. His opinions show great analytical power. They also display the rare willingness and ability to lay bare and grapple forthrightly with the fundamental issues that underlie a controversy.

Judge Bork has been accused of arrogance, and indeed there are times when his criticisms of a colleague with contrary views in a case seem unnecessarily preemptory. But his opinions in cases such as NRDC v. EPA and Jersey Central Power Co. v. FERC show that he has the capacity to rethink positions initially taken and to abandon them when convinced by further exchange and reflection that he was wrong. Judge Bork's opinion for a unanimous en banc court in NRDC v. EPA is a particularly outstanding example of his capacity for open-mindedness and intellectual growth; it also reveals that Judge Bork has the statecraft to build consensus within a large and often divided court.

Regulatory and administrative law cases require reviewing judges to determine whether administrative decisions comply with statutory, procedural, and other applicable legal requirements; whether agency fact findings are adequately supported by evidence of record; and whether agencies' exercise of policy discretion has been sufficiently explained and justified to pass muster as not "arbitrary and capricious."

Such determinatives necessarily involve substantial room for judgment. The exercise of that judgment -- especially by able and strong judges like Judge Bork and his colleagues on the D.C. Circuit -- will inevitably and properly be influenced by an individual judge's overall view of the appropriate role of litigation and judges in the governance of a democratic society. Judge Bork's view is that the basic and most important function of courts is to protect established liberty and property interests against unconstitutional or unauthorized coercive invasion by government. Otherwise, decisions about the society's collective goals and values and how best to implement them should ordinarily be left to the political and administrative branches unless there is constitutional or statutory warrant for courts to intervene. This view has lead Judge Bork, in cases where the correct result is legitimately debatable and the judicial exercise of judgment is therefore necessary and proper, to limit judicial review to cases involving claims of specific harm from particular government decisions; to limit the right of litigants not themselves subject to coercive government action to demand extensive administrative hearings; to require clear or persuasive statutory authority for the exercise of coercive power by administrative agencies; and to decline to impose or enforce on administrators affirmative obligations not established by statute.

Judge Bork's avowal of these positions have not gone unchallenged. They are often contrary to the views of some of Judge Bork's colleagues on the D.C. Circuit who for the past 15 years have sought to expand judicial review, impose additional procedural formalities on agencies, amd enlarge the courts' role in ensuring that agencies affirmatively embrace and carry out certain social objectives. Judge Bork's positions are also in many cases contrary to the agenda of advocacy groups such as Public Citizen. I personally disagree with a number of Judge Bork's decisions. But I nonetheless respect them because they cogently present a candid, well-reasoned, powerful and important point of view on the role of courts in the governance of the regulatory welfare state.

I must also emphasize that Judge Bork's decisions in administrative and regulatory law are well within the mainstream of current judicial thinking and practice in the federal appeals courts and, especially, the Supreme Court. Over the past decade, the Supreme Court has imposed limits on the expansion of judicial review, curtailed the lower federal courts' imposition of novel procedural requirements on administrators, limited expansive agency claims of regulatory authority, and declined to impose on agencies mandates not statutorily manifest. Justice Powell has played an important role in these developments. Judge Bork's general orientation, as well as his willingness to examine each case on its merits, are quite similar to those of Justice Powell. The most obvious difference between them is that Judge Bork expresses his conclusions in more pungent language. If we are to judge by his decisions in regulatory and administrative law, claims that Judge Bork is a radical revolutionary of the right are simply ludicrous. I do not believe conformity a particular virtue. But if we are to take the Supreme Court's current administrative and regulatory jurisprudence as the benchmark, it is not Judge Bork but some of his more liberal colleagues on the D.C. Circuit who seem out of line.

II Judge Bork's Opinions

In discussing Judge Bork's opinions, I deal first with three cases that seem to have attracted the greatest attention and criticism. I then consider the remaining opinions are arranged according to the types of issues presented.

NRDC v. EPA involved an environmental group challenge to EPA standards for control of vinyl chloride (VC) emissions from chemical plants under Sec. 112 of the Clean Air Act. That section requires the EPA Administrator to set emission limitations for VC and other hazardous pollutants "at the level which in his judgment provides an ample margin of safety to protect the public health." EPA initially set a VC standard requiring the maximum degree of control that it believed to be technologically attainable and economically achievable by industry. In response to environmental group litigation, it proposed to issue a more stringent standard, but later rescinded the proposal after concluding that compliance was technologically and economically infeasible. This recession was challenged by environmental groups.

It is not known whether the adverse health effects of VC involve safety thresholds. The association between VC concentrations, particularly at lower levels, and health effects is quite uncertain. Science is unable to determine whether VC concentrations will cause adverse health effects only if they exceed a certain level, and, if so, what that level is. This uncertainty is characteristic of most pollutants subject to regulation under Sec. 112.

In an initial panel opinion, 804 F.2d 710 (1986), Judge Bork rejected claims by the government that 1977 amendments to the Act had impliedly ratified EPA's position that Sec. 112 standards could be based directly cost and technology. He also rejected claims by environmental groups that emission standards (incorporating the margin of safety required by the statute) must be set by reference to health considerations alone. He pointed out that if health protection were the only consideration, standards should, in the face of uncertainty, be set at zero. It is undisputed that such standards would cause a massive shutdown of many basic industries, a result which, Judge Bork concluded, Congress could not have intended. On the other hand, the dominant goal of Sec. 112 is clearly to protect health. How the EPA is to set standards in this situation presents a "paradox" which Judge Bork sought to unravel. He concluded, based on the above analysis, and a careful review of the Act's language, history, and structure, that the statute should not be read as precluding EPA discretion to consider cost and feasibility in determining the margin of safety in setting standards in those cases where the existence and location of safety thresholds is uncertain and the standard is set within the area of uncertainty. Finding that the initial VC standard satisfied these criteria and was therefore within EPA's lawful discretion, Judge Bork upheld EPA.

Judge Wright entered a strong dissent. Pointing out that most Sec. 112 pollutants are characterized by wide uncertainty regarding health effects and safety thresholds, Judge Wright argued that the practical effect of Judge Bork's resolution would be to give EPA considerable latitude to set standards directly on the base of cost and technology. Judge Wright argued that this result would be inconsistent with the overall structure of the Act and the language of Sec. 112.

On rehearing en banc, Judge Bork wrote a new opinion for a unanimous court. While adhering to his earlier rejection of the positions advocated by EPA and the environmental groups, he reformulated the limits imposed on EPA's discretion by the Act. The Administrator must first determine what level of VC concentrations is "safe," based exclusively on health considerations. A "safe" level does not necessarily mean zero; ours is not a risk-free society and EPA has latitude to determine what level of risk is "acceptable." The standard may not exceed this "safe" level, regardless of cost or feasibility. EPA has discretion, however, to take cost and feasibility into account in selecting the appropriate margin of safety, which would in turn determine how far below the "safe" level the standard would be set. Health is thus the first and basic criterion for setting standards, with cost and technological feasibility factored into the safety margins. Because EPA's VC standard and current interpretation of the Sec. 112 were inconsistent with this reading of the statute, Judge Bork set aside the EPA's recession of its proposed more stringent standard and remanded for further proceedings consistent with his opinion.

Judge Bork's performance in this case is impressive. His opinions lay bare the dilemma posed for agencies and courts by congressional language that refers only to health protection in authorizing regulatory standards that which cannot reasonably be set on the basis of health considerations alone. Judge Bork's rejection of EPA's claim of implied congressional ratification is plainly correct. His conclusion that Sec. 112 does not bar the EPA from giving some consideration to cost and technology presents a closer question but is also sound. Although other sections of the Act providing for health-based standards have been interpreted as excluding or at least not requiring EPA consideration of cost and technology, their role in the Act is quite different from that of Sec. 112.

The panel opinion's effort to define middle position to resolve the dilemma is commendable, but its formulation is subject to the shortcoming noted by Judge Wright. The reformulation in the _en banc_ opinion is probably the best accommodation that can be made between the the statutory primacy of health protection, the pervasiveness of scientific uncertainty, and the consequent inevitable need to give some consideration to cost and feasibility.

Judge Bork displayed intellectual candor in facing up to the dilemmas posed by the case and perserverance in trying to solve the riddle. After his initial solution was challenged by a strong dissent and rehearing _en banc_ was had, he rethought his position and developed a new and better approach endorsed unanimously by his colleagues.[2] This record speaks very favorably as to Judge Bork's intellectual capabilities, his open-mindedness, and his capacity for statecraft.

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[2] The analysis of the case by Public Citizen and the AFL-CIO deal only with the panel opinion and fail to discuss the _en banc_ opinion.

McIlwain v. Hayes, 690 F.2d 1041 (1041) was one of two Bork opinions singled out for criticism in the Biden report as evidence of "pro-business" bias and was also criticized in the Public Citizen report. Individuals and health advocacy groups sued the Food and Drug Administration, challenging delays in manufacturer safety testing of food color additives. Judge Bork's panel opinion upheld the FDA, Judge Mikva dissenting.

In 1960 Congress amended the Food Drug and Cosmetic Act to shift the responsibilty for testing the safety of color additives from the FDA to industry. The amendments provided that established color additives could remain on the market pending completion of safety testing for two and one-half years, and for such further periods as the FDA administrator "from time to time" finds "necessary to carry out" the testing program, if such postponements are consistent with completion of the testing "as soon as reasonably practicable." After FDA had several times extended the testing deadline, plaintiffs brought suit in 1980 to challenge a further extension.

Although the testing program had by then been in progress for twenty years, far longer than Congress had anticipated, Judge Bork found that the FDA's further postponement was authorized by the statute and was not an abuse of discretion. The facts of the case were crucial to his conclusions. The delays were due to the development of new and more sophisticated testing methodologies. The additives had passed successive rounds of increasingly demanding tests, with no evidence of adverse effects. The FDA, however, determined that they should be subjected to new, more sensitive tests before receiving final clearance. A variety of unforeseen practical problems in carrying out the testing had also contributed to the delay.

On these facts, Judge Bork found that the successive FDA postponements fell squarely within the language of the statutory provision authorizing such postponements. FDA's determinations that the postponements were necessary were amply supported by the facts and reasonable. Judge Bork's opinion is well reasoned and the result is clearly correct. The only alternative would be to ban long-established color additives that had passed every safety test to which they had been subjected, a result plainly contrary to the statutory scheme.

Judge Mikva's dissent castigates the FDA for engaging in a "charade of regulation" and the court for putting its "imprimatur on this disgraceful track record." Judge Mikva, however, never comes to terms with the facts carefully adduced by Judge Bork, nor does he show how FDA's actions are contrary to the terms of the statute or otherwise unreasonable. The language and logic of the dissent seems more appropriate for a floor statement by a member of Congress than for a judicial opinion.

Jersey Central Power & Light Co. v. FERC, 810 F.2d 1168 (1987)(en banc) is also criticized in the Biden report as well as the Public Citizen Report. Judge Bork wrote the opinion for an en banc court, requiring the Federal Energy Regulatory Commission (FERC) to hold a hearing on Jersey Central's claim that FERC's refusal to allow it increased rate revenues would be confiscatory, violating its statutory and constitutional rights. Four judges dissented in an opinion by Judge Mikva.

The case is a difficult one because relevant Supreme Court precedent provides inadequate guidance and because the FERC determinations being reviewed were murky and unhelpful. Jersey Central had made a concededly prudent investment of nearly $400 million in a nuclear plant that was later cancelled because of changed market conditions. The company sought rates that would enable it to recover (a) the cost of this investment and (b) the carrying charges on the debt and preferred stock portions of the investment by including the unamortized portion thereof in its rate base. It made detailed assertions to the effect that its financial condition was precarious and that the rates sought were necessary to restore financial integrity. Relying on past decisions, FERC allowed recoupment of the investment but refused to include any part thereof in Jersey Central's rate base. It did not grant Jersey Central a hearing or otherwise respond to its claims of financial hardship. Jersey Central then petitioned FERC for an evidentiary hearing on its claim that the end result of FERC's ruling violated applicable statutory and constitutional requirements by denying it a reasonable return on its investment, and sought a rate of return on investment higher than that allowed by FERC. FERC denied the petition on the grounds that its ruling accorded with established FERC ratemaking policies; that the request for a higher rate of return was an impermissible modification of the relief originally sought; and that Jersey Central's allegations of hardship failed to provide a basis for relief.

Judge Bork first wrote a panel opinion upholding FERC, but reversed himself in a subsequent panel opinion and required FERC to grant Jersey Central a hearing on its claims after both parties asserted that the first opinion had misconstrued relevant Supreme Court precedent. His en banc opinion reached the same result as the second panel opinion.

It is established law that government refusal to allow regulated monopolies a reasonable return on their investment is an unconstitutional taking of property. Rate regulatory statutes have been read to incorporate the principle of reasonable return on investment. Giving this principle workable content has not, however, been easy. FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944), repudiated earlier judicial efforts to impose a particular rate-making methodology on regulators, holding that so long as the "end result" was reasonable, they enjoyed wide discretion. While Hope cut back on judicial review of ratemaking, it also contemplated that regulators would remain subject to constitutional and statutory constraints of reasonableness. Subsequent Supreme Court decisions have reaffirmed this expectation without providing much guidance as to how it is to be implemented.

Both Judge Bork and the en banc dissent agree that the Hope "end result" test requires courts to review the reasonableness of rate regulation, and that in a proper case a regulatory agency must hold an evidentiary hearing on a utility's claims that a given rate decision is unreasonable and confiscatory. They differed on whether Jersey Central had made an adequate case for a hearing. Judge Bork concluded that the facts alleged by Jersey Central made out a prima facie case that failure to grant it additional revenues was confiscatory, and that FERC could not summarily disregard these allegations. The dissent made two basic arguments. First, Jersey Central's request for a hearing and for a higher return was premature because it might file further proceedings with FERC seeking such relief; the only issue thus far decided by FERC was whether Jersey Central's part of its investment in the cancelled plant should be included in its rate base. Second, in order to obtain a hearing, Jersey Central must allege more than hardship. It would have to show that the particular decision challenged would cause insolvency, and that rate relief would not exploit consumers.

The underlying problem is how courts can ensure that regulated monopolies receive a reasonable return on investment without disrupting orderly administrative decisionmaking or requiring ratepayers to bail out incompetent and unlucky management. The best way to achieve these objectives would be for courts to allow regulators wide discretion in selecting a methodology for regulating rates but require adherence to a given methodology once selected.[3] But the Supreme Court has not followed this course and has instead adopted an amorphous "end result" test.

Judge Bork's ruling that Jersey Central's demand for a hearing was ripe for decision is well supported. As he points out, FERC had not argued that Jersey Central should exhaust further agency proceedings, and had squarely rejected its demand for a hearing on the reasonableness of the rates allowed. Under established administrative law principles, the hearing issue was properly before the court, even if other avenues of relief might have been available before FERC. Moreover, it does not appear that any such alternative relief would in fact have been available to Jersey Central.

Whether Jersey Central's allegations were sufficient to entitle it to a hearing is a closer question. Judge Bork may have been too quick to suggest that Jersey Central's allegations made out a prima facie case of unconstitutional action by the Commission. But the dissent can be faulted for imposing its own elaborate, more restrictive test of unconstitutionality, a test which has no support in prior decisions. Given the murkiness of the precedent, the better course was to hold Jersey Central's allegations sufficient to entitle it to a hearing. This would enable the court, in accordance with basic administrative law principles established in SEC v. Chenery Corp. 318 U.S. 80 (1943) to have the benefit of a full factual record and FERC's considered views before attempting to define more precisely the constitutional standard and the corresponding showing required to obtain a hearing in future cases. As pointed out in Judge Starr's concurring opinion, this was essentially the course adopted by Judge Bork for the majority.

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[3] See S. Breyer, Regulation and Its Reform, Ch.2 (1982)

While it has been criticized as a radical and unprecedented pro-business initiative, the position adopted in Judge Bork's Jersey Central opinion is entirely consistent with precedent and represents a reasoned and reasonable resolution of a difficult case.[4]

Judge Bork's guarded approach to standing is reflected in *Northwest Airlines, Inc.* v. *FAA*, 795 F.2d 195 (1986). Judge Bork's opinion for the court held that Northwest lacked standing to challenge in court FAA's decision authorizing a former Northwest pilot, whom Northwest had discharged for drunkenness,to fly commercial planes. Northwest claimed that the safety of its flights would be endangered and the efficacy of its disciplinary program would be undermined if the pilot were allowed to fly again. Invoking several relevant Supreme Court decisions, Judge Bork ruled that the causal connection between the government's action and the asserted injury to Northwest was too indirect and conjectural to support standing. He also ruled that Northwest's claim that it might, as a result of the reauthorization, be required to rehire the pilot was premature.

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[4] Judge Bork's opinion represents far less an innovation than the position taken by Justice Powell, concurring in *Industrial Union Dept. AFL-CIO v American Petroleum Institute*, 448 U.S. 607, (1980). Justice Powell would have required OSHA to engage in cost-benefit analysis in setting standards for occupational exposure to toxic standards in order to protect the competitiveness of American industry and avoid asserted constitutional problems. Justice Powell's position, unlike that of Judge Bork in *Jersey Central*, lacked foundation in constitutional precedent or in the language or history of the OSHA statute. Justice Powell's willingness to *require* use of cost-benefit analysis in setting environmental standards should also be contrasted with the far more guarded approach taken by Judge Bork in *NRDC* v. *EPA*.

This last ruling was plainly correct. As to standing, there are basically two lines of Supreme Court precedent on judicial review of administrative decisions, a more permissive line represented by United States v. SCRAP, 412 U.S. 669 (1973), and a more recent and more restrictive line initiated by Justice Powell in Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976). Simon requires that a litigant establish specific injury traceable to the challenged government action and also show that victory on the merits would eliminate the injury. Judge Bork generally follows the latter line of cases, which easily support his standing rulings in Northwest. My own view is that the injury in fact test is misguided and that it should not in any event be viewed as constitutionally required by Article III. In using the injury in fact test and equating it with Article III, however, Judge Bork is adhering to positions that have been adopted by the Supreme Court.[5]

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[5] Judge Bork's opinion for the court in Haitian Refugee Center v. Gracey, 809 F.2d 794 (1987), elaborates the causal "traceability" "redressability" elements of the injury in fact test and insists that they are grounded in Article III and separation of powers principles. The case involved a challenge by the Center, which counselled Haitian refugees, to the legality of a Presidential order instructing the Coast Guard, with the assistance of the INS, to interdict Haitian refugee boats on the high seas and determine whether any of the passengers qualified for admission to the United States as refugees. Plaintiffs intended that the interdiction violated international law, the Constitution, and federal immigration statutes. In a powerful, elaborate, and closely reasoned opinion relying heavily on recent Supreme Court precedent, Judge Bork found that plaintiffs failed to meet the "traceability" and "redressability" requirements respecting their own alleged injury and also lacked third party standing to assert claims of the refugees themselves. He further found that plaintiffs' associational interests were not protected by the legal provisions which they invoked. Judge Buckley's concurring opinion agreed that plaintiffs lacked standing but disagreed with portions of Judge Bork's analysis of causation requirements. Judge Edwards, concurring in part and dissenting in part, believed that the Center had standing but had failed to state any claim on which relief could be granted.

Northwest Airlines shows that restrictions on standing can work to the disadvantage of business as well as public interest litigants. It should also be noted that Judge Bork has followed more liberal standing principles in cases governed by D.C. Circuit precedent that employed such principles. See Center for Auto Safety v. Thomas, 806 F.2d 1071, 1080 (1986)(Bork, J. concurring).

The scope of right to intervene in administrative proceedings was at issue in Bellotti v. Nuclear Regulator Comm'n., 725 F. 2d 1380 (1983). Following a determination that Boston Edison's management of its Plymouth nuclear plant was seriously deficient, the NRC imposed substantial fines on Boston Edison and amended its license to require development of a plan for improved management. The Massachusetts Attorney General moved to intervene and sought an adjudicatory hearing by the NRC on additional issues, including the continued operation of the plant and the implementation of Boston Edison's plans for improvements. Judge Bork wrote the court's opinion upholding the NRC's failure to grant the requested intervention, Judge Wright dissenting.

Section 189(a) of the Atomic Energy Act grants a right of intervention to any person "whose interest may be affected" by a licensing proceeding. Judge Bork reasoned that whether a person's interest was affected by a proceeding depends on the issues presented. Here the NRC had limited the issues to the imposition of a fine and the preparation of a plan. The Attorney General had not shown any stake in these issues, but rather sought to assert Massachusetts' interest in additional issues that he sought to interject into the proceeding. The question was one of authority to define the agenda in a licensing proceeding. Judge Bork found that under the Commission's regulations this authority rested with the Commission, and that it had acted reasonably in limiting the issues here. Allowing would-be intervenors to set the agenda would create the potential for "turning focused regulatory proceedings into a public extravaganza." If in a licensing proceeding the Commission proposed to relax existing safety requirements, those near the plant could intervene because their interest would be affected by the proposed action. But if the Commission, as here, proposed to increase safety requirements which they thought inadequate, their remedy was not intervention in the licensing proceeding but a separate petition to the Commission to take further measures.

Judge Wright wrote a powerful dissent, arguing that the majority's approach unjustifiedly restricted the intervention rights granted by section 189(a). Here the violations by Consolidated Edison were serious, and the Attorney General, as a representative of residents of the state, had a strong interest in ensuring that adequate corrective steps were taken. Judge Wright argued that the Commission had means other than denial of intervention to avoid unduly protracted or diffuse proceedings, and that petitioning the Commission was not an adequate alternative because the applicable procedures and scope of judicial review were far less extensive than in licensing proceedings.

The essential issue is whether intervention rights should be defined by a relatively clear but restrictive test, such as that adopted by Judge Bork, or whether a more flexible and permissive test should be applied, as urged by Judge Wright. The former has the advantages of clarity and predictability. As the Supreme Court emphasized in Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978), which limited the authority of federal courts to impose new procedural requirements on the NRC, these are important considerations. Also, liberal intervention could threaten the Commission's ability to make best use of its limited administrative resources and take prompt enforcement action. On the other hand, Judge Bork's distinction between Commission actions that relax existing safety requirements and those that impose new ones seems unduly mechanical. And his willingness to give the Commission almost total discretion to limit the issues in a proceeding is troubling. My own view is that Judge Wright's position is the better one. Judge Bork's approach, however, is supported by substantial considerations that were endorsed by the Supreme Court in Vermont Yankee.

The reviewability of an administrative decision was at issue in Robbins v. Reagan, 780 F.2d 37 (1983). The federal government allocated $2.7 million to rehabilitate a shelter for the homeless operated by CCNV, a local community group. CCNV asserted that additional monies were needed in order to create the "model shelter" assertedly promised by the government, and refused to participate further unless they were provided. The government thereupon withdrew the $2.7 million allocation. CCNV brought suit demanding that the government expend the monies necessary to create a "model shelter."

The per curiam majority held that the withdrawal was reviewable because the general purposes of the Community Services Health Block Grant, as well as requirements that government action be non-arbitrary and factually supported, provided "law" that the court could apply to decide the validity of the withdrawal. The majority then ruled in favor of the government on the merits. It also upheld the district court's injunction against closing the shelter until alternative housing was developed, on the ground that this course had been proposed in an internal government memorandum on which the court had relied in concluding that the government's withdrawal decision was reasonable.

Judge Bork, dissenting, argued that the controversy was not subject to review. He disagreed that the government's withdrawal was in issue, finding that CCNV had deliberately limited its challenge to the government's refusal to provide the funds needed for a "model shelter." Applying criteria set forth in Heckler v. Chaney, 105 S.Ct. 1649 (1985), he found this refusal unreviewable because relevant statutes provided no standards for judging its legality. Judge Bork also asserted that the injunction was improper because the entire controversy was not reviewable and because the government was under no legal obligation to CCNV to keep the shelter open. It had made no such commitment to CCNV, and CCNV had not sued to enforce any such commitment.

The majority and Judge Bork disagree in their conceptions of the case and their readiness to use judicial power to attempt to help solve the problem of the homeless. The majority was willing to reach out and uphold injunctive relief through means that are difficult to justify under the traditional view that the courts' responsibility is to adjudicate the controversy presented by the parties. Judge Bork would adhere more closely to the traditional view. His position is cogently reasoned and consonant with precedent.

Agency authority to impose regulatory requirements was at issue in Middle South Energy, Inc. v. FERC, 747 F.2d 763 (1984), and Planned Parenthood Fed'n of America v. Heckler, 712 F. 2d 650 (1983). Judge Bork wrote the court's opinion in the first case and a concurring opinion in the second. Both rejected agency claims of authority to impose novel regulatory requirements.

FERC has authority under the Federal Power Act to suspend changes in existing wholesale electric rates pending a Commission determination of their reasonableness. FERC and its predecessor, the Federal Power Commission, had long construed the statute not to grant suspension authority over initial rates. This distinction has long been traditional in rate regulation. Trans Alaska Pipeline Rate Cases (TAPS), 436 U.S. 631, (1978) read somewhat similar statutory provisions governing pipelines as giving the ICC power to suspend initial rates. FERC thereupon asserted that it had such power.

Judge Bork rejected this assertion, distinguishing TAPS primarily on the ground that the relevant language of the ICC and FERC statutes was different, and that the most natural and sensible reading of the FERC statute was to limit its suspension authority to changes in existing rates. In dissent, Judge Ruth Bader Ginsburg acknowledged that the case was "close" but would give controlling weight to the goal, stressed in TAPS, of protecting consumers against excessive rates, a goal which applied to initial as well as changed rates. She also argued that the language of the FERC statute could be stretched to cover initial rates.

The case is a classic standoff between two approaches to statutory interpretation: the language of the statute versus its general purpose as understood by the courts. The former approach leads to Judge Bork's conclusion, the latter supports Judge Ginsburg's result. There is no obvious way to reconcile the two in the circumstances of the case at issue. Insistence that Congress take clear responsibility for grants of regulatory authority tips the balance in favor of Judge Bork's position.

In Planned Parenthood, HEW had issued regulations requiring that family planning services receiving federal funds under Title X of the Public Health Act notify parents when contraceptives were prescribed to minors. HEW asserted that this requirement was authorized by 1981 amendments to Title X which provide that recipients "encourage family participation" to "the extent practical." Judge Wright's panel opinion concluded that the amendments did not give authority to HEW to impose the notification requirement; Judge Bork agreed with his analysis on this issue. This ruling, however, left open the possibility that HEW might seek to reimpose a notification requirement by disclaiming reliance on the 1981 amendments and relying instead on its general Title X authority. Judge Wright, however, found that Title X affirmatively barred HEW from imposing a notification requirement because the House in 1978 had failed to adopt an amendment to Title X requiring notification. He found that this failure to amend the statute amounted to an implicit congressional reification of HEW's established policy of maintaining client confidentiality. He therefore affirmed an injunction against the notification regulations.

Judge Bork dissented on this point, arguing that Congress had never resolved the notification issue. Accordingly, Title X did not mandate confidentiality. It did not follow, however, that HEW had statutory authority to require notification. Under SEC v. Chenery Corp., 318 U.S. 80 (626), the court should not decide that issue until HEW had decided whether to reissue the regulations on the basis of some claim of authority other than the 1981 Amendments. The regulations should therefore be remanded rather than permanently enjoined.

Judge Bork's concurrence is an outstanding and sophisticated application of administrative law principles. Judge Wright's conclusion that Title X requires confidentiality because the House, many years after enactment of Title X, failed to adopt an amendment requiring notification is illogical and unsound. As Judge Bork notes, such holdings undermine political accountability by supposing that Congress has legislated on a subject by not legislating. Once it is concluded that the statute does not affirmatively bar HEW from adopting a notification requirement, Chenery compels the position adopted by Judge Bork.[6]

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[6] Judge Bork's conclusion that remand is the appropriate disposition of the case is, however, subject to question. Remand would be appropriate if the case were brought as a statutory review proceeding, but it was in fact brought under the general federal question jurisdiction of the district court. In these circumstances, the appropriate remedy was to enjoin enforcement of tha regulations unless and until HEW decided to repromulagte them under a different rationale. The difference between this remedy and remand is, however, not material.

Judge Bork's opinions in Middle South and Planne Parenthood require relatively clear statutory warrant for administrative assertions of regulatory authority. This insistence is fully supported by the prevailing approach of the Supreme Court over the past decade, as reflected in decisions such as Midwest Video Corp. v. FCC, 440 U.S. 689 (1979) and Industrial Union Department AFL-CIO v. American Petroleum Institute, supra. As Planned Parenthood illustrates, this insistence serves to protect individual as well as business interests.

Three of Judge Bork's opinions involved challenges to agency deregulatory initiatives or agency failure to take regulatory initiatives favored by private parties.

Oil, Chemical & Atomic Workers v. American Cyanamid Co., 741 F.2d 444 (1984) involved a union challenge to an Occupational Safety and Review Commission ruling that a Cyanamid policy on sterilization of women workers did not violate its obligation, under the "general duty" provision in the OSHAct, to furnish each of its employees "employment and a place of employment which are free from recognized hazards" causing serious physical harm. The policy in question prohibited women of childbearing age from working in a plant containing airborne lead in concentrations harmful to fetuses unless the women submitted proof of sterilization. The lead concentrations in the plant did not violate any applicable OSHA standards and it was not economically feasible to reduce them.

In an opinion for a unanimous court, Judge Bork upheld the Commission's determination that Cyanamid's policy was not a "hazard" because the Act was directed at processes and materials which cause injury or disease by operating directly on employees. Judge Bork found this interpretation to be supported by the statute's language and legislative history and consonant with relevant precedent. He noted that

Cynamid's policy put its women employees to "unhappy choices" and the case raised "moral issues of no small complexity" but concluded that the Act was not addressed to the problems raised by the policy and was ill-suited to resolve them. If the company's policy were deemed a "hazard," the company would face the option of either discharging all women in the plant (or transferring them to other positions at lesser pay), or shutting down the plant. Giving women the option of continued employment on proof of sterilization was arguably the best solution to this dilemma. Congress had not remotely considered such issues when it enacted the statute and the court was "not free to make a legislative judgment."

Judge Bork's well-crafted opinion acknowledges the painful and far-reaching implications of the case but provides good reasons for insisting on the limited authority of judicial office. The most appropriate resolution of the problem presented might be to require the employer to offer alternative employment without diminution of pay, but this would effectively require a statutory amendment.

TRAC v. FCC, 801 F.2d 502 (1986) involved FCC regulatory policies for teletext, a new broadcast technology that utilizes the intervals between regular television broadcast signals to transmit signals that can be converted into text messages on viewers' screens. The FCC declined to require teletext broadcasters to adhere to the same requirements imposed by the FCC on regular television broadcasters regarding (1) reasonable access by political candidates to the medium; (2) "equal time" for all candidates if broadcasters permitted any candidate to use the medium; (3) "fairness doctrine" requirements that broadcasters present a range of differing views on issues of public importance.

Judge Bork's panel opinion reversed FCC ruling (2) as inconsistent with statutory requirements. It sustained rulings

(1) and (3), upholding the FCC's determination that regular broadcasting afforded adequate opportunities for candidate access and for discussion of opposing views on public issues, and its finding that obliging teletext to meet the same requirements as regular broadcasters would stifle the development of this promising new technology. Judge MacKinnon entered a very brief dissent on this last point, which had not been litigated by petitioners; he stated his belief that teletext would not be unduly burdened.

In the course of his opinion Judge Bork rejected FCC arguments that teletext was a "print" medium constitutionally immune from regulation under Supreme Court precedent striking down government regulation of newspaper content. The Court had, however, upheld the constitutionality of FCC regulation of broadcast content on the ground of the physical scarcity of the radiomagnetic spectrum. Judge Bork doubted that broadcasting regulation could be upheld on scarcity grounds, noting that the machinery and other resources needed for printing were also scarce. But he concluded that the Supreme Court had nonetheless adopted the distinction and that teletext must therefore be classified as broadcasting because it used the airways.

Judge Bork also rejected petitioners' argument that the fairness doctrine is a statutory requirement rather than a discretionary Commission policy, rejecting claims that a 1959 amendment to the Act dealing with "equal time" issues amounted to a backhand congressional adoption of the doctrine. He found that the Commission had adequately supported its finding that application of the doctrine to teletext would be unduly burdensome.

Judge Bork's opinion is thorough, well-reasoned, and persuasive. His discussion of the Supreme Court's print/broadcasting distinction was not, as some have claimed, gratuitous; it was a necessary step in resolving the FCC's contentions. Judge Bork's analysis is also a powerful and indeed devastating demonstration of bankruptcy in a distinction which he must nonetheless follow and does so conscientiously. His refusal to find that the fairness doctrine is mandated by the Act reflects sound principles of statutory interpretation and a healthy insistence on politically responsible policymaking. The opinion's treatment of regulatory burdens on teletext seems excessively brief, but this may simply reflect petitioners' failure to litigate the issue.

The final decision in this trio is Black Citizens for a Fair Media v. FCC, 719 F.2d 407 (1983), in which a public interest group and individuals challenged the FCC's decision to drastically curtail the information that most applicants for broadcast license renewal are required to file in their applications. The Commission asserted that a combination of other required public filings by broadcasters regarding their broadcast promises and performance, monitoring by public interest groups such as petitioner, and random inspections by FCC staff would ensure adequate compliance by licensees with their public service requirements and enable the FCC to determine, as it is required to do by statute, that renewal serves "the public interest, convenience and necessity".

Petitioners asserted that the alternatives relied upon by the FCC were not adequate to ensure broadcaster compliance with public service obligations, and that the basic justification for the FCC's policy change -- to relieve the Commission and broadcasters of the administrative burdens of paperwork -- was impermissible. Judge Bork's opinion for the majority disposed of these contentions rather easily. Administrative burdens are surely a relevant consideration and petitioners were unable to discharge the necessarily heavy burden of establishing, in advance of any operating experience, that the Commission's predictions regarding the efficacy of the alternatives upon which it relied were unreasonable.

Judge Wright's dissent provided a far stronger challenge. The Communications Act provides that "the Commission shall determine in the case of each application filed with it . . . whether the public interest . . . will be served by the granting of such application." He argued that this provision obliged the Commission to make a case by case determination of each applicant's performance, that the Commission in the past had so understood its obligations, and that it could not properly make such determinations unless applicants submitted more information than the Commission now required. Judge Bork's response was that the Commission enjoyed considerable statutory discretion in carrying out its responsibilities, that its past practices could therefore be changed, and that the Commission had provided well-reasoned justifications for the changes in issue. Judge Bork's position is amply supported by other recent decisions in the D.C. Circuit and the Supreme Court that allow the FCC considerable flexibility to cut back broadcast regulatory requirements that it had previously imposed, and that reject arguments by Judge Wright and several of his colleagues that such requirements are mandated by the Communications Act. See, e.g., FCC v. WNCN Listener Guild, 450 U.S. 582 (1981). The basic issue presented in San Luis Obispo Mothers for Peace v. NRC, 789 F.2d 26 (1986)(en banc) was whether the NRC's acted arbitrarily in failing to consider the potential complicating effects of an earthquake in response plans for a radiological emergency when it licensed the Diablo Canyon nuclear plant in California. Judge Bork wrote the opinion for an en banc court. Chief Judge Wald wrote a dissenting opinion for four justices.

Judge Bork convincingly refuted petitioners' claims that the Commission's failure to consider earthquakes violated its own regulations and that the petitioners should have been allowed to discover transcripts of a closed Commission meeting. Whether the Commission's refusal to consider earthquakes in connection with emergency response plans was reasonable presented a closer question. In licensing the plant, the Commission had found that an earthquake of magnitude 7.5 or greater could initiate a radiological emergency at the plant, but concluded that the likelihood of such an earthquake was too small ("so small as to be rated zero") to be a factor in the licensing decision, a determination upheld in a previous D.C. Circuit decision. Relying on this determination, the Commission held that the emergency plans need not consider the occurrence of a 7.5 magnitude initiating earthquake. Further, it held that the plans need not consider the possibility that an earthquake (whether greater or less than 7.5 magnitude) might occur at the same time as a radiological emergency initiated by other means because the likelihood that both events might occur simultaneously (1/6,500,000 during the life of the plant) was too low. Judge Bork upheld these determinations.

Chief Judge Wald entered a strong dissent arguing that emergency plans should by their very nature be based on worst case assumptions. Accordingly, they should deal with the possibility that an earthquake less than 7.5 magnitude would, contrary to the Commission's predictions, initiate a radiological emergency. Also, in considering the possible complications of an earthquake in connection with an emergency initiated by other causes, the plan must be based on the premise that such an emergency would occur. If the occurrence of an emergency was assumed, the simultaneous occurrence of a serious earthquake was not so improbable that it need not be considered. Finally, Judge Wald thought the Commission's refusal to consider earthquakes, which she attributed to its desire to expedite licensing of an already long-delayed plant, was at odds with its consideration in other cases of infrequent natural events such as 100-year floods, although she admitted that petitioners had failed to demonstrate decisional inconsistency by the Commission.

The issues presented by cases such as this present great difficulties for reviewing courts in reviewing highly technical issues of potentially great policy importance. Judge Bork would accord rather more deference to the fact findings and policy judgments of the Commission than would Chief Judge Wald. In this he has the support of the Supreme Court, which in Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87 (1983) rejected an analagous challenge to NRC determinations regarding the likelihood of releases from stored radioactive wastes.

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JUDGE ROBERT BORK'S DECISIONS IN WHICH HE WROTE NO OPINION: AN ANALYSIS OF THE REGULATORY AND BENEFIT CASES

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A. THE SIGNIFICANCE OF THIS SURVEY

Most of the attention given Judge Bork's judicial record has been directed at the cases in which he wrote an opinion. Such attention is eminently appropriate, since the opinions present a direct expression of his views.

But little attention has been devoted to the more numerous cases in which Judge Bork participated and joined in the decision, but did not himself write an opinion. The assessment of Judge Bork should take these decisions into account.

There are almost 300 such cases. In response to allegations that Judge Bork has favored business against government agencies and favored the agencies against individuals, this survey examines the cases in which Judge Bork's court passed upon agency actions that involved regulatory issues (48 cases) and benefits entitlement (8 cases).

Even though they contain no written Bork opinion, these somewhat neglected cases are informative.

If the primary interest is in the outcomes of the cases, and in whether those outcomes show bias, these cases are every bit as relevant as those in which he did write an opinion. Any bias ought to show up equally in both.

Beyond that, these cases demonstrate his manner of working in concert with others. Each decision is the product of collaborative consideration and discussion among the three judges of the panel. The outcomes and accompanying opinions show concretely the ways Judge Bork has worked with other judges, respecting and accommodating their views without relinquishing the essentials of his own. While the opinions a judge joins may reflect his personal style of reasoning less exactly than those he writes himself, he is nevertheless accountable for them. Such opinions are especially relevant in appraising qualifications for the Supreme Court, whose members each write fewer opinions because all nine of them sit on all cases.

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In the 56 regulatory and benefits cases covered by this survey, Judge Bork sat and concurred with each of his D.C. Circuit colleagues, at least once and usually several times. The issues they passed upon stretched across a great range. Almost all were decided unanimously. There were only three dissents among the regulatory cases and one in the benefits cases.

Judge Bork has concurred with colleagues of all political persuasions in a very high percentage of his decisions -- not only in the 56 cases surveyed here, but in all of his cases (see White House briefing papers, part 6). Critics have asserted that the mere fact that Judge Bork concurred with a liberal colleague ipso facto proves that the case was noncontroversial, and therefore irrelevant to the evaluation of Judge Bork. They thus attempt to divert attention from the unanimous decisions, which in fact are highly revealing.

The critics' position is fallacious, for two reasons. First, it is not the fact of concurrence or dissent that is critical. What is critical is the substance of what was concurred in: what does a decision show about the judge's position on that particular issue involving those specific parties? Second, the unanimous cases contradict the charges of bias. If Judge Bork harbored a bias regarding a certain class of parties or subject matter, the bias would exert itself not only in the split-decision cases but also in the process of deciding all cases involving the same kinds of parties or subject matter.

As this analysis shows, large proportions of Judge Bork's non-opinion decisions in the regulatory field favored the agency or nonbusiness party against business, and in the benefits area favored the individual against the agency. These decisions refute the claims of bias. Their unanimity cannot change that fact.

B. CASES INVOLVING REGULATION

The report prepared for Senator Biden states in a heading that "Judge Bork's Opinions Show a Decidedly Pro-Business Pattern" (p. 39). Astoundingly, the report cites only two cases to support this highly unfair and misleading allegation (p. 39-40). Some "pattern"!

The 48 regulatory cases covered in the present survey show quite a different pattern. They are analyzed in three groups: First are those cases in which a regulatory issue was contested between a federal agency and business interests. Second are those where business organizations were the real parties in interest on both sides of the matter brought before Judge Bork's court. Third are cases (not all involving business) where nonbusiness groups sought to reverse regulatory agency action.

Needless to say, these 48 cases involved an enormous span of varied issues and procedural postures. In such circumstances, there obviously are limits on how informative an analysis can be when it is based on measuring outcomes against the identity of the parties. Nevertheless, such an approach has been made the framework of this analysis, for two reasons. First, the critics of Judge Bork have charged bias, and bias is revealed or refuted most tellingly by outcomes. Second, opponents of Judge Bork have argued heavily in "box score" terms, inviting rejoinder in kind.

1. Business v. Regulatory Agency

The Public Citizen paper states "that in cases in which businesses challenged agency actions, Judge Bork often overturned the agency and ruled in favor of the business interests" (p. 15). In the cases here surveyed, it wasn't so very "often" that this happened. Of 12 cases in this first group, Judge Bork decided 7 for the agencies and against the business interests, 4 for the business interests, and one with mixed results.

The paper prepared for Senator Biden asserts that Judge Bork's approach "favors big business against the government" (heading F, p. 39, emphasis added). But consider: Where Judge Bork ruled in favor of business (including the case with mixed results), the winners were Athlone Industries, Yakima Valley

Cablevision, Wisconsin Electric Power, Quincy Cable TV, and (a partial winner) the National Soft Drink Association -- a couple pretty big, the others not so big. In 6 of the 7 cases ruling against business, by contrast, the losers were indubitably big: American Telephone and Telegraph, Kennecott, Tennessee Gas Pipeline division of Tenneco, American Trucking Associations, Kansas Gas and Electric, and General Electric Uranium Management Corporation. (The seventh case involved a licensed perishable commodities company.)

Judge Bork's panel dismissed AT&T's case on appeal because its petition to review was filed after the FCC's order had been announced but before the jurisdictional 60-day filing period, which began after publication in the Federal Register (Western Union Telegraph Co. v. F.C.C., 773 F.2d 375 (1985)). He voted to reduce the attorney's fees previously awarded Kennecott as a partially successful challenger of EPA regulations (Kennecott Corp. v. E.P.A., 804 F.2d 763 (1986)). His panel rejected on ripeness grounds Tennessee Gas's challenge to a Federal Energy Regulatory Commission rule change (Tenn. Gas Pipeline Co., A Div. of Tenneco v. F.E.R.C., 736 F.2d 747 (1984). Judge Bork joined Judge Scalia in ruling against the American Trucking Associations' attack on ICC actions that enlarged competition among truckers (American Trucking Associations, Inc. v. I.C.C., 697 F.2d 1146 (1983)). His panel upheld the FERC's disallowance of Kansas Gas and Electric's use of "minimum billing demand clauses" in contracts with its customers (Kansas Gas & Elec. Co. v. F.E.R.C., 758 F.2d 713 (1985)). Judge Bork's panel rejected General Electric Uranium's complaint that the Department of Energy was charging excessive fees for disposal of spent nuclear fuel (General Elec. Uranium v. U.S. Dept. of Energy, 764 F.2d 896 (1985)). And he voted to uphold USDA orders debarring from employment stockholders of a licensee company that had violated the perishable commodities laws (Martino v. United States Dept. of Agriculture, 801 F.2d 1410 (1986)).

It assuredly cannot be said that these 7 pro-regulatory decisions disclose a pro-business bias. Nor can such a bias be discerned in the cases in which Judge Bork ruled in favor of business interests. It is amply clear that in none of his decisions was he engaging in some sort of pro-business activism, by reaching beyond the established law to arrive at a desired result. The concurrence of liberal judges on the panels that decided these cases attests to that. These judges would not have countenanced any sort of pro-business ruling that was not tied to normal legal moorings.

Four cases in this group were decided in favor of business interests, and a fifth partially so. Judges Wilkey, McGowan and Bork held that the CPSC overreached its statutory powers when it attempted to impose civil penalties administratively (Athlone Industries v. Consumer Product Safety Commission, 707 F.2d 1485 (1983)). In Yakima Valley Cablevision, Inc. v. F.C.C., 794 F.2d 737 (1986), Judge Bork joined the opinion of Judge Edwards chastising and reversing the FCC for abruptly changing its practice of passing upon the legality of cable franchise fees. With Judges Spottswood Robinson and Starr, Judge Bork held for utilities in their attack upon unauthorized DOE nuclear waste fees (Wisconsin Elec. Power Co. v. Dept. of Energy, 778 F.2d 1 (1985)). Finally, in a major freedom of speech decision, Judge Bork joined with Judges Wright and Ruth Ginsburg in striking down, as violative of the First Amendment, FCC regulations requiring cable operators to carry nearby over-the-air television programming (Quincy Cable TV, Inc. v. F.C.C., 768 F.2d 1434 (1985) earlier proceeding at 730 F.2d 1548 (1984)).

One case produced mixed results for business. National Soft Drink Ass'n v. Block, 721 F.2d 1348 (1983). Pursuant to a then-recent amendment to the Child Nutrition Act, the Secretary of Agriculture promulgated regulations restricting the sale of soft drinks and other junk food in public schools where federally subsidized breakfasts and lunches are served. Sale of the junk foods was prohibited until after the last lunch meal of the day at the school. Senior Judge McNichols of the District of Idaho, joined by Judge Bork, upheld the regulations over several general lines of attack. But they held that the statute, in accordance with the prior practice, authorized the prohibition of junk food sales only during periods of actual meal service, rather than all day until after lunch. Judge Wilkey dissented. (The Public Citizen paper, incidentally, grievously misstates this case. It declares that Judge Bork's panel held that the agency "did not have the authority to ban the sale of soft drinks in schools during mealtimes" (p. 34). In fact, the panel held precisely the opposite.)

2. Business Interest v. Business Interest

Although brought against an agency, an appeal to Judge Bork's court frequently represents the protest by one business interest against agency action favoring another business interest. Judge Bork participated in twelve such cases within this survey. All were decided unanimously. If one were searching most diligently for a pro-business bias, it would be very hard to find even a suspicion of it in these cases. They were business against business.

The paper prepared for Senator Biden charges that Judge Bork "favors big business", albeit that he favors big business "against the government." The cases certainly cannot support any suspicion that he favors big business over little business in his decisions. The parties in these cases were pretty evenly matched: Railroad against railroad (Burlington N.R. Co. v. U.S., 731 F.2d 33 (1984); Southern Pacific Transp. Co. v. I.C.C., 736 F.2d 708 (1984)); utility against railroad (S. Carolina Elec. & Gas Co. v. I.C.C., 734 F.2d 1541 (1984)); pipeline against major distributor (Atlanta Gas Light Co. v. F.E.R.C., 756 F.2d 191 (1985); Wisconsin Gas Co. v. F.E.R.C., 758 F.2d 669 (1985)); shippers' group against bus freight carriers (Drug & Toilet Preparation Traffic Cont. v. U.S., 797 F.2d 1054 (1986)); major shipper against railroads (Aluminum Co. of America v. United States, 790 F.2d 938 (1986); Ford Motor Co. v. I.C.C., 714 F.2d 1157 (1983)); trucker against competing truckers (Global Van Lines, Inc. v. I.C.C., 804 F.2d 1293 (1986)); Bell operating companies against MCI and other long distance carriers (Bell Telephone Co. of Pennsylvania v. F.C.C., 761 F.2d 789 (1985).

In one case, the panel upheld the big guy, Wisconsin Bell, in its refusal to make pole attachments for the little guy, Paragon Cable, after Paragon's municipal franchise had been revoked (Paragon Cable Television, Inc. v. F.C.C., 822 F.2d 152, (1987).

In a "race to the courthouse" involving seven filings on the same day, the court chose two winners (Associated Gas Distributors and the Ohio Office of Consumers' Counsel) based on time of filing, but made no other disposition among the parties (Associated Gas Distributors v. F.E.R.C., 738 F.2d 1388 (1984)).

As noted above, Public Citizen asserts that "in cases in which businesses challenged agency decisions, Judge Bork often overturned the agency and ruled in favor of the business interests" (p. 15). We saw in the preceding section that, in 12 cases involving business challenges of agency regulatory action, this happened just 5 times, including one in which the agency's decision was overturned only in part. Of the 12 cases just discussed in the present section, in which business interests were pitted against other business interests, Judge Bork reversed the agency in only 4. He upheld the agency in 7 cases (including one, Southern Pacific Transp. Co. v. I.C.C., 736 F.2d 708 (1984), in which there was remand on one minor aspect of a multipart appeal). In the twelfth case, the agency's action was not passed upon.

3. Cases Where Nonbusiness Organizations Sought Review

The cases in which Judge Bork participated but wrote no opinion include 24 regulatory cases in which nonbusiness organizations sought review of agency action. The petitioners included a broad assortment of activist citizen groups and some state and local governmental units.

In assessing his record in these cases, one may recall that Judge Bork *is* conservative, in the sense that he is disinclined to stretch law and precedent beyond their established foundation, as judges are often urged to do by activist groups seeking change through the judicial process. And though, as the cases show, Judge Bork harbors no pro-business prejudice, he certainly is in no way anti-business. Thus his philosophy stands in contrast to many activist groups that, for whatever reason, are consistently postured in support of or in opposition to business interests.

Particularly in light of these considerations, Judge

Bork's record of outcomes in these cases is a balanced one. Nine favored the citizen or public organizations: 8 reversed the agency and one affirmed the agency but ruled for the intervenor environmental organization. Fifteen others affirmed the agency, including one which produced mixed results for the environmental group.

Prevailing parties for whom Judge Bork ruled in this group of cases included a public housing tenants' group, environmental action organizations, a labor union, Navajo Indian groups, a radio listener group, consumers' organizations, and a state asserting its right to regulate beyond the federal minimum.

In Ashton v. Pierce, 716 F.2d 56 (1983), Judge Bork upheld the claim of public housing tenants for a broader reading of the Lead-Based Paint Poisoning Prevention Act and for stricter enforcement against paint poisoning hazards than was being pursued by HUD.

Judge Bork joined in a strong opinion by Judge Wald setting aside DOE determinations not to promulgate mandatory energy-efficient standards for major types of household appliances and sternly directing DOE to reappraise its appliances program (Natural Resources Defense Council v. Herrington, 768 F.2d 1355 (1985)).

On the petition of United Transportation Union officials, Judges Bork, Edwards and Swygert (Senior Judge of the 7th Circuit) reversed an ICC order that had denied statutory labor protections to railroad workers who were displaced by a railroad's abandonment of a stretch of track but were not employed by that railroad. The panel held that the displaced union employees should be given the statutory protections even though they were employed by a different railroad. Black v. Interstate Commerce Commission, 814 F.2d 769 (1987).

Again voting to set aside an ICC action, Judge Bork ruled in favor of a group of petitioners representing various Navajo Indian interests in northwestern New Mexico. The court remanded an order which had approved a new rail line, near Navajo lands, without adequately considering allegations of misconduct regarding the preservation of Navajo sites, and without considering the Navajos' right to quiet possession of their domains. New Mexico Navajo Ranchers Assn v. I.C.C., 702 F.2d 227 (1983).

Judge Bork ruled in favor of a radio listeners' group that petitioned the FCC to deny renewal of a radio station's broadcast license, after the station had changed its programming format. The court set aside the Commission's denial of the group's petition without a hearing. The decision is significant because the petition-to-deny procedure is a citizen group's most potent tool to accomplish change in broadcast cases. The opinion joined by Judge Bork clarifies in a liberal direction the standard for granting hearings on petitions to deny. Citizens for Jazz on WRVR, Inc. v. F.C.C., 775 F.2d 392 (1985).

In Consumers Union of U.S. Inc. v. F.C.C., 691 F.2d 575 (1982), the court en banc, including Judge Bork, unanimously held unconstitutional the legislative veto provisions by which Congress had purported to nullify the FTC's used car rule.

The DOT's Federal Highway Administration and the ICC's Office of Compliance and Consumer Assistance opposed the grant of a trucking certificate to an allegedlly unfit applicant, and on review Judge Bork's panel vacated the grant (Department of Transp., Fed. Hy. Admin. v. I.C.C., 733 F.2d 105 (1984)).

The FCC purported to preempt state regulation of subchannels of federally-licensed FM channels, even where the service was purely intrastate. Judge Buckley, joined by Judges Wright and Bork, held that the FCC lacked statutory authority to preempt such intrastate service, leaving the State of California free to regulate it. People of State of Cal. v. F.C.C., 798 F.2d 1515 (1986).

The case of Town of Summerville, W.Va. v. F.E.R.C., 780 F.2d 1034 (1986) is included here because the town was seeking a license in its proprietary capacity, and intervenor Friends of the Earth, opposing the town, prevailed before Judge Bork's panel. The court upheld the agency's dismissal of the town's application to develop a hydroelectric project on a river that was under consideration for inclusion in the national wild and scenic rivers system.

In the above 9 cases, just mentioned, Judge Bork upheld the positions of nonbusiness interests 6 times in dealing with economic regulation and 3 times in cases involving health, safety and environmental regulation. The corresponding numbers for the cases in which Judge Bork upheld the agency are 7 concerned with economic and 8 with health, safety and environmental regulation -- 15 altogether.

In those 15 decisions, Judge Bork joined panel opinions by or with Judges Robinson, Wright, Wald, Mikva, Edwards, Ruth Ginsburg, Scalia, Starr, Buckley, Wilkey, Robb, Oberdorfer (District of the District of Columbia), Gasch (District of the District of Columbia), Jameson (District of Montana) and Gordon (Western District of Kentucky). In only two of these 15 cases were dissenting opinions written, both by Judge Wald.

Again, an examination of the decisions shows nothing that can be seen as indicative of a bias or activism favoring business. The decisions are sensible and solidly rooted in the law. In most of them, Judge Bork was joined by judges of established liberal views who, again, would surely countenance no activism on the right.

In the economic regulation area, the single nonunanimous decision was Cal. Ass'n of Physically Handicapped v. F.C.C., 778 F.2d 823 (1985). A handicapped persons group challenged the FCC's use of a "short-form" application in approving the transfer of stock interests in Metromedia, a licensed owner of broadcast stations. The group claimed injury from Metromedia's alledged longstanding neglect of its responsibilities to the hearing impaired and failure to exert reasonable efforts to hire the handicapped. Judge Ruth Ginsburg, joined by Judge Bork, held that the handicapped group lacked standing because the challenged action (use of the short form and the transfer) did not cause its injury, as is required for a justiciable case or controversy under Article III of the Constitution. Judge Wald in dissent found standing based on injury from the transfer.

Judge Bork again (together with Judge Buckley) joined an opinion of Judge Ruth Ginsburg's in Committee to Save WEAM v. F.C.C., 808 F.2d 113 (1986). A group of big band music aficionados petitioned to deny the transfer of station WEAM to a new owner planning a country music format. In pursuance of its policy not to inquire into whether proposed radio entertainment format changes are in the public interest, the Commission granted the transfer without a hearing. Since the controlling FCC policy had been sustained by the Supreme Court and was properly applied in this case, the Commission's action was upheld.

In National Black Media Coalition v. F.C.C., 760 F.2d 1297 (1985), Judge Scalia, joined by Judges Bork and Starr, dismissed the appeal where appellants failed to file their notice of appeal within the statutory period. The panel held that the appeal deadline is jurisdictional, and equities possibly favoring appellants could not serve to create jurisdiction where it did not otherwise exist under the statute. (It may be noted that this is virtually identical to the basis on which Judge Bork dismissed an appeal brought by AT&T (Western Union Telegraph Co. v. F.C.C., 773 F.2d 375, (1985), described above.)

In an unrelated case involving the same parties, Judges Jameson, Wright and Bork upheld an FCC rule amendment exempting small market television broadcasters from the requirement of conducting surveys to ascertain community need. Noting that only the survey requirement and not the underlying ascertainment requirement had been removed, the court held that the FCC had rationally based the change on the hypothesis that small-market broadcasters know their communities well enough to ascertain needs without a formal survey. National Black Media Coalition v. F.C.C., 706 F.2d 1224 (1983).

In City of Charlottesville, Va. v. F.E.R.C., 774 F.2d 1205 (1985), Judges Bork and Gasch joined an opinion by Judge Scalia upholding FERC approval of a new accounting method for allocating tax allowances among several utilities. The new method tended to result in higher rates for customers of profitable utilities, since tax losses of affiliate companies could no longer be passed through, but it more accurately reflected the cost of service to those customers.

In Cities of Anaheim and Riverside, Cal. v. F.E.R.C., 692 F.2d 773 (1982), the cities sought to compete with Southern

California Edison in development of a hydroelectric site located near other existing facilities of Edison. The cities appealed Commission actions which did not preclude their competitive application but, they contended, reduced its effectiveness. Judge Jameson, joined by Judge Bork, held that the appeal was premature and therefore not ripe for review. Judge Mikva concurred, holding that some aspects (though not all) were ripe for review, but agreeing with the result by finding the Commission's actions proper on the merits.

The final economic regulation case in which Judge Bork ruled against a nonbusiness challenger to agency action is Pennsylvania Public Utility Com'n v. U.S., 812 F.2d 8 (1987). Judge Oberdorfer, joined by Judges Bork and Buckley, rejected the Pennsylvania commission's contention that bus transportation of airline passengers and crew between Baltimore-Washington Airport and Columbia, Maryland was intrastate commerce.

In the realm of health, safety and environmental regulation, the single case that elicited dissent was San Luis Obispo Mothers for Peace v. N.R.C., 751 F.2d 1287 (1984), reheard en banc, 789 F.2d 26 (1986). Since Judge Bork wrote the majority opinion en banc, this case strictly need not be included in this survey of those cases in which he participated but did not write an opinion. Because the earlier proceeding (751 F.2d) was such a case, however, it is included. Both proceedings upheld the NRC's issuance of nuclear plant operating licenses over intervenors' objections, which were based on the concern that efforts to cope with a breakdown might be impeded by a simultaneous earthquake along nearby fault lines. In the originial panel decision, Judge Wilkey, joined by Judge Bork, held that the NRC had reasonably concluded that the possibility of an earthquake occurring at the same time as an independently-caused radiological emergency at the facility was so remote as to be insignificant. Judge Wald dissented. After rehearing en banc, parallel results ensued. Judge Bork wrote the majority opinion, which was joined by Judges Edwards, Scalia and Starr and partially by Judge Mikva, who concurred separately. Judge Wald again wrote in dissent, and was joined by Judges Robinson, Wright and Ruth Ginsburg.

In another case where an operating license for a nuclear facility was opposed because of the asserted risks of seismic activity, Judges Bork and Scalia joined an opinion by Judge Starr, which painstakingly reviewed the record and found the agency action to be fully supported. Carstens v. Nuclear Regulatory Com'n, 742 F.2d 1546 (1984).

A per curiam opinion of Judges Edwards, Bork and Buckley upheld NRC procedures and the resulting NRC decision in Oystershell Alliance v. United States Nuc. Reg., 800 F.2d 1201 (1986). In the interest of reducing delays, the NRC issued a temporary operating license before all final proceedings including reconsideration were completed. The panel held that the temporary approval was proper, despite pendency of petitioners' motions for reconsideration, since the approval was without prejudice to further consideration of the merits. Judge Bork's panel also held that it was proper and indeed mandatory for the Commission to take account of all relevant evidence in the administrative record, whether or not contained in the adjudicatory record, provided the information was available to all parties.

In Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678 (1982), conservation groups objected to a mining company's plan to conduct exploratory drilling on claims it held within a wilderness area. Since each drill site was limited to an area of 20 feet by 20 feet, the numerous sites to be explored over the planned four-year period would occupy a total combined area of about one-half acre. After completing several environmental and biological assessments, and imposing restrictive conditions including those suggested by the Fish and Wildlife Service to protect grizzly bears, the Forest Service concluded that the plan would have no significant impact on grizzly bears, and approved it as modified. A panel of Judges Gordon, Bork and Robb held that in these circumstances, under established D.C. Circuit criteria, the Forest Service properly declined to prepare a full environmental impact statement.

The same panel upheld EPA's 1979 determination, overriding a State's preferences, that funding for advanced waste treatment projects should be deferred in favor of funding basic treatment facilities for municipalities that did not yet have them. People of the State of Cal. v. United States E.P.A., 689 F.2d 217 (1982).

Judge Wald wrote the opinion, joined by Judges Robinson and Bork, in National Wildlife Federation v. Gorsuch, 693 F.2d 156 (1982). The panel upheld EPA's decision that certain dam-induced water quality changes should be regulated under state-developed management plans, pursuant to the Clean Water Act, rather than under the National Pollutant Discharge Elimination System.

The penultimate case in this series has attained a modest fame by virtue of Judge (now Justice) Scalia's opening waggery:

> This case, involving legal requirements for the content and labeling of meat products such as frankfurters, affords a rare opportunity to explore simultaneously both parts of Bismarck's aphorism that "No man should see how laws or sausages are made."

Community Nutrition Institute v. Block, 749 F.2d 50, 51 (1984). The Scalia opinion, joined by Judges Bork and Wilkey, upheld USDA regulations governing the labeling of meat products made partly with meat mechanically separated from bone. The rules were found to be authorized, reasonable, and supported by the record, which among other things included the findings of a panel of scientists that bone particles in the permitted amounts posed no health or safety risks except perhaps to persons sensitive to calcium and to infants, for whom protections were included in the regulations.

The final case, consolidating two proceedings, yielded mixed results. Judges Ruth Ginsburg, Bork and Buckley upheld an EPA safe drinking water rule against crossfire from an environmental organization, which wanted a stricter rule, and from a state health department, which urged a more tolerant rule or no rule at all. Natural Resources Defense Council v. Environmental Protection Agency, 812 F.2d 721 (1987).

The 48 cases reviewed in this Section B -- including those in which Judge Bork held for business interests, those in which he ruled for nonbusiness interests, and those in which he upheld the agencies -- when patiently inspected, belie any suggestion that Judge Bork acts upon a predispostion in favor of business. These decisions and opinions can be searched in vain for any iota of evidence that Judge Bork decided them on the grounds of bias, ideology or politics. To the contrary, the pattern they trace is one of taking each case on its merits, and deciding it conscientiously and with scrupulous even-handedness.

C. CASES INVOLVING BENEFITS

The paper prepared for Senator Biden charges that Judge Bork's approach "favors the government against the individual" (heading F, p. 39).

It should be noted that the report cites not a single case to substantiate this harsh change. And it nowhere cites any of Judge Bork's decisions in the benefits entitlement field.

If this allegation had substance, the bias would manifest itself readily in the decision of cases involving the administration of federal benefits entitlement programs.

Judge Bork took part in 8 decisions in this category. Again, the cases belie the allegations of bias.

In 3 of the 8 decisions, individuals sought review of agency actions denying their claims. In all three, Judge Bork ruled in favor of the individuals' claims and against the agencies. Moreover, in two of these three decisions, Judge Bork's panel took strong and rather unusual measures to direct positive agency action in the claimants' favor.

In three further cases, organizations representing benefits recipients challenged agency regulations or financing decisions. Judge Bork held for the benefits recipients' group in one case, ruled for the agency in a second, and dismissed the challenge in the third case on the basis that Congress had precluded court review by statute.

Thus, in the six cases just mentioned, Judge Bork held in favor of benefits recipients in 4 (including all three in which individuals sought to overturn agency denial of their benefits), and for the agency in 2 (including one dismissed for lack of jurisdiction).

Completing the category of Judge Bork's decisions involving benefits entitlement are two cases in which hospitals sought increased reimbursment under Medicare. They are included here principally in the interest of presenting all the cases in this group. The Medicare decisions do not involve the direct benefit claims of individuals, although persons relying upon Medicare may benefit indirectly from increased levels of reimbursement to hospitals. Judge Bork decided one of these cases for the hospital, and one for the agency.

The three cases involving individuals' claims for benefits -- in all of which Judge Bork held for the individual -- are these:

Ganem v. Heckler, 746 F.2d 844 (1984), opinion by Judge Mikva, joined by Judges Bork and Starr. The Social Security benefits claimant was a citizen of Iran who had lived in the United States. Benefits are payable to such persons if the country of their citizenship has a general social insurance or pension system and that system does not discriminate against Americans. Although SSA resumed benefit payments to the claimant when she returned to the United States in 1984, SSA denied benefits for a prior period of residence in Iran, on the ground that it could not obtain from the revolutionary government of Iran the needed information about its social security system. The court issued the extraordinary writ of mandamus compelling the Secretary of HHS to adopt realistic means to determine Iranian law.

Vance v. Heckler, 757 F.2d 1324 (1985), opinion by Judge Wright, joined by Judges Bork and Scalia. The issue was whether the claimant's son was eligible for Social Security child's insurance benefits on the ground that he was the child of a deceased worker. Although the SSA administrative law judge, the Secretary and the district court had found the evidence insufficient to support a paternity finding, Judge Bork's panel held that a letter written by the putative father was an acknowledgement of paternity sufficient to meet the requirements of 42 U.S.C. sec. 416(h)(3)(C)(i)(I)! The court took the unusual step of remanding to the district court with instructions to direct the Secretary to award benefits.

Carter v. Dir., Office of Workers' Comp. Programs, 751 F.2d 1398 (1985), opinion by Judge Scalia, joined by Judges Bork and Starr. The court held that the agency could not offset a tort recovery against the benefits due the claimant under the Longshoremen's and Harbor Workers' Compensation Act.

The cases entailing challenges to general agency actions, rather than to the denial of individuals' claims, are these:

City of New Haven, Conn. v. United States, 809 F.2d 900 (1987), opinion by Judge Edwards, joined by Judges Bork and Swygert. Municipalities, community groups and expectant recipients of benefits challenged the President's deferral of funds earmarked for housing assistance programs administered by HUD. The statutory authorization for such deferrals contained a legislative veto clause. The court held that the legislative veto was unconstitutional, and since it was not severable the entire statute was invalid, leaving no authority upon which to base the deferrals.

Petry v. Block, 737 F.2d 1193 (1984), opinion by Judge Starr, joined by Judges Wald and Bork. Participants in the Child Care Food Program challenged a USDA regulation. The court ruled that the Secretary had followed proper procedures in issuing the regulation to implement spending reductions mandated by the Omnibus Budget Reconciliation Act.

Gott v. Walters, 756 F.2d 902 (1985), vacated and remanded with directions to dismiss, 791 F.2d 172 (1985), opinion by Judge Scalia joined by Judge Bork, dissent by Judge Wald. Veterans groups challenged VA documents establishing methodologies for assessing claims of radiation injury in the determination of benefits. They argued that the VA had not duly observed the Administrative Procedure Act or its own regulations in promulgating these documents informally instead of through rulemaking procedures. The court held that the unusual preclusion provisions of the veterans' benefits statutes foreclosed judicial review of the matter. (After decision to rehear the case en banc, the parties jointly moved to remand the case to the district court, with directions to vacate all orders and dismiss, and the circuit court en banc unanimously so ordered.)

The Medicare cases are Walter O. Boswell Memorial Hosptial v. Heckler, 749 F.2d 788 (1984) (opinion by McGowan, joined by Mikva and Bork), remanding HHS regulations reducing the share of hospitals' malpractice insurance to be reimbursed by Medicare, and Villa View Community Hosptial v. Heckler, 728 F.2d 539 (1984) (per curiam, Wright, Mikva and Bork), holding that hospitals without bedside monitoring for cardiac patients do not qualify for the higher level of "special care unit" reimbursement.

These cases were decided on the merits, not on politics or ideology. In them, Judge Bork joined in decisions with colleagues across the spectrum of supposed political and policy identifications. In only one was there a dissent. These decisions disclose no trace of bias. Indeed, they evidence Judge Bork's receptivity to the claims of individuals and of organizations seeking benefits in their behalf.

The author thanks Charles Ablard, Joan Anthony, Peter Anthony, Marc Hoberman, Lee Liberman, Martha Moo, Patrick W. Murphy, Fred Nelson, Arthur Schulcz, Jennifer Smith, Denise Wallace, Scott Whitney and Katherine Yarbrough for their help.

Arlington, Virginia
September 10, 1987

I

JUDGE BORK, SEPARATION OF POWERS AND SPECIAL PROSECUTOR BILLS

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During his service as a judge and executive branch official, Judge Bork has dealt at great length with issues that, from a broad standpoint, involve the constitutional allocation of authority among the three branches of government. For example, his well-known writings and speeches on the proper role of the courts in our constitutional democracy directly implicate the separation of powers. However, for good reasons or bad, this fundamental issue of the judicial role is generally treated as a subject distinct from "separation of powers." The same is true of numerous other subjects that also address, at some level, the proper allocation of governmental powers, such as administrative law, statutory interpretation, and standing. The term "separation of powers" is instead often reserved for a class of constitutional issues dealing with the governmental process or pertaining to the enforcement of the laws; issues generally considered to involve "separation of powers" in this sense are the proper modes for appointment and removal of federal officials, the constitutionality of legislative or line-item vetoes, and the propriety of special prosecutors not subject to plenary executive branch control. This essay explores Judge Bork's publicly-expressed views on this narrower class of separation-of-powers questions. What emerges is a sketchy, but nonetheless discernible, approach to separation of powers that is very similar to the view reflected in Supreme Court decisions of the past decade.

Like most federal judges, Judge Bork has had no occasion to write an opinion directly addressing separation-of-powers issues. The closest he has come is a concurring opinion in Nathan v. Smith,[1] in which he concluded that private citizens are not authorized by the Ethics in Government Act[2] to bring court challenges to decisions by the Attorney General not to conduct preliminary inquiries into whether to seek appointment of a special prosecutor.[3] In construing the statute not to create a private right of action, Judge Bork relied in large measure on the well-established constitutional principle that enforcement of the federal criminal laws is committed to the executive branch, pointing to the possible constitutional problems that would thus be raised by a contrary interpretation. Judge Bork's construction of the statute was in substance adopted by the full court when it determined that such decisions by the Attorney

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1. 737 F.2d 1069, 1077 (D.C. Cir. 1984).

2. 28 U S C. §§591-598.

3. See id. at §592(a)(1).

General are not subject to judicial review.[4] Judge Bork also joined several per curiam opinions invalidating legislative veto provisions before the Supreme Court held them unconstitutional in INS v. Chadha.[5] Taken alone or together, these decisions say little about Judge Bork's views on separation of powers. However, while serving as Solicitor General and Acting Attorney General, Judge Bork gave testimony before Congress on the constitutionality of then-proposed legislation to create a special prosecutor, in which he set forth an identifiable view of separation of powers. That view is consistent with that expressed by a majority of the present Supreme Court.

The possible approaches to separation-of-powers analysis form a spectrum, with two end-points. At one extreme is a "formalist" view, which gives literal and quite rigid effect to the Constitution's separation of powers provisions. The author subscribes to this view, but it appears to find favor on the present Supreme Court only with Justice Scalia.[6] At the other extreme is an "accommodationist" approach, which views the Constitution much more as requiring a balancing of interests, and which thus displays a willingness to accommodate the perceived needs of modern government. Justice White appears to be an exponent of this approach, judging from his dissents in all of this decade's major Supreme Court decisions finding practices unconstitutional on separation-of-powers grounds.[7]

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[4] 737 F.2d 1167 (D.C. Cir. 1984) (en banc).

[5] 462 U.S. 919 (1983). See AFGE v. Pierce, 697 F.2d 303 (D.C. Cir. 1983); Consumers Union v. FTC, 691 F.2d 575 (D.C. Cir. 1982), aff'd mem., 463 U.S. 1216 (1983).

[6] See Young v. United States ex rel. Vuitton Et Fils S.A., 107 S.Ct. 2124, 2141 (1987) (Scalia, J., concurring in judgment that a contempt prosecution conducted by an interested private attorney appointed by the court was invalid, but maintaining--in a lone opinion--that separation of powers requires that all contempt prosecutions for noncompliance with court judgments be conducted by executive branch officials).

Most of the present (and, indeed, past) Justices fall between these two extremes, employing an analysis more flexible than formalism but more demanding that accommodationism.[8] Bork squarely aligns himself with this "centrist" analysis. In his 1973 testimony before the House Judiciary Committee, Bork was asked by Rep. Hungate, "Now, page 6 of your statement relates to the separation of powers. You are not a watertight compartment man, are you?", to which Bork replied, "No sir, I am not.

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[7] See Bowsher v. Synar, 106 S. Ct. 3181, 3205 (White, J., dissenting from invalidation of automatic spending reduction provisions of Gramm-Rudman); Chadha, 462 U.S. at 967 (White, J., dissenting from invalidation of one-house legislative veto); Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 92 (1982) (White, J., dissenting from holding that non-Article III bankruptcy judges cannot decide state law questions).

[8] Compare Synar, Chadha, and Buckley v. Valeo, 424 U.S. 1 (1976), which employ formalistic reasoning, with Vuitton and CFTC v. Schor, 106 S. Ct. 3245 (1986) (the Commodity Futures Trading Commission, a non-Article III body, may adjudicate state law counterclaims in reparations proceedings), which uphold practices that are dubious on formalist reasoning.

the separation of powers. You are not a watertight compartment man, are you?", to which Bork replied, "No sir, I am not. Whatever else I am I am not a rigid constructionist."[9] The views on specific issues expressed by Bork at those hearings show the accuracy of this self-assessment. At the time of Bork's testimony, it had been announced that Sen. William Saxbe was to replace him as Attorney General. Article I, section 6, clause 2 of the Constitution provides that "No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time." The salary for the office of Attorney General had been increased during Mr. Saxbe's tenure in the Senate. Congress and the Executive Branch responded by reducing the Attorney General's salary to the level it had been when Mr. Saxbe was elected to the Senate. Bork viewed this as a fully adequate response to the constitutional problem, because "the rationale of this constitutional provision was to prevent Senators or Congressmen or Representatives from voting for bills and raising salaries in the expectation of getting the increased salary,"[10] and by reducing the Attorney General's salary "the spirit of the constitutional provision is fully complied with."[11]

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[9] Special Prosecutor and Watergate Grand Jury Legislation: Hearings before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess. 284 (1973) ("House Hearings").

A formalist, like this author, would argue that the clause says nothing about whether the appointee actually receives an increase in salary; it says only that he cannot be appointed to a position for which the salary was increased. Bork, however, rejects the formalist view in favor of a more moderate position that seeks to give effect to the purposes behind the provision without giving it a "rigid"[12] construction or application. (And, it must be conceded that Bork has precedent on his side.) Bork's flexible approach is also demonstrated by his suggestion that President Roosevelt's court-packing plan, if implemented, would have been "unconstitutional because...it was designed to destroy the independent judicial review function of the Supreme Court."[13] A formalist would again argue, as did Rep. Hungate, that the Constitution nowhere specifies the size of the Supreme Court and thus places no legal (as opposed to moral) limits on the elected branches' ability to alter its composition.

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10. Id. at 275.

11. Id. at 279.

12. Id. at 284.

13. Id.

At the same time, however, Bork took a hard line in his testimony on the need for executive branch control of law enforcement:

> Congress' duty under the Constitution is not to enforce the laws but to make them. The Federal courts' duty under the Constitution is not to enforce the laws but to decide cases and controversies brought under the laws. The Executive alone has the duty and the power to enforce the laws by prosecutions brought before the courts. To suppose that Congress can take that duty from the Executive and lodge it either in itself or in the courts is to suppose that Congress may be [sic] mere legislation alter the fundamental distribution of powers dictated by the Constitution. Under such a theory, the Congress, should it deem it wise, could take the decision of criminal cases from the courts and assume that function itself or lodge it in the Criminal Division of the Department of Justice. That is simply not our system of government.[14]

He also took a dim view of devices designed to circumvent the President's constitutional power to appoint, with Senate advice and consent, principal federal officials by limiting the pool of appointees that he could choose from,[15] which provided that officers removed by the President were to remain in office until their successors were confirmed by the Senate.[16]

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[14] Special Prosecutor: Hearings before the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 451 (1973) ("Senate Hearings").

[15] See House Hearings, at 269, and of the 1867 Tenure of Office Act.

Applying these principles, Bork expressed grave doubts as to the constitutionality of the special prosecutor bills then before the Congress. Those bills sought to place as much distance as possible between the President and the conduct of investigations. One approach was to lodge the appointment of a special prosecutor in the Attorney General, subject to removal the Attorney General only for cause. Advocates of this plan relied on a proviso in the Appointments Clause which generally requires officers of the United States to be appointed by the President subject to Senate confirmation, but allows Congress by law to "vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[17] Bork agreed that this clause permitted Congress to make the special prosecutor appointable by the Attorney General and to place restrictions on the prosecutor's removability that might not be valid if he was a presidential appointee performing prosecutorial functions.[18] He made clear, however, that he did not believe that Congress could make appointees of the Attorney General subject to Senate confirmation. Rather, the Appointments

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[16] See id. at 257-58.

[17] U.S. Const. Art. II, §2, cl. 2.

[18] See House Hearings, at 260, 279, 290.

Clause contemplates two modes of appointment: by the President with Senate confirmation, and by the President, department heads, or courts without confirmation.[19] Bork's view is amply supported by judicial precedent, and again represents middle ground. A formalist would maintain that the President personally retains ultimate responsibility for all criminal prosecutions, and the remedy for presidential misconduct rests in the impeachment power. Bork, in fact, noted the possibility that impeachment may be the only means of getting at a President, without endorsing or in terms rejecting it[20] though, as noted, his views implicitly reject the premises underlying the formalist position. This is not untypical of Bork's testimony; he frequently displays a keen sensitivity to the existence of separation-of-powers questions without having definitively formed a view on their proper resolution.

The other approach taken by the bills considered by Bork was the strategy eventually adopted by the Ethics in Government Act: appointment of the special prosecutor is lodged in a special division of the courts.[21] Bork expressed doubts as to the constitutionality of this plan.[22] Although the Appointments Clause says that Congress can vest the appointment of inferior officers "in the Courts of Law," Bork did not believe that this provision, added "with little or no debate toward the end of the Constitutional Convention,"[23] can be read casually to undo "the principle of separation of powers [the Framers] had so painstakingly worked out in the course of their deliberations."[24] Rather,

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[19] See Senate Hearings, at 455-56; House Hearings, at 260.

[20] See Senate Hearings, at 474.

[21] See 28 U.S.C. §§592(c), 593.

> It seems as clear as such matters ever can be that the Framers intended to give Congress the power to vest in the courts the power to appoint "inferior officers" such as clerks, bailiffs, and similar functionaries necessary to the functioning of courts, just as they intended "Heads of Departments" to be able to appoint most of their subordinates without troubling the President in every case. The power is clearly one to enhance convenience of administration, not to enable Congress to destroy the separation of powers by transferring the powers of the Executive to the Judiciary or, for the matter of that, transferring the powers of the Judiciary to the Executive.[25]

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[22] See Senate Hearings, at 262 ("I don't see any way that can be done.").

[23] Id. at 452.

[24] Id.

[25] Id.

It is true, Bork noted, that courts temporarily appoint United States Attorneys when there is a vacancy.[26] Nor did he think that Ex parte Siebold[27] was good authority for judicial appointment of a special prosecutor. Siebold involved judicial appointment of an election monitor. Bork thought the case both wrongly decided and distinguishable, as "the appointment of a supervisor to look at an election is certainly unlike taking a major area of criminal jurisdiction out of the Department of Justice and the executive branch and locating it somewhere else."[28] Bork also thought the appointment of a special prosecutor different from appointment by a court of a private attorney to prosecute contempts, which Bork thought proper and necessary when a court "feels that it has been flouted."[29]

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[26] See United States v. Solomon, 216 F. Supp. 835 (S.D. N.Y. 1963) (upholding the practice against constitutional attack), but in those cases the President retains the power immediately to remove the appointees, who are wholly subject to the control and direction of the executive branch. See Senate Hearings, at 490; House Hearings, at 259.

[27] 100 U.S. 371 (1879).

[28] House Hearings, at 264.

[29] Id. at 271. (This may or may not be inconsistent with Justice Scalia's position in Vuitton; unlike Bork, Justice Scalia distinguished between contempt prosecutions to secure compliance with court judgments and to maintain order in the courtroom. The Vuitton opinion addresses only the former.)

It is not possible from this testimony to determine whether Judge (or Justice) Bork would uphold the constitutionality of the special prosecutor statute now in effect. Although the present scheme involves a court-appointed prosecutor, which Bork repeatedly indicated he thought to be unconstitutional, it is important to note that the bills on which he commented in 1973 provided for both appointment and removal by a court.[30] This point may be critical, because Bork also testified that it was constitutional for courts to appoint temporary United States Attorneys, as long as those officers remained subject to the control and direction of the executive branch. Special prosecutors under an existing provision of law are subject to removal, for cause, by the Attorney General,[31] a provision that Bork specifically approved. Whether that constitutes sufficient executive branch control to validate the statutory scheme is an open question, and the inability to pigeon-hole Bork's general position on separation of powers make prediction impossible. It seems very likely, however, that Judge Bork would uphold a prosecution under the statute if the prosecutor received a parallel appointment from the Attorney General, as has been done with some of the prosecutors investigating the Iran-Contra affair.

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[30] See Senate Hearings, at 462-63.

[31] See 28 U.S.C. §596(a)(1).

It is also worth noting that in Buckley v. Valeo,[32] Solicitor General Bork filed a brief on behalf of the Attorney General arguing that officials of the Federal Election Commission could not engage in law enforcement activities because they were appointed by Congress rather than in conformance with the Appointments Clause. The Supreme Court ultimately agreed with this position.

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[32] 424 U.S. 1 (1976).

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THE ACLU'S EVALUATION OF JUDGE BORK'S EMPLOYMENT DECISIONS

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The American Civil Liberties Union has distributed a lengthy memorandum, opposing the confirmation of Judge Bork. I have reviewed a small part of that memorandum, comprising its treatment of several cases involving employment rights -- cases close to my professional interests. My evaluative statement has two principal purposes: (1) to identify what I believe to be significant distortions in that part of the ACLU memorandum; and (2) to highlight the ACLU's practice of attempting to summarize complex cases in a line or two, and the shallowness and confusion implicit in such an approach. In addition, this statement will point up the ACLU's consistent failure to indicate that in these cases Judge Bork was not alone but was joined by some or all of the other participating judges. That failure, whether it is part of a campaign to portray Judge Bork as an eccentric far from "the mainstream", also contributes to public misunderstanding.

The ACLU Memorandum charges (at p. 18):

> Even where Congress has legislated in favor of sexual equality, Judge Bork has declined to enforce statutory guarantees by adopting narrow rules of construction. Thus, in Vinson v. Taylor, Judge Bork argued that Title VII of the 1964 Civil Rights Act does not protect women against on-the-job

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*The writer was a teacher of Robert Bork when he was a student at the University of Chicago Law School.

> sexual harassment. His view was unanimously rejected by the Supreme Court in an opinion written by Chief Justice Rehnquist. "[W]ithout question," the Court held, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex.

In order to evaluate the foregoing quotation, it is unfortunately necessary to begin with a lengthy statement of the Vinson case. In that case, a three-member panel of the Court of Appeals for the District of Columbia Circuit, not including Judge Bork, reversed a federal district court, which had rejected the plaintiff's claim that she had been the victim of a sexual harassment by one Taylor, her supervisor. The district court had found that the plaintiff's proof had been inadequate even against Taylor and that, in any event, the plaintiff's employer was not legally responsible for any of Taylor's Title VII violations because the employer had no notice of his allegedly offensive conduct.[1] Reversal of that decision rested on the panel's conclusion that the district court had committed the following errors: First, it had not clearly recognized that a violation of Title VII could have occurred if Taylor had created or condoned a discriminatory work environment offensive to women even though the plaintiff had not lost any job benefits because of sexual discrimination.[2] Second, the district court had found that if the plaintiff and her supervisor had had a sexual relationship, it was a voluntary one (on the plaintiff's part), unrelated to any employment benefit.[3] The panel, noting the ambiguity of this finding, stated that if an offensive sexual working environment had existed, "voluntariness" would have been immaterial.[4] Third, the district court may have erred in considering evidence of the plaintiff's allegedly provocative dress or of her sexual fantasies -- evidence that should have been excluded.[5] Fourth, in the plaintiff's case-in-chief, the district court had improperly limited her presentation of evidence of her supervisor's sexual harassment of other female employees.[6] Finally, the district court had erred in not holding the employer strictly responsible for sexual harassment by a supervisor, without regard to the employer's knowledge of such harassment.[7]

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[1] See Vinson v. Taylor, 753 F. 2d 141, 146-147 (D. C. Cir. 1985).

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[2] Id., at p. 145. The Court of Appeals noted that the plaintiff's complaint clearly was based on a claim of an offensive environment rather than a claim of "quid pro quo discrimination", that is, a claim that job benefits were conditioned on sexual favors. Id., at pp. 144-145.

[3] Ibid.

[4] Id., at p. 146.

[5] Id., at p. 146, n. 36.

[6] Id., at p. 146.

[7] Id., at pp. 146-147.

The employer petitioned for a rehearing by the entire court. Judge Bork, in an opinion joined by (then) Judge Scalia and Judge Starr, dissented from the court's denial of that petition.[8] Judge Bork urged that the panel's resolutions, in combination, produced an unacceptable result. Specifically, he objected to the panel's ruling requiring the exclusion of evidence offered by the supervisor that the sexual behavior alleged to be harassment was voluntarily engaged in by the plaintiff and that her conduct was in fact a solicitation of sexual advances.[9] He urged that this exclusionary ruling was particularly troublesome because it was coupled with the rule admitting evidence of the supervisor's alleged misconduct toward other employees.[10]

Finally, Judge Bork urged that these evidentiary rulings made it even more appropriate for the full court to reexamine the rule of strict liability imposed on the employer for the acts of a supervisor, in the unique context presented by a sexual harassment claim.[11] He observed that the panel's rulings on evidence and employer responsibility in combination, "virtually converted the employer into an insurer that all relationships between supervisors and employees are entirely asexual,"[12] thereby making unseemly employer monitoring of workers' sexual relationships a means of avoiding liability.[13]

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[8] See Vinson v. Taylor, 760 F. 2d 1330 (D. C. Cir. 1985).

[9] Judge Bork conceded that voluntariness "may have been irrelevant to environmental, as opposed to quid pro quo harassment." But he objected that the panel had not rested on that distinction but had rejected voluntariness as a defense in any kind of case. Ibid.

[10] Id., at pp. 1330-1331.

[11] Id., at pp. 1331-1332.

It was in connection with his discussion of employer responsibility that Judge Bork, in a footnote keyed to the next to the last sentence of his opinion, made the only reference to the question of whether Title VII protects against sexual harassment of women. That footnote, (even though the ACLU does not indicate that it was relying on a footnote), is the only possible basis for the ACLU's charge that "Judge Bork argued that Title VII...does not protect women against on-the-job sexual harassment."

To test that charge the entire footnote must, of course, be read -- and reread -- in the context of the opinion. This what the footnote said:

> Perhaps some of the doctrinal difficulty in this area is due to the awkwardness of classifying sexual advances as "discrimination." Harassment is reprehensible, but Title VII was passed to outlaw discriminatory behavior and not simply behavior of which we strongly disapprove. The artificiality of the approach we have taken appears from the decisions in this circuit. It is "discrimination" if a man makes unwanted sexual overtures to a woman, a woman to a man, a man to another man, or a woman to another woman. But this court has twice stated that Title VII does not prohibit sexual harassment by a "bisexual

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[12] Id., at pp. 1331-1332.

[13] Id., at p. 1331, n. 3.

> supervisor [because] the insistence upon sexual favors would...apply to male and female employees alike." Barnes v. Costle, 561 F.2d at 990 n. 55; Bundy v. Jackson, 641 F.2d at 942 n. 7. Thus, this court holds that only the differentiating libido runs afoul of Title VII, and bisexual harassment, however blatant and however offensive and disturbing, is legally permissible. Had Congress been aiming at sexual harassment, it seems unlikely that a woman would be protected from unwelcome heterosexual or lesbian advances but left unprotected when a bisexual attacks. That bizarre result suggests that Congress was not thinking of individual harassment at all but of discrimination in conditions of employment because of gender. If it is proper to classify harassment as discrimination for Title VII purposes, that decision at least demands adjustments in subsidiary doctrines. See, e.g. Bundy v. Jackson, 641 F.2d at 951.[14]

Judge Bork in that footnote did not, as the ACLU suggests, argue that sexual harassment should not be classified as discrimination under Title VII. On the contrary, his emphasis was on the need for adjustments in doctrines, including rules for employer responsibility, if that classification is proper. In referring to the "bizarre result" of granting women Title VII protection -- against some forms of sexual harassment, while denying them such protection against harassment by bisexuals, he may also have been suggesting a reconsideration of the latter result and a possible expansion of the scope of Title VII.

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[14] Id., at p. 1333, n. 7.

The structure and primary concerns of Judge Bork's opinion also undermine the ACLU's charge. He was primarily concerned with the asymmetrical rules of evidence announced by the panel, combined with its strict rule for employer responsibility. His suggestion for reconsideration by the entire court covered only these issues and not whether sexual harassment was proscribed by Title VII. Indeed, the issues that concerned him would be real issues only if the rule that Title VII proscribes sexual harassment is accepted. If that rule were rejected, questions of the employer's responsibility for such harassment or questions regarding appropriate rules of evidence for proving it would, of course, not arise. Rather than arguing for the rejection of Title VII's protection against sexual harassment, Judge Bork was pointing to the way in which the acceptance of such protection interwove with problems of proof and the rules of employer responsibility with which he was concerned.

It is true that there is a possibility that a party seeking to deny Title VII protection to victims of sexual harassment might find in the footnote a germ of an argument -- an argument based on the difficulties and the anomalies that Judge Bork mentioned and that suggested to him that Congress had not been aiming at sexual harassment. But similar possibilities arise whenever a judge frankly acknowledges difficulties or awkwardness in a position that he accepts. To point out a seeming difficulty in a particular position is not, of course, to argue that that position should be rejected. An open expression of such difficulties is necessary for the growth of the law. Surely our understanding of the law and the law itself would be poorer if judges failed to acknowledge such difficulties.

Counsel for the company had every motive in his brief to the Supreme Court to suggest that Judge Bork had urged that Title VII does not protect women against on-the-job sexual harassment. Counsel did not make that suggestion. The Supreme Court did not do so. The ACLU managed to do so -- by ignoring the structure and context of Judge Bork's opinion and torturing out of a footnote an "argument" that Judge Bork may have adumbrated but did not adopt.

The ACLU then compounds that distortion by its treatment of the Supreme Court opinion in Vinson.[15] It is true, as the ACLU reports, that the Court, rejecting the company's contention, held that Title VII prohibits sexual harassment that creates an offensive work environment even though the victim does not suffer any tangible economic loss. But the ACLU fails to tell us that the Court upheld Judge Bork's principal criticisms of the disposition by the panel below.

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[15] Meritor Savings Bank F.S.B. v. Vinson, 106 S.Ct. 2399 (1986).

Thus the Court -- and it was unanimous on this point -- held that the panel had erred in announcing a per se rule excluding evidence of the complainant's sexually provocative speech or dress. Such evidence, the Court noted, might bear on the crucial question, that is, whether the complainant found the alleged sexual advances unwelcome.[16] The Court, although it was divided on this point, also rejected the conclusion of the panel "that employers are always liable for sexual harassment by their supervisors."[17] The Court, noting the abstract character of the record before it, declined, however, to issue a definitive rule on employer responsibility.[18] In the end, then, the Supreme Court, although it affirmed the panel's reversal of the district court, remanded the case to the Court of Appeals while directing it, in effect, to consider the very questions that Judge Bork and his colleagues had urged deserved attention. The ACLU memorandum says not a word about that fact and may, indeed, suggest to the unwary -- at least -- that Judge Bork's views in Vinson were unanimously rejected by the Supreme Court.

The ACLU in discussing Dronenberg v. Zech[19], compounds the deficiencies that marred its treament of the Vinson case. In Dronenberg, Judge Bork spoke for a unanimous panel that included (then) Judge Scalia and Judge Williams, a Senior District Court Judge for the Central Distict of California. That panel upheld the Navy's dismissal of a 27-year-old chief petty officer who, inter alia, had engaged in homosexual acts with a 19-year-old seaman recruit. The ACLU memorandum declared (at p. 31, n. 122):

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[16] Id., at pp. 2406-2407.

[17] Id., at p. 2408.

[18] Ibid.

[19] 741 F.2d 1388 (D.C. Cir. 1984).

> Similarly, Judge Bork refused to recognize a constitutional right to privacy when James L. Dronenburg challenged a government decision dismissing him from the Navy solely on grounds that he engaged in homosexual sex [Citation omitted]. In Dronenburg, Judge Bork speculated that the mere presence of homosexual men in the miliary causes damage:
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> > Episodes of this sort are certain to be deleterious to morale and discipline to call into question the even-handedness of superiors' dealing with lower ranks, to make personal dealings uncomfortable when the relationship is sexually ambiguous, to generate dislike and disapproval among many who find homosexuality morally offensive, and it must be said, given the powers of military superiors over their inferiors, to enhance the possiblity of homosexual seduction[20] [citation omitted].

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[20] The ACLU chose to omit from the foregoing quotation the sentences in Judge Bork's opinion that immediately preceded it. Those sentences, which explain the court's general approach and connect it with the facts of Dronenberg, are as follows:

> The effects of homosexual conduct within a naval or military unit are almost certain to be harmful to morale and discipline. The Navy is not required to produce social science data or the results of controlled experiments to prove what common sense and common experience demonstrate. This very case illustrates dangers of the sort the Navy is entitled to consider; a 27-year-old petty officer had repeated sexual relations with a 19-year-old seaman recruit. The latter then chose to break off the relationship. See id., at p. 1398.

The ACLU memorandum then suggests an inconsistency between Judge Bork's views in Dronenburg and Vinson, stating:

> Judge Bork's parade of horribles that can result from the presence of male homosexuals on the job stands in sharp contrast to his dismissive attitude toward the problem of male heterosexual harassment of women. He has also explicitly stated in dissent that the civil rights laws do not protect women against unsolicited lesbian advances.

Here the ACLU sets forth the following "quotation" from Judge Bork's opinion in Vinson:

> Congress was not thinking of individual harassment at all but of discrimination in conditions of employment because of gender [citation omitted].

This "quotation is, of course, a part of a sentence in footnote 7 of Judge Bork's opinion in the Vinson case. Although the entire footnote was set forth above, it is reproduced below, with the ALCU "quotation" underscored.[21]

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[21] Perhaps some of the doctrinal difficulty in this area is due to the awkwardness of classifying sexual advances as "discrimination." Harassment is reprehensible, but Title VII was passed to outlaw discriminatory behavior and not simply behavior of which we strongly disapprove. The artificiality of the approach we have taken appears from the decisions in this circuit. It is "discrimination" if a man makes unwanted sexual overtures to a woman, a woman to a man, a man to another man, or a woman to another woman. But this court has twice stated that Title VII does not prohibt sexual harassment by a "bisexual supervisor [because] the insistence upon sexual favors would...apply to male and female employees alike." Barnes v. Costle, 561 F.2d at 990 n.55; Bundy v. Jackson, 641 F.2d at 942 n. 7. Thus, this court holds that only the differentiating libido runs afoul of Title VII, and bisexual harassment, however blatant and however offensive and disturbing, is legally permissible. Had Congress been aiming at sexual harassment, it seems (continued next page)

One need only to compare the "ACLU quotation" with the real thing to see the transparent distortion involved.[22]

I turn now to the ACLU's treatment of American Cyanamid[23] the second case in the ACLU's litany against Judge Bork's allegedly crabbed interpretation of legislation "in favor of sexual equality."

The ACLU memorandum states (at pp. 18-19):

> Judge Bork adopted a similarly narrow construction of the Occupational Safety and Health Act of 1970, which requires an employer to provide "each of his employees employment and a place of employment which are free from recognized

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21 (continued) unlikely that a woman would be protected from unwelcome heterosexual or lesbian advances but left unprotected when a bisexual attacks. That bizarre result suggests that Congress was not thinking of individual harassment at all but of discrimination in conditions of employment because of gender. If it is proper to classify harassment as discrimination for Title VII purposes, that decision at least demands adjustments in subsidiary doctrines. See, e.g., Bundy v. Jackson, 641 F.2d at 951. (Emphasis supplied).

[22] The ACLU in the portion of its memo quoted above (at p. 11) implies that Judge Bork's views in Vinson are not consistent with his views in Dronenburg. The inconsistency however, seems to be the ACLU's. The ACLU, while understandably sensitive, in Vinson, to the problems posed by "voluntary" sexual heterosexual relationships between a civilian male supervisor and a subordinate female employee appears strangely oblivious, in Dronenburg, to the problems arising from "voluntary"sexual relations between a homosexual non-commissioned officer and a seaman recruit -- the lowliest subordinate of all.

[23] Oil, Chemical and Atomic Ukra v. American Cyanamid Company, 741 F.2d 444 (D. C. Cir. 1984).

> hazards that are causing or are likely to cause death or serious physical harm...." Despite the statute's broad remedial goals, Bork rejected a challenge to a company policy demanding that women of childbearing age be surgically sterilized as a condition of employment in certain plant departments. Bork held that relief could be granted only if "the words of the statute "inescapably" require it.

The memorandum once again withholds the context necessary for appreciating either the problem before the court or the ACLU's criticism. Once again, the memorandum wrenches a snippet of a sentence out of context and then imputes to Judge Bork a statement he did not make.

In American Cyanamid, the Oil Chemical and Atomic Workers Union and one of its locals (together "OCAW") sought from the court a reversal of an order by the Occupational Safety and Health Review Commission. The Commission had held that the company's fetus protection policy was "not a hazard cognizable under the Occupational Safety and Health Act ("OSHA"). That policy, adopted at one of the company's plants, barred women of childbearing age from jobs that exposed them to toxic substances at levels considered unsafe for fetuses. The company had, however, made an exception for women who could show that they had been surgically sterilized. The Secretary of Labor had issued a citation charging that the company's policy violated OSHA's "general duty clause". The Administrative Law Judge vacated that citation, and the Commission affirmed, concluding that the disputed policy was not cognizable under the Act. The Secretary of Labor did not challenge the Commission's decision, but OCAW, an intervenor in the proceedings before the Commission, petitioned the court for reversal.

Judge Bork wrote for a unanimous court,[24] which affirmed the Commission's decision. He referred to "unattractive alternatives" for the company and "a distressing choice" for the women involved.[25] They worked in a department in which ambient lead levels could not be reduced sufficiently to eliminate the risk of serious harm to human fetuses. The company could have removed all women of childbearing age from that department, or it could have allowed them to keep their jobs if they were surgically sterilized. (Neither the court nor apparently the union mentioned other possibilities, such as continuing pregnancy tests, which would, of course, have raised difficult issues of privacy but which might have expanded the women's options.) The company offered the sterilization option. Some of the women chose it, some quit.

Judge Bork acknowledged that complex moral issues were involved, but concluded that under the governing legislation those issues were "not for us." The court's task was "the mundane one of interpreting [the statute's] language and applying its policy."[26] In concluding that the charge against the company failed to allege a violation of the Act, the court conceded that "the words of the general duty clause can be read, albeit with some semantic distortion,"[27] to cover the disputed fetus protection policy. OCAW had, however, urged that the sterilization exception contained in the company's fetus-protection policy was within the plain meaning of the statutory language.

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[24] The panel also included (then) Judge Scalia and Judge Williams, Senior District Court Judge for the Central District of California.

[25] See 741 F. 2d at p. 445.

[26] Ibid.

It was in response to that plain-meaning contention that the court, by Judge Bork, declared:[28]

> That conclusion is necessary, however, only if the words of the statute inescapably have the meaning petitioners find in them and are unaffected by precedent, usage, and congressional intent. The words of the statute -- in particular, the terms "working conditions" and "hazards" -- are not so plain that they foreclose all interpretation.

The ACLU's assertion that in American Cyanamid "Bork held that relief could be granted only if the words of the statute *inescapably* require it" (emphasis ACLU's) involves such self-evident distortion that further comment is unnecessary.

In any event, the court did not restrict itself to the literal statutory language. It considered the case law; it examined the analogy presented by the union and the implications of various arguments before it. In short, it brought to bear the classic arts of statutory construction on the difficulties involved.

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[27] Id., at p. 447. That clause required each employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

[28] Id., at p. 448.

Some of the pertinent difficulties were illustrated by OCAW's concession that there would not have been any violation had the company simply stated that only sterile women would be employed. The court understandably saw no material difference between that hypothetical situation and the one before it and noted that the union's position would produce a strange result: An employer would be better shielded the less information it provides -- a result that scarcely commended itself to common sense and that, in any event, could not be extracted from the general duty clause. Finally, the court made it clear that it was dealing only with remedies under OSHA rather than the whole body of relevant law. Indeed, in a concluding footnote it suggested that Title VII of the Civil Rights Act of 1964, as amended, might provide a remedy for the women involved[29] -- a position that academic writers have fully developed.[30]

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[29] Id., at p. 450 n. 1. The court's footnote added that counsel for the parties had informed it that the women employees had filed a suit under Title VII and that the company had settled it.

[30] See, e.g., Becker, From Muller v. Oregon to Fetal Vulnerability Policies, 53 U.Chi.L.Rev. 1219 (1986).

The details that I have presented above tell a sad story of shabby tactics -- tactics that are not worthy of the ACLU's better traditions and that unjustifiably denigrate Judge Bork, as well as the confirmation process. Other parts of the ACLU memorandum that I have not discussed here indicate a wider use of such dubious tactics. In any event, the tactics that I have described are enough, I believe, to call for the closest scrutiny of every allegation that the ACLU makes about Judge Bork.

September 11, 1987

Bernard D. Meltzer

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The "Response Prepared To White House Analysis of Judge Bork's Record": A Critical Appraisal

by

Joseph D. Grano*

I. Introduction

On August 3, 1987, the White House issued a briefing paper pertaining to the nomination of Judge Robert H. Bork to be an Associate Justice of the United States Supreme Court.[1] Shortly thereafter, Senator Joseph R. Biden requested a review of that paper. The review, entitled "Response Prepared To White House Analysis of Judge Bork's Record," was released on September 3, 1987.[2]

The Response took issue with numerous claims in the White House paper. For example, disputing that Judge Bork was a proponent of judicial restraint, the Response suggested that he

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[1]. Materials on Robert H. Bork.

[2]. Professor Christopher Schroeder (Duke) and attorney Jeffrey Peck prepared the review; attorneys Floyd Abrams and Clark Clifford and Professors Walter Dellinger (Duke) and Laurence Tribe (Harvard) approved it. For brevity, the review will hereinafter be cited as the Response.

"has often advocated and engaged in 'judicial activism'."[3] Similarly, by critically reviewing Judge Bork's writings and opinions in a number of areas, the Response depicted Judge Bork as an extremist who is likely to change dramatically the direction of the Supreme Court. The Response also voiced concern that Judge Bork, in contrast to Justice Powell, would be willing to overturn many landmark Supreme Court decisions.[4]

This appraisal of the Response was prompted by the conviction that in its effort to find distortion in the White House material, the Response itself presents a distorted view of Judge Bork. Whether or not the Senate ultimately confirms his nomination, Judge Bork and his views deserve fairer treatment. Without attempting to rebut every allegation and insinuation in the Response, this appraisal seeks to put Judge Bork's judicial philosophy in a fairer perspective by concentrating on some of the major points of controversy.

Two preliminary points warrant mention. First, this appraisal does not attempt to portray Judge Bork as another Justice Powell. In terms of judicial philosophy, Bork and Powell no more belong in the same school of thought than did the late Justices Hugo Black and John Harlan, both of whom made significant contributions to our constitutional jurisprudence. Second, this appraisal seeks to put in perspective Judge Bork's view of the judge's responsibility in constitutional interpretation. Appealing to the reader's emotions by emphasizing the results actually reached, the Response makes charges such as that Judge Bork opposed the decision invalidating restrictive covenants and that he opposed the decision establishing the one person-one vote principle.[5] In contrast, without questioning whether certain results are good or bad, this appraisal works from the premise that judicial means in constitutional adjudication matter even more than the ends achieved.[6] Thus, for those who believe that the result is all that matters, this appraisal of the Response has little to offer.

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[3]. Response at 2.

[4]. Response at 66-72.

II. Judge Bork's Record on the D.C. Circuit Court Demonstrates Competence, Judicial Restraint, and a Constitutional Philosophy That Is Not Radical.

Prior to his nomination, Judge Bork participated as a D.C. Circuit judge in over 400 cases with published opinions. He authored over 100 majority opinions. None of his opinions has been reversed by the Supreme Court.

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[5]. Response at 44-45.

[6]. This premise is essential to the view, first articulated by Chief Justice John Marshall in Marbury v. Madison, 1 Cranch 137 (1803), that the constitution is superior, binding *law*.

The Response claims that Judge Bork's five year record on the D.C. Circuit Court of Appeals largely is irrelevant because (1) an intermediate court judge is bound by Supreme Court precedent, (2) most of the cases were non-ideological, and (3) none of the cases has been reviewed by the Supreme Court.[7] The Response recognizes that none of the cases has been reviewed either because the losing party did not seek further review or because the Supreme Court denied review.[8] While a denial of certiorari is not a decision on the merits, surely this record of complete immunity from Supreme Court review says something about the reasonableness of the Bork decisions.

More fundamentally, the Response's arguments would make examination of a lower court judge's record rather useless in assessing competence. While a record of reversals presumably would indicate poor performance, a record of affirmances or non-review would have little force. One appropriately may wonder, however, why some lower courts, and some judges in particular, receive more review and more reversals than others. The commitment to precedent and the non-controversial nature of the majority of cases do not save some judges from appellate reversals.

The Senate did not hesitate in confirming Judge Bork for the D.C. Circuit Court of Appeals, a court that ranks among the most prestigious in the country. The Response basically concedes that Judge Bork's performance on the D.C. Circuit in the vast majority of cases has been beyond reproach. While there can be no doubt that an intermediate court's function differs from that of the Supreme Court, a heavy burden should be on those who contend that a given individual is well qualified for the former but unfit (not merely less qualified) for the latter.

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[7]. Response at 14-18.

[8]. Response at 17.

The Response, however, discovered ominous signs of activist inclinations (in the wrong direction) in a few of Judge Bork's more controversial cases. For example, in Dronenburg v. Zech,[9] according to the Response, Judge Bork went out of his way to criticize Supreme Court privacy decisions. The Response even quotes from a four-judge dissent to rehearing en banc that accused Judge Bork of engaging in dictum and unwarranted activism.[10] Given this criticism, a few points about Dronenburg, overlooked in the Response, warrant mention.

First, Judge Bork's panel decision was unanimous not only in result but also in rationale. No judge wrote separately. Second, now Justice Antonin Scalia, who easily won Senate confirmation, joined the Bork opinion. Third, when rehearing en banc was denied, Judge Bork responded to what he characterized as the "serious misunderstandings" of the dissent.[11] His statement again was joined by Judge Scalia. Fourth, and most significantly, Judge Bork's view ultimately was adopted by the United States Supreme Court.

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[9] 741 F.2d 1388 (D.C. Cir., 1984).

[10] Response at 19, quoting Dronenburg v. Zech, 746 F.2d 1579 (1984) (Robinson, Wald, Mikva, and Edwards, JJ., dissenting from denial of en banc reconsideration). At least some observers might consider the dissenters to be activist judges.

The issue in Dronenburg was whether a Navy discharge for homosexual conduct violated the petitioner's constitutional rights. The Dronenburg panel unanimously concluded that the constitution does not create a right to engage in such conduct. Subsequently the 11th Circuit ruled to the contrary, but in Bowers v. Hardwick[12] the Supreme Court reversed the 11th Circuit. Citing Dronenburg, the Court observed that the 11th Circuit decision conflicted with decisions in other circuits.[13]

In considering just who was activist and out of the mainstream in Dronenburg, Justice White's majority opinion in Bowers, which Justice Powell fully joined, deserves attention:

> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law

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[11] 746 F.2d at 1582.

[12] 106 S. Ct. 2841 (1986).

[13] Id. at 2843 & n.3.

> having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clause of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.[14]

As indicated above, Judge Scalia joined both of the Bork opinions in Dronenburg. In portraying Judge Bork as outside the mainstream of judicial thought, the Response does not indicate how or why Justice Scalia differs from Judge Bork. In fact, of course, Justice Scalia and Judge Bork have similar judicial philosophies. Although Justice Scalia easily obtained confirmation first for the D.C. Circuit and then for the Supreme Court, we are now being told that the Senate's reaction to Judge Bork must be different. The import necessarily is that while one Justice Scalia is fine, two are too many. More significantly, however, the import of such a message is that the Court's results, rather than its constitutional methodology, are what matter, for if Justice Scalia's approach to constitutional interpretation is within the range of acceptability, the only objection to Judge Bork's nomination can be that this approach will have another vote on issues that concern the critics.

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[14] Id. at 2846. Anyone familiar with Judge Bork's thinking knows that he could have authored these very words.

No single Justice can change the direction of the Supreme Court. Even before Justice Scalia joined the Supreme Court, a majority of five justices viewed as outside the pale the constitutional claim set forth in Bowers. Without the influence of Antonin Scalia and Robert Bork, Justice White authored an opinion in Bowers that both of these men easily could have joined. Recognizing that many people may prefer the Bowers dissent, it nevertheless is difficult to believe that many would contend that the Bowers majority was outside the mainstream of judicial thought. The objection to Judge Bork thus must be viewed not in terms of judicial philosophy but as totally result-oriented.

III. The Supreme Court Decisions That Judge Bork Has Criticized Are Difficult to Justify If Judges Are Bound By the Framers' Intentions.

A judge who believes that the framers' intentions control in constitutional interpretation sometimes may be forced to reach conclusions that he or she regrets. For example, an ardent opponent of the death penalty nevertheless may believe that the constitution permits the people to adopt such a punishment. Indeed, because the constitution makes specific reference to the death penalty,[15] this seems the correct constitutional answer. Of course, the judge may disregard the framers' intentions and simply impose his or her own moral beliefs on the people, but the authority for a politically unaccountable federal judiciary to act in this fashion cannot be found in our constitution. If the constitution is law, it must bind the judiciary as much as it binds the other branches of government.

Because the constitution is an old document, many people find it inconvenient to be bound by the intentions of its drafters and ratifiers. Such people argue that the constitution must be kept up to date with the times. Of course, the constitution provides for its updating by allowing the people to make amendments.[16] Those who are impatient with the constitution's amendment process, however, argue that judges should do the updating. The difficulty is that nothing in the constitution authorizes the judiciary to assume such power.

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[15]. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...." U.S. Constitution, Amend. V. No person shall "be deprived of life, liberty, or property, without due process of law." Id.

[16]. U.S. Constitution, Art. V.

In Griswold v. Connecticut,[17] the Supreme Court invalidated a state law that banned the use of contraceptives. Justice Black was offended by this "unwise" law, but his theory about the Supreme Court's function in constitutional interpretation compelled him to dissent. His words should give pause to Judge Bork's critics:

> I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. [I] must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat old-fashioned I must add it is good enough for me. And so, I cannot rely on the Due Process Clause or the Ninth Amendment or any myster-

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[17]. 381 U.S. 479 (1965).

> ious and uncertain natural law concept as a reason for striking down this state law.[18]

Without even mentioning Justice Black's eloquent dissent, the Response criticizes Judge Bork for his views about *Griswold*.[19] The Response fails to explain, however, that the issue was not whether the Connecticut law offended the Court's sense of decency but rather whether anything in the constitution authorized the Court to invalidate it. Although the framers' intentions sometimes may seem inconvenient, Judge Bork, like Justice Black before him, properly believes that these intentions, rather than personal predilections, must control, and this is what makes *Griswold* properly subject to criticism.

The Response's laundry list of cases that Judge Bork opposes is intended to shock the reader into the belief that Judge Bork stands outside the mainstream of American thought. The effect is created by conveying the impression that Judge Bork opposes the *results* in these cases when, of course, he only has criticized the Court for creating rights not found in the constitution.

The Response states in a heading that "Judge Bork Opposed the Decision Outlawing Poll Taxes."[20] The Response does not indicate, however, that both Justices Black and Harlan dissented in Harper v. Virginia Board of Elections.[21] As he did in Griswold, Justice Black admonished the Court against writing into the constitution its notions of what is good governmental policy. He again insisted that the judiciary has no authority "to alter the meaning of the constitution as written." Justice Harlan similarly faulted the Court for departing from long-established equal protection standards.

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[18] *Id*. (Black, J., dissenting).

[19] Response at 20.

[20] Response at 45.

The Response faults Judge Bork for opposing the decisions establishing the principle of one person-one vote.[22] In Reynolds v. Sims,[23] the Court held that the fourteenth amendment's equal protection clause requires both houses of a state legislature to be apportioned on a population basis. (The Court overcame the objection that the constitution itself created a Senate that was not apportioned according to population.) The Response again omits that Justice Harlan filed a lengthy dissent demonstrating, through an exhaustive historical analysis, that the fourteenth amendment simply did not address the issue before the Court. Harlan's dissent specifically argued that the intentions of the framers' were controlling.

The Court's use of the fourteenth amendment to address voting issues is, as Justice Harlan demonstrated, highly problematic. Section two of the amendment provides only for a reduction of representation in the House of Representatives when a state denies or abridges the right to vote "of any of the male inhabitants of such State, being twenty-one years of age."[24] The framers, of course, recognized that the fourteenth amendment did little to address voting discrimination, for two years after its adoption, they added the fifteenth amendment which specifically prohibits discrimination in voting on the basis of race. That the fifteenth amendment itself had a narrow focus is evident from the fact that it took another amendment, the nineteenth, to prohibit gender discrimination in voting. Thus, while the one person-one vote principle may seem progressive and desirable to many, Justice Harlan's dissent makes a powerful case that the fourteenth amendment simply does not impose this principle on the states.

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[21]. 383 U.S. 633 (1966).

[22]. Response at 44.

[23]. 377 U.S. 533 (1964).

Of course, the majority of the Court rejected Justice Harlan's analysis. In evaluating Judge Bork, however, it warrants emphasis that his objection to the Court's equal protection voting cases coincides precisely with that of Justice Harlan. One may disagree with both these men, but one can conclude that Judge Bork's views place him out of the mainstream of judicial thought only by concluding the same for Justice Harlan. Few would have the temerity to say this of Justice Harlan.

In result-oriented, emotive language, the Response states that Judge Bork "opposed the decision striking down racially restrictive covenants."[25] Although decent people cannot help but be offended by the odious practice of such covenants, the issue is whether the Court's decision legitimately is subject to criticism from a constitutional perspective.

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[24]. U.S. Constitution, amend. XIV, sec. 2.

Except for a few provisions like the thirteenth amendment,[26] the constitution addresses only state action. Although racial discrimination by private persons is morally offensive, the constitution does not speak to such discrimination, and for this reason, it has taken major legislation to eradicate much of this discrimination in our society. Restrictive covenants in deeds, of course, are covenants between private individuals.

In Shelley v. Kraemer,[27] however, the Supreme Court ruled that the requisite "state action" could be found in the state court's enforcement of the covenants. Taken seriously, such a holding suggests that private action will be converted into state action whenever a court enforces private contractual and property arrangements, and this in turn suggests that all private disputes ultimately can be converted into constitutional cases reviewable in the federal courts. Not surprisingly, the Supreme Court virtually has limited Shelley to its facts.

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[25] Response at 45.

[26] The 13th amendment, which prohibits slavery, applies to private persons as well as the state.

[27] 334 U.S. 1 (1948).

Judge Bork has said that Shelley is not supportable by neutral principles because the Court was not prepared to apply it to cases it could not honestly distinguish.[28] The Response does not challenge his assertion that the Court has been unwilling to follow the logical implications of the case. Thus, it may be appropriate to suggest that Shelley is an example of the axiom that hard cases make bad law: decent people applaud the result, but the legal principle (i.e., of state action) used to achieve the result is difficult to defend.[29]

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[28]. Response at 45.

[29]. Perhaps it can be argued that Shelley is a case in which judicial civil disobedience is appropriate. From a philosophical perspective, there is no easy answer to the question of whether it ever is appropriate for a judge to disregard the constitution when it requires, in the judge's view, a result that is fundamentally unjust. (Illustrative of the issue would be the question of judicial enforcement of slavery laws before the 13th amendment banned slavery: should moral judges have enforced such laws, resigned from the bench, or purposely flouted them?) Whatever the answer to this philosophical question, civil disobedience represents rejection, not application of, the rule of law. It is doubtful that many critics are prepared to challenge Judge Bork on the ground that he is not sufficiently prepared to disobey the law he would be sworn to enforce. Thus, in evaluating Judge Bork's views on Shelley as law, the question should be whether

Of all the charges in the Response, perhaps the one that will cause most concern is that Judge Bork does not include women within the coverage of the equal protection clause.[30] Critics even have been heard to say that a person who regards women as second class citizens is not fit to sit on the Supreme Court. It remains to be seen what Judge Bork's thinking on the scope of the equal protection clause really is. It must be emphasized, however, that one can believe in the full equality of women and hold to the view that the fourteenth does not address gender discrimination. While Judge Bork has raised some questions about the Supreme Court's gender cases, he never has expressed the view that women should be treated as second class citizens. As in all the above treated examples, therefore, the question for analysis should be what the constitution requires, not what we would like it to require.

The purpose of the fourteenth amendment, of course, was to protect the former slaves emancipated by the thirteenth amendment. As already indicated, Section two of the amendment reduced representation in the House only when a state denied the right to vote "to any of the male inhabitants of such State, being twenty-one years of age." If a state denied the vote to black males over

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his criticisms have force. That they do is evidenced by the fact that the Court itself refuses to take seriously the implications of Shelley's state action doctrine.

[30] Response at 48.

twenty-one years of age, its representation was to be reduced; if it denied the vote to black or white women, the amendment imposed no consequence. While the fourteenth amendment reduced representation in the House for racial discrimination in voting, it did not as such prohibit such discrimination altogether. Under the fourteenth amendment, a state willing to pay the consequence of reduced representation could continue to discriminate on the basis of race.

The framers of the fourteenth amendment did not permit that possibility to occur. Just two years after adoption of the fourteenth amendment, they enacted the fifteenth amendment, which specifically prohibits denial of the vote "on account of race, color, or previous condition of servitude."[31] Again, however, the amendment did not address the right to vote for women.

If the fourteenth amendment prohibited gender discrimination in general, it surely would have prohibited gender discrimination in voting, for the right to vote is perhaps the most basic right of an individual in a democracy. As seen, however, and as Justice Harlan repeatedly emphasized, both the fourteenth and fifteenth amendments specifically excluded gender discrimination in voting from their concerns. Indeed, we know from history that it took another half century of political struggle before the people specifically amended the constitution to prohibit discrimination in voting "on account of sex."[32]

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[31] U.S. Constitution, amend. XV.

Unfortunately, the nineteenth amendment, which accomplished this, only speaks to the issue of voting. Outside of voting, it does not prohibit gender-based discrimination. Recognizing this, advocates of a constitutional right of gender equality have had to resort to the fourteenth amendment's equal protection clause. For the reasons stated above, however, this simply does not work if one is honest about the text of the fourteenth amendment and its history.

Perhaps no issue is more difficult for a judge or a contemporary teacher of constitutional law who genuinely believes in gender equality than that of equal protection in this context. As the quote from Justice Black at the beginning of this section indicates, however, the constitution authorizes the people, not the judiciary, to amend its provisions. An honest judge who believes that the constitution rather than personal predilection must control cannot permit impatience with the people to excuse judicial alteration of the constitution's terms.

Just as it took the people's actions through the nineteenth amendment to prohibit gender discrimination in voting, the constitutional abolition of gender discrimination in other areas of life should have come from the people not from the Court. Of course, the proposed twenty-seventh amendment had precisely this purpose. As Professor Van Alstyne (Duke) has observed, one cannot discount the possibility that the Supreme Court's strained use of the equal protection clause to address gender discrimination helped to persuade many people that the proposed twenty-seventh amendment was redundant.

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[32] U.S. Constitution, amend. XIX.

That the Court may have strained the equal protection clause in addressing gender discrimination does not mean, however, that its gender discrimination cases should be overruled. The question of whether the Court erred is quite different from the question of whether erroneous decisions warrant overruling. As the late Alexander Bickel observed in a different context, on some issues it simply is too late in the day to turn the clock back.

IV. Judicial Restraint and an Inflexible Commitment to Precedent Do Not Necessarily Go Hand-in-Hand.

The Response portrays Judge Bork as an activist because, as it alleges but fails to demonstrate, he is not sufficiently committed to stare decisis. In the Response's words, "In contrast to Judge Bork, Justice Powell emphasized that stare decisis is a doctrine that 'demands respect in a society governed by rule of law.'"[33] Of course, we really do not know whether Judge Bork would vote to overrule many of the cases he believes were wrongly decided. In any event, no case can be overruled unless five justices agree. Nevertheless, for purposes of analysis, we may assume arguendo that Judge Bork would sometimes urge his colleagues to overrule a previous case.

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[33] Response at 71.

Two criticisms of the analysis in the Response may be made. First, an advocate of judicial restraint very well can believe that at least clearly wrong constitutional precedent should be overruled. Second, the commitment to stare decisis cannot be made into a one-way ratchet. It is no secret that many of Judge Bork's most vocal critics are devotees of the Warren Court, a Court that most likely surpassed all other Supreme Courts in our history in overruling precedent. The silence of Judge Bork's critics with regard to the Warren Court's lack of commitment to precedent is deafening.

A. Judicial Restraint Is Not Inconsistent with a View That Fundamentally Flawed Precedent Ought To Be Overruled.

It is indisputable that the late Justice Harlan believed in and practiced judicial restraint. Yet, in Oregon v. Mitchell[34] he stated the following about stare decisis:

> The consideration that has troubled me most in deciding that the 18 year old and residency provisions of this legislation should be held unconstitutional is whether I ought to regard the doctrine of stare decisis as

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[34]. 400 U.S. 112 (1970).

> preventing me from arriving at that result....
>
> After much reflection I have reached the conclusion that I ought not to allow stare decisis to stand in the way of casting my vote in accordance with what I am deeply convinced the Constitution demands.... Concluding, as I have, that such decisions cannot withstand constitutional scrutiny, I think it my duty to depart from them, rather than to lend my support to perpetuating their constitutional error in the name of stare decisis.[35]

Of course, Harlan's statement was not a brief for seeking to overrule everything with which one disagrees. Whether overruling is appropriate depends both upon the nature and depth of the perceived mistake and the reliance and ordering of affairs that have resulted from the "erroneous" case. Lacking proof that Judge Bork would engage in wholesale efforts at overruling, the Response produces nothing more than a series of statements by Judge Bork expressing disagreement with a number of Supreme Court cases. Justice Harlan could have produced an equally long list of cases of which he disapproved, and yet he did not always vote, as he did in Mitchell, to disregard the force of precedent.

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[35] Id. at 217-218.

Bork's commitment to judicial restraint reflects a belief that judges should not seek to constitutionalize their own moral and political values. As he has stated on numerous occasions, the judge's task in constitutional interpretation is limited to ascertaining the intended meaning of the document. Like Justice Harlan in Mitchell, Bork believes that a number of the Court's decisions reflect something other than an effort to ascertain the intended meaning of the document. When a Justice believes, as Harlan did in Mitchell, that a line of cases is this fundamentally flawed, judicial restraint does not dictate obsequious commitment to stare decisis.

The Response makes much of the philosophical differences between Judge Bork and Justice Harlan.[36] For example, while Bork seems to oppose substantive due process altogether, Harlan believed in a very restrained and limited substantive due process doctrine. It warrants emphasis, however, that Harlan believed that ascertaining the intent of the framers was the judge's primary responsibility in constitutional interpretation. In Mitchell, for example, he described as "undoubtedly sound" the following statement made by Senator Sumner in 1866:

> Every Constitution embodies the principles of its framers. It is a transcript of their minds. If its meaning in any place is open to doubt, or if words are used which seem to have no fixed signification, we cannot err if

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[36] Response at 26.

> we turn to the framers; and their authority increases in proportion to the evidence which they have left on the question.[37]

Harlan added that he had to "confess to complete astonishment at the position of some of my Brethren that the history of the Fourteenth Amendment has become irrelevant."[38]

The cases that Justice Harlan declined to follow in Mitchell were ones, in his view, in which the Supreme Court had not simply made an interpretational mistake but, more fundamentally, had exceeded the scope of its interpretational authority. Harlan recognized that his philosophy of judicial restraint did not require that precedent of such a nature be followed. Harlan saw no inconsistency in his belief that such flawed precedent should be rejected and his commitment to the rule of law.

A judge who is not willing to overrule what he or she perceives as fundamentally wrong precedent is, of course, caught in a bind. If the judge adheres honestly to the precedent, the judge will be forced to vote in subsequent cases to perpetuate and even extend the error. Of course, the judge always can adhere to the precedent in a dishonest way that deprives it of much of its force, but few would applaud such a course of conduct.

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[37] 400 U.S. at 280 (Harlan, J., quoting Sumner).

[38] Id. at 201.

B. The Commitment to Precedent Expressed by Some of Judge Bork's Critics Is Highly Selective.

In the late 1930's, with the help of President Roosevelt's new appointees, the Supreme Court turned its back on a number of commerce clause and substantive due process decisions that had invalidated economic reform legislation in the name of economic liberty. In the new majority's view, the previous decisions deserved to be discarded because they were fundamentally flawed. Judge Bork's critics do not fault the Court for this. One must wonder whether this is because so-called economic freedoms are not high on the list of those who oppose the nomination.

In Garcia v. San Antonio Metro. Transit Authority,[39] a bare majority of the Court overruled National League of Cities v. Usery,[40] an opinion that Justice Rehnquist had authored less than ten years earlier. Judge Bork's critics do not fault the Court for this. One must wonder whether this is because the federalism concern that prompted League of Cities is not high on the list of those who oppose the nomination.

In Virginia Pharmacy Board v. Virginia Consumer Council,[41] the Supreme Court overturned the holding in Valentine v. Chrestensen[42] that mere commercial speech was not protected by the constitution. Without mentioning that Virginia Board overruled precedent, the Response simply includes it in a list of "landmark" cases "rejected by Judge Bork."[43]

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[39] 105 S. Ct. 1005 (1985).

[40] 426 U.S. 833 (1976).

[41] 425 U.S. 748 (1976).

Most significantly, many of Judge Bork's critics, who now express a desire for judges with a firm commitment to precedent, openly worry about the survival of Warren Court cases. Yet the Warren Court, perhaps more than any other Supreme Court in our history, engaged in substantial overruling of precedent. What follows is simply a list that comes to mind without researching the matter. The point is not to fault any particular case; indeed, some cases, like Brown v. Bd. of Education,[44] not only helped to remedy a great societal evil but restored the constitution to its intended purpose. The point simply is that the Warren Court did not view precedent as an obstacle to its view of what the constitution required, and the recent converts to stare decisis never voice concern about this.

The following, then, is a short list of Warren Court cases that overruled or disregarded precedent:

Brown rejected the contrary holding of Plessy v. Ferguson.[45]

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[42]. 316 U.S. 52 (1942).

[43]. Response at B-5.

[44]. 347 U.S. 483 (1954).

[45]. 163 U.S. 537 (1986).

Benton v. Maryland[46] overturned the holding in Palko v. Connecticut[47] that the double jeopardy clause did not apply to the states.

Malloy v. Hogan[48] and Griffin v. California[49] overruled the holdings in Twining v. New Jersey[50] and Adamson v. California[51] that the fifth amendment self-incrimination clause neither applied to the states nor barred them from permitting comment on the defendant's failure to testify.

Gideon v. Wainwright[52] overruled the holding in Betts v. Brady[53] that the sixth amendment right to counsel neither applied to the states nor required them to appoint counsel for indigents except when fundamental fairness so required.

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[46]. 395 U.S. 784 (1969).

[47]. 302 U.S. 319 (1937).

[48]. 378 U.S. 1 (1964).

[49]. 380 U.S. 609 (1965).

[50]. 211 U.S. 78 (1908).

[51]. 332 U.S. 46 (1947).

[52]. 372 U.S. 335 (1963).

[53]. 316 U.S. 455 (1942).

Mapp v. Ohio[54] overruled Wolf v. Colorado,[55] which had been decided only twelve years earlier, and applied the exclusionary rule to the states.

Katz v. United States[56] overruled the holding in Olmstead v. United States[57] that wiretapping is not covered by the fourth amendment.

Warden v. Hayden[58] overruled the so-called mere evidence rule established in Gouled v. United States.[59]

Miranda v. Arizona[60] and Escobedo v. Illinois[61] rejected the holdings in Crooker v. California[62] and Cicenia v. LaGay,[63] less than ten years earlier, that denial of counsel to a suspect during police interrogation does not automatically make a resultant statement inadmissible.

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[54]. 367 U.S. 643 (1961).

[55]. 338 U.S. 25 (1949).

[56]. 389 U.S. 347 (1967).

[57]. 277 U.S. 438 (1928).

[58]. 387 U.S. 294 (1967). This was one of the rare cases in which he Warren Court overruled a precedent that was more favorable to the indidividual than to the government.

[59]. 255 U.S. 298 (1921).

[60]. 384 U.S. 436 (1966).

[61]. 378 U.S. 478 (1964).

[62]. 357 U.S. 433 (1958).

Fay v. Noia,[64] in greatly expanding federal habeas corpus review of state criminal convictions, simply stated that "to the extent any decisions" of the Court suggested a different standard, "such decisions shall be deemed overruled to the extent of any inconsistency."[65]

Harper v. Virginia Board of Elections,[66] in invalidating a poll tax of $1.50 that had not been found to be racially discriminatory, overruled Breedlove v. Suttles[67] which had held to the contrary.

Baker v. Carr,[68] without specifically overruling Colegrove v. Green,[69] which had been analyzed under a different constitutional provision, rejected the teaching of the latter case that challenges to apportionment were non-justiciable.

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[63] 357 U.S. 504 (1958).

[64] 372 U.S. 391 (1963).

[65] Id. at n.44.

[66] 383 U.S. 663 (1966).

[67] 302 U.S. 277 (1966).

[68] 369 U.S. 186 (1962).

[69] 328 U.S. 549 (1946).

In the Response's view, stare decisis is a "crucial doctrine that counsels respect for and adherence to precedent."[70] It is "a cornerstone of our constitutional and jurisprudential foundations."[71] The Response suggests that overruling must be exercised "with discretion,"[72] and it worries that massive overruling could carry the suggestion that constitutional law turns upon the vagaries of individual justices and politics rather than the constitution. One must wonder whether the drafters and supporters of the Response are prepared to apply these views to the Warren Court's unprecedented overruling of earlier decisions or whether their proffered commitment to precedent merely is another result-oriented strategy designed to preserve the status quo.

V. Conclusion.

Prior to Marbury v. Madison,[73] the Federalist party and the Jeffersonian Republicans battled furiously over whether the judiciary even had the authority to say that an act of Congress violated the constitution. Though it was not universally accepted at first, Chief Justice Marshall's eloquent opinion in Marbury established that the constitution is the supreme law of our land and that the judiciary has an obligation to disregard statutes that, in its view, conflict with that supreme law.

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[70]. Response at 64.

[71]. Response at 72.

[72]. Id.

[73]. 5 U.S. (1 Cranch) 137 (1803).

In reality, today's advocates of judicial activism (sometimes candidly called "noninterpretivism" by its proponents) are challenging this system. Professor Thomas Grey (Stanford), for example, has described Marbury itself as "a most atypical constitutional case, and an inappropriate paradigm for the sort of judicial review that has been important and controversial throughout our history."[74] Those, like Professor Grey, who believe our constitution to be deficient want the judiciary to recognize "fundamental rights" that the constitution has failed to protect. As Justice Black recognized,[75] the usual refrain of such people is that the Court must keep the constitution up to date with the times.

The difficulty is that if the constitution is not to be the judge's source of judgment, what is? Appeals have been made to our history and tradition, but this does not work because society's progress often depends on its willingness to turn away from its past. This certainly has been the case with regard to the issues of racial and gender equality. History cannot replace the constitution as a source of judgment if judges are free to rely on history only when it suits their purposes and to discard it when it does not. Contemporary morality sometimes gives the results the activists want, but often it does not; moreover, contemporary morality is a strange check upon majority rule. The point can be labored, but the truth is that once the constitution ceases to be the source of judgment for judges, once it ceases to be regarded as binding law, constitutional decisionmaking necessarily degenerates into imposition of the judge's own personal values.[76] This is why Justice Black dissented in Griswold: he dissented not because he liked the Connecticut anti-contraception law but because he realized that the constitution did not give him authority to invalidate this law that he disliked.

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[74] Grey, Do We Have an Unwritten Constitution, 27 Stan. L. Rev. 703, 707 (1975).

[75] See note 18 and accompanying text.

The courts have not yet been as generous as academic writers in inventing new fundamental rights to be constitutionalized. Professor Kenneth Karst (U.C.L.A.), for example, has argued that incestuous marriage (except for parent-child marriage), homosexual marriage, and bigamy should be constitutionally protected.[77] More radically, Professor Mark Tushnet (Georgetown) has stated that he would decide constitutional cases by opting for the result "likely to advance the cause of socialism."[78] Similarly, Professor Parker (Harvard) has written that constitutional law offers "his generation" a chance to rebuild the political order.[79] The point is not that any of these commentators are wrong as a matter of politics--although many Americans undoubtedly think they are; the point is that because our constitution does not address these matters, there is no level other than the political one with which to debate their viewpoints. Once the constitution is put out of the picture, anyone's proposed "fundamental right" is as plausible as anyone else's.

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[76]. Cf. J. Ely, Democracy and Distrust (1980), particularly Chapter 3 "Discovering Fundamental Values." This chapter should be required reading for Bork's critics.

[77]. Karst, The Freedom of Intimate Association, 89 Yale L.J. 624, 672-686 (1980).

Roe v. Wade[80] was not discussed in the body of this paper precisely because the temptation is too easy to let one's personal view of abortion color one's analysis of the case. Roe, in fact, is only one example of a judicial methodology that permits judges to veto legislation even though the constitution does not address the matter, and as such it is no better or worse than other "noninterpretivistic" decisions. Roe is wrong independently of whether abortion is wrong. As Dean John Ely (Stanford), a Warren Court admirer, has written:

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[78] Tushnet, The Dilemmas of Liberal Constitutionalism, 42 Ohio St. L.J. 411, 424 (1981).

[79] Parker, The Past of Constitutional Theory--and Its Future, 42 Ohio St. L.J. 223 (1981).

[80] 410 U.S. 113 (1973).

> [Roe] is, nevertheless, a very bad decision. Not because it will perceptibly weaken the Court--it won't; and not because it conflicts with either my idea of progress or what the evidence suggests is society's--it doesn't. It is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be.[81]

It is perhaps not surprising that political controversy surrounding the Supreme Court has tended to coincide with its activist eras. In the early part of this century, for a period of about 30 years, an activist, conservative Court wrote its view of "economic liberty" into the due process clause, and this precipitated the Court crisis of the 1930's. President Roosevelt even appealed to the nation to save the constitution from the Supreme Court.[82] This history, of course, partly explains Justice Black's vehement objection to cases like Griswold, for Black knew well that activism can be a two-edged sword. In the last twenty years (beginning with Griswold), the Court again has been reading rights into, rather than out of, the constitution, and not surprisingly we find more controversy with regard to the issue of the Court's role than at any time since the New Deal.

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[81]. Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 947 (1973).

[82]. Radio Address, March 9, 1937.

Robert Bork is controversial because, like Justice Black, he consistently insists that the judge must allow the people to prevail when the constitution does not speak to the issue. He believes the same judicial restraint is required whether the legislation is liberal or conservative. The political nature of the debate surrounding his nomination reveals the wisdom of his approach. As we should have learned from the New Deal era, our constitution on most issues leaves the direction of society to the people. When the constitution speaks, the judge must apply its restraints regardless of personal belief; when the constitution is silent, the judge must let the people prevail regardless of personal belief. That Judge Bork is so controversial for holding such a view only demonstrates how far we have deviated from the view of the constitution that John Marshall articulated in Marbury.

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EMBARGOED UNTIL 10:00 AM EDT
Thursday, 9/3/87

RESPONSE PREPARED TO WHITE HOUSE ANALYSIS
OF JUDGE BORK'S RECORD

The Chairman of the Senate Judiciary Committee requested a review of the White House briefing paper, released August 3, 1987, on the nomination of Judge Robert Bork to be an Associate Justice of the Supreme Court. The background research was conducted by Committee consultants Jeffrey Peck, a member of the District of Columbia Bar, and Christopher Schroeder, Professor of Law at Duke University. Their research was reviewed and approved by Floyd Abrams, member of the New York Bar; Clark Clifford, member of the District of Columbia Bar; Walter Dellinger, Professor of Law, Duke University Law School; and Laurence H. Tribe, Tyler Professor of Constitutional Law at Harvard Law School.

Attached you will find a copy of the researchers' statement and the text of their review of the White House briefing paper.

STATEMENT OF COMMITTEE CONSULTANTS

SEPTEMBER 2, 1987

The White House statement, "Materials on Robert H. Bork," released on August 3, 1987, significantly distorts the issues posed for the Senate and the nation by President Reagan's nomination of Judge Bork to fill the Supreme Court vacancy created by the resignation this July of Associate Justice Lewis Powell. Although there is room for debate and disagreement over the ultimate issue -- whether the Senate should grant or withhold its consent to the pending nomination -- the record of Judge Bork's public pronouncements and actions over the past quarter-century paint a picture of Judge Bork as an extremely conservative activist rather than a genuine apostle of judicial moderation and restraint.

The attempt by the White House to depict Judge Bork as a mainstream moderate simply does not comport with his record. Bruce Fein, a former Reagan Administration official and a conservative legal scholar, made much the same point earlier this week in a radio interview. He remarked:

> Judge Bork, even if he's portrayed as a moderate and is confirmed is not going to alter his vote that way....I think when you try to be a little too cute as the President is being I believe, that no one is deceived....They chose Bob Bork because they wanted him to make changes in the law.

Fein went on to say that the President should be

> going straight forward and telling the Senate, telling all the public, and the media, that of course, these are the major areas where he believes the Court has erred in the past and where he believes Justice Powell perhaps cast an errant vote and he would hope that Judge Bork would correct these.

The enclosed paper undertakes to present a response to the White House summary of Judge Bork's record. It incorporates briefing materials received and reviewed by Senator Biden and was prepared in response to inquiries from Senate staff and the media about the White House position paper. It is intended to serve these purposes only, and is not intended to be a complete evaluation of the nominee's record.

Upon completion of the research, the Chairman asked four distinguished members of the legal community to review the draft of the Response: Floyd Abrams, member of the New York Bar; Clark Clifford, member of the District of Columbia Bar; Walter Dellinger, Professor of Law, Duke Univerity Law School; and Laurence H. Tribe, Tyler Professor of Constitutional Law, Harvard University Law School. These individuals have advised the Chairman that they support wholeheartedly the substance of the views expressed in the Response.

RESPONSE PREPARED TO WHITE HOUSE ANALYSIS
OF JUDGE BORK'S RECORD

September 2, 1987

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APPENDIX A.

APPENDIX B.

I.

SUMMARY

On August 3, 1987, the White House distributed a document entitled "Materials on Judge Robert H. Bork." In itself, this was unusual so early in a confirmation process. Because of that early distribution, and because the document portrays Judge Bork as in the "mainstream tradition" of such justices as Lewis Powell and John Harlan, the White House position paper has generated considerable comment.

Members of the media, Senate staff and other interested persons have inquired about the substance of the White House position paper. In response to these inquiries, Senator Joseph R. Biden, Jr., Chairman of the Senate Judiciary Committee, directed several consultants to prepare an analysis of its portrayal of Judge Bork's record, and then asked several prominent academics and lawyers to evaluate their work.

This Response is the result of that effort. It is not a definitive or exhaustive analysis of Judge Bork. It is based upon an examination of the public record, including Judge Bork's writings as an academic, as Solicitor General and as a federal Circuit Court Judge, as those pertain to the principal assertions in the White House position paper concerning Judge Bork's public record. The overall conclusion of this review is that the position paper contains a number of inaccuracies, and that the picture it paints of Judge Bork is a distortion of his record. By highlighting the major inaccuracies and by collecting other pertinent information, omitted by the White House, relevant to an overall assessment of Judge Bork, this Response undertakes to depict Judge Bork's record more fully and accurately.

The White House position paper sets forth a number of propositions about Judge Bork that are not supported by the record. These propositions, and the response to them, are summarized below.

The White House position paper asserts that the Senate should focus on the nominee's judicial, rather than academic, record and suggests that since his criticism of "the reasoning of Supreme Court opinions" is merely something "that law professors do," it has little relevance to the Senate's inquiry. (Chapter 3, at 2.) **In fact, Judge Bork's own statements demonstrate that he believes that a nominee's entire record is relevant to the Senate's inquiry. He has said that:**

- "teaching is very much like being a judge and you approach the Constitution in the same way." (Interview with WQED, Pittsburgh, Nov. 19, 1986.)
- "my views have remained about what they were [since becoming a judge]....So when you become a judge, I don't think your viewpoint is likely to change greatly." (District Lawyer Interview, May/June 1985, at 31.)
- "when you're considering a man or woman for a judicial appointment, you would like to know what that man or woman thinks, you look for a track record, and that means that you read any articles they've written, any opinions they've written. That part of the selection process is inevitable, and there's no reason to be upset about it." (District Lawyer Interview at 33.)

The White House position paper asserts that Judge Bork is one of the "most eloquent and principled proponents of judicial restraint" and that he rejects a philosophy in which "the desire for results appears to be stronger than the respect for legitimacy." (Chapter 2, at 1.) **In fact, the nominee's record shows that he has often advocated and engaged in "judicial activism."**

- members of the D.C. Circuit charged Judge Bork with attempting to "wipe away selected Supreme Court decisions in the name of judicial restraint" and with conducting "a general spring cleaning of constitutional law." (Dronenburg v. Zech, 746 F.2d 1579, 1580 (D.C. Cir. 1984).)
- five members of the D.C. Circuit described Judge Bork's criteria for reviewing cases en banc as "self-serving and result-oriented" and as doing "substantial violence to the collegiality that is indispensable to judicial decision-making." (United States v. Meyer, No. 85-6169, slip op. at 2 (D.C. Cir. July 31, 1987).)

- other members of the D.C. Circuit stated that Judge Bork's use of sovereign immunity to deny access to the courts was "extraordinary and wholly unprecedented" and, if adopted as the governing rule, would destroy the "balance implicit in the separation of powers." (Bartlett v. Owen, 816 F.2d 695, 703, 707 (D.C. Cir. 1987).)

The White House position paper attempts to support its claim about Judge Bork's restraint in a number of ways. For example, the position paper asserts that Judge Bork "has never wavered in his consistent and principled protection of...civil liberties...that can actually be derived from the Constitution and federal law," and that he has "opposed what he views as impermissible attempts to overturn" the right to privacy decisions. (Chapter 2, at 1-2.) **In fact, Judge Bork has repeatedly and consistently rejected the right to be free rom governmental interference into one's private life and has never said that the Supreme Court should not overturn its prior decisions establishing and extending the right to privacy.**

- the nominee has repeatedly rejected the decision upholding the right of married couples to use contraceptives. ("Neutral Principles" at 9.)

- Judge Bork described as "unconstitutional" the decision upholding the right of a woman to decide with her doctor the question of abortion. (Hearings Before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 97th Cong., 1st Sess., June 10, 1981, at 310.)

- Judge Bork has sharply criticized the decision striking down a law that called for the involuntary sterilization of certain criminals. ("Neutral Principles" at 11-12.)

- Judge Bork has rejected constitutional protection for what he views as "so tenuous a relationship as visitation [of children] by a non-custodial parent." (Franz v. United States, 707 F.2d 582 (1983).)

- Judge Bork has criticized the Supreme Court's rulings protecting the decisions of parents about their children's education. ("Neutral Principles" at 11.)

The White House position paper states that the nominee is "[a]mong the nation's foremost authorities on antitrust...law." (Chapter 1, at 3.) **In fact, what the White House omits is that Judge Bork's antitrust views are a vivid demonstration of his judicial activism.**

- in the antitrust area, Judge Bork proposes that the courts ignore almost one hundred years of congressional enactments and judicial precedents.

- Judge Bork's exclusive focus on "economic efficiency" is inconsistent with the legislative history of the antitrust statutes.

- Judge Bork has attacked virtually all of the basic antitrust statutes.

- Judge Bork has rejected many of the Supreme Court's leading antitrust decisions.

- Judge Bork has put his activist ideas into practice on the Court of Appeals.

The White House position paper also asserts that Judge Bork's First Amendment cases "suggest a strong hostility to any form of government censorship" (Chapter 9, at 1), and that his "record indicates he would be a powerful ally of First Amendment values on the Supreme Court." (Chapter 3, at 6.) **In fact, Judge Bork's record on First Amendment issues demonstrates that he would narrow many well-established First Amendment protections.**

- Judge Bork's criticism of landmark Supreme Court decisions suggests that he would tolerate far broader prior restraints on the press than have historically been deemed constitutional, as well as permitted far more governmental punishment of speech than has traditionally been protected.

- Judge Bork has taken a narrow view of the right of the press to gather information by limiting requests under the Freedom of Information Act.

- Judge Bork's writings show that he would protect only speech that is tied to the political process, and that he would not protect artistic and literary expression such as Shakespeare's plays, Rubens' paintings and Barishnokov's ballet.

- Judge Bork has rejected protection for the advocacy of civil disobedience, so that if his view had been the governing rule, the right to advocate sit-ins at lunch counters segregated by law would have been left to the discretion of state legislatures.

- in the area of church and state, Judge Bork has rejected several Supreme Court decisions, and has called for a "relaxation of current rigidly secularist doctrine" and for the "reintroduction of some religion into public schools." ("Untitled Speech, Brookings Institution, Sept. 12, 1985, at 3.)

The White House position paper asserts that Judge Bork would follow in the "mainstream tradition" exemplified by such jurists as Justices Powell and Harlan. (Chapter 2, at 1.) **In fact, the position paper has ignored many fundamental differences between Judge Bork and the jurists in whose tradition he would purportedly follow.**

- Judge Bork's repeated rejection of constitutional protection for certain fundamental liberties contrasts markedly with the views of Justice Powell, who found such liberties to be "deeply rooted in this Nation's history and tradition," (Moore v. East Cleveland, 431 U.S. 494 (1977)), and Justice Harlan, who found them to be "implicit in the concept of ordered liberty." (Griswold v. Connecticut, 381 U.S. 479, 500 (1965).)

- Judge Bork's willingness to overturn numerous landmark Supreme Court decisions conflicts with Justice Powell's view that the doctrine of stare decisis "demands respect in a society governed by the rule of law." (City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 419-420 (1983).)

- Judge Bork's view that Roe v. Wade is an "unconstitutional decision" and "a serious and wholly unjustifiable judicial usurpation of state legislative authority" (Hearings Before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 97th Cong., 1st Sess., June 10, 1981, at 310), conflicts with Justice Powell's view that there are "especially compelling reasons for adhering to stare decisis in applying the principles of Roe v. Wade." (City of Akron, 462 U.S. at 420 n.1.)

- Judge Bork's restrictive view of press rights conflicts with the balanced approach used by Justice Powell.

- the statistics proffered in the position paper do not demonstrate that Judge Bork and Justice Powell are ideologically similar.

The White House position paper asserts that Justice Powell agreed with Judge Bork in a leading case protecting employees from sexual harassment in the workplace (Vinson v. Taylor (753 F.2d 141, rehearing denied, 760 F.2d 1330 (D.C. Cir. 1985), aff'd sub nom. Meritor Savings Bank v. Vinson, 106 S. Ct. 2399 (1986)), and that the Supreme Court "adopted positions similar to those of Judge Bork" in the case. **In fact, this assertion is incorrect, since a unanimous Supreme Court flatly rejected Judge Bork's views on the issue of liability.**

- Judge Bork argued that "[b]y depriving the charged person of any defense, [the majority] mean[s] that sexual dalliance, however voluntarily engaged in, becomes harassment whenever an employee sees fit, after the fact, to so characterize it." (760 F.2d at 1330.)

- in an opinion joined by Justice Powell, Justice Rehnquist held that "[t]he correct inquiry is whether [the plaintiff] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her participation...was voluntary." (106 S. Ct. at 2406.)

The White House position paper asserts that Judge Bork "has never wavered in his consistent and principled protection of civil rights...that can actually be derived from the Constitution and federal law," and suggests that Judge Bork is a strong supporter of civil rights. (Chapter 2, at 1.) **In fact, Judge Bork's extensive record shows that he has opposed virtually every major civil rights advance on which he has taken a position, including such issues as the public accomodations bill, open housing, restrictive covenants, literacy tests, poll taxes and affirmative action.**

- in 1963, Judge Bork opposed the Public Accommodations bill on the ground that it would mean "a loss in a vital area of personal liberty." ("Civil Rights -- A Challenge," New Republic, 1963, at 22.) He has since recanted this view.

- in 1968, the nominee attacked a Supreme Court decision striking down a referendum that revoked a state open-housing statute. ("The Supreme Court Needs A New Philosophy," Fortune, Dec. 1968, at 166.)

- in 1968, 1971 and 1973, Judge Bork sharply criticized the decisions establishing the principle of one-person, one-vote. ("The Supreme Court Needs A New Philosophy," at 166; "Neutral Principles and Some First Amendment Problems," 47 Indiana Law Journal 1, 18-19 (1971); Confirmation Hearings to be Solicitor General (1973) at 13.)

- in 1971, he challenged the decision striking down racially restrictive covenants in housing. ("Neutral Principles" at 15-16.)

- in 1972 and 1981, he criticized decisions banning literacy tests in voting. ("Constitutionality of the President's Busing Proposals," American Enterprise Institute (1972) at 1, 9-10; Hearings on the Human Life Bill Before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 97th Cong., 1st Sess. (1982).)

- in 1973 and 1985, he attacked the decision outlawing poll taxes as a prerequisite to voting. (Solicitor General Hearings (1973) at 17; "Forward" in G. McDowell, The Constitution and Contemporary Constitutional Theory (1985) at vii.)

- in 1978, he rejected the decision upholding affirmative action. ("The Unprincipled Bakke Decision," Wall Street Journal, July 21, 1978.)

- in 1987, he stated that "I do think the Equal Protection Clause probably should be kept to things like race and ethnicity," indicating that he would not extend protection, for example, to women. ("Worldnet Interview," United States Information Agency, June 10, 1987, at 12.)

- Judge Bork has opposed the Equal Rights Amendment because it would, in his view, constitutionalize issues of gender equality. (Judicial Notice Interview, June 1986, at 7-8.)

- commenting generally on the Bill of Rights, Judge Bork says that it was "a hastily drafted document on which little thought was expended." ("Neutral Principles" at 22.)

The White House position paper asserts that a "statistical analysis of Judge Bork's voting record," including the fact that none of his majority opinions has been reversed, demonstrates his suitability for the Supreme Court. (Chapter 6, at 1.) **In fact, the position paper's compilation of statistics seriously distorts Judge Bork's record.**

- the statistical analysis is uninformative since the nominee, as a circuit court judge, has been constititionally and institutionally bound to follow Supreme Court precedent.

- the analysis of Judge Bork's supposed "agreement" with majority opinions often distorts his more substantive rejection of the majority's position.

- since Judge Bork concedes that 90% of his docket has been non-ideological (Untitled Speech, Federal Legal Council, Oct. 16, 1983, at 2), his circuit court record says little about his suitability for the Supreme Court, whose docket is far more controversial.

- the emphasis on Judge Bork's lack of reversals distorts the more important fact that none of his majority opinions has yet to be reviewed by the Supreme Court.

The White House position paper describes the case reviewing then-Acting Attorney General Bork's firing of Special Prosecutor Archibald Cox by reference only to the "rescission of the regulations granting Cox independent prosecution authority." (Chapter 8, at 3.) **In fact, this description is, for several reasons, inaccurate and incomplete.**

- the plaintiffs challenged both the firing of Mr. Cox and the rescission of the regulations.

- the court ruled that Mr. Cox was illegally discharged, not just that the rescission of the regulation was improper.

- the position paper fails to note that even if the rescission of the regulation had preceded the actual firing of Mr. Cox, Judge Bork still would have acted unlawfully, since the court found that the rescission itself was "arbitrary and unreasonable."

The White House position paper asserts that there is "no basis...in Judge Bork's record" for the view that he would "seek to 'roll back' many existing precedents" and that Judge Bork "believes in abiding by precedent." (Chapter 3, at 2.) **In fact, Judge Bork's judicial and academic record raise serious questions about his willingness to respect and adhere to landmark decisions of the Supreme Court, since he has said that:**

- the appointment power is the "only cure" for "judicial excesses." (Hearings Before the Senate Judiciary Committee (1982) at 7; "'Inside' Felix Frankfurter," The Public Interest, Fall Book Supplement (1981) at 109-110.)

- an originalist judge would have "no problem whatever in overruling a non-originalist precedent." (Remarks on the Panel "Precedent, the Amendment Process, and Evolution of Constitutional Doctrine," First Annual Lawyers Convention of the Federalist Society, Jan. 31, 1987, at 126.)

- precedent in constitutional law "is less important" than it is with respect to statutes or the common law. (Federalist Society Convention at 126.)

- "broad areas of constitutional law" should be "reformulated." ("Neutral Principles" at 11.)

- a "large proportion" of the "most significant constitutional decisions" of the "past three decades" could not have been reached through a proper interpretation of the Constitution. (Untitled Speech, Catholic University, March 31, 1982, at 5.)

- the Constitution does not "allow" "dozens of cases" that have been decided "in recent years." (*Hearings Before The Subcommitte on Separation of Powers* (1981) at 315.)

- *Roe v. Wade* is "by no means the only example of unconstitutional behavior by the Supreme Court." (1981 *Hearings* at 310.)

- the Supreme Court has since "the mid-1950s" made decisions for which it has offered little or no "constitutional argument." ("Judicial Review and Democracy," *Encyclopedia of the American Constitution*, Vol. 2 (1986) at 1062.)

The White House position paper asserts that "there can be no serious debate that the *Los Angeles Times* is correct" when it observed on July 2, 1987, that "Bork has proved to be a judge who follows the law and legal precedent--not his personal preferences--in arriving at his opinions." (Chapter 2, at 8.) **In fact, the position paper distorts the position of the *Los Angeles Times*, which on the very same day spoke against the Bork nomination in an editorial entitled "Hard-Right Rudder." The editorial said that:**

- "it appears that Bork's addition to the court would cement a five-vote majority for undoing much of the social progress of the last three decades."

- "The country would have been better served by a nominee more like Justice Powell, who had few ideological commitments but who weighed each case on the facts before him and tried to decide what was right."

II.

ESTABLISHING THE CONTEXT: THE BORK NOMINATION IS A DECISION ABOUT THE FUTURE

A vacancy on the Supreme Court is always a national concern. But this particular vacancy -- occurring at this particular time -- carries historical weight. In this year of its bicentennial, the Constitution is more than an object of celebration; it is the focus of a critical national debate about what it is, what it means and what it requires.

The appropriateness of a Supreme Court nomination must be considered in context, taking into account the Court on which the nominee would sit, the impact of the nominee's judicial philosophy on vital decisions likely to face the Court during the nominee's tenure, as well as the nominee's personal qualifications. The White House position paper attempts to narrow the focus of the Senate's inquiry and to obscure the significance of this nomination, by charging that it is inappropriate for any member of the Senate to oppose the nomination "on the ground that it would affect the 'balance' on the Supreme Court" because a "balance theory" is "result orient[ed]." (Chapter 7, at 2.) "There would be no need to worry" about balance, the paper continues, "if Judges...were to confine themselves to interpreting the law as given to them by statute or Constitution, rather than injecting their own personal predilections...." (Id.) Even if the question of balance were an appropriate topic of inquiry, the paper concludes, "Judge Bork's appointment would not change the balance of the Court." (Id.)

A. The Direction Of The Supreme Court's Constitutional Interpretation Is Of Legitimate Concern To The Senate

To be sure, neither the Constitution nor judicial practice enshrines any particular philosophical balance on the Supreme Court. And the President must have some latitude to select Supreme Court nominees who generally share his philosophical perspective.

That latitude is exceeded when a President attempts to remake the Supreme Court in his own image by selecting nominees whose extensive expressions of views on major, specific issues clearly parallel his own; when the President and the Senate are divided deeply on the great issues of the day; and when the Court itself is closely divided philosophically, and a determined President could bend it to political ends that he can not achieve through the legislative process. When it is clear that the President is seeking more than broad philosophical compatibility, it is the Senate's right, and indeed its responsibility, to look closely at the philosophy of even a well-qualified nominee. That much is apparent from both the text and history of the Constitution and from Senate precedent.

B. The Supreme Court's Constitutional Direction Is At Stake

When a nominee such as Judge Bork could dramatically change the direction of the Supreme Court, each Senator has both a right and a constitutional duty to consider whether the judicial philosophy of that nominee is desirable for this time and for this Court. And, contrary to the assertions of the White House position paper, the direction of the Supreme Court is very much at stake.

1. The Supreme Court's Last Term Demonstrates That Justice Powell Often Cast The Swing Vote

Statistics from the Supreme Court's last term (derived from "Supreme Court Review," The National Law Journal, Aug. 17, 1987, at S-1 to S-36) demonstrate that Justice Powell often cast the swing vote on the Court: he voted with the majority in 36 of the 43 decisions decided by a 5-4 vote. Powell was clearly a moderate conservative on the Court. And over half of the cases in which Justice Powell agreed with Chief Justice Rehnquist and disagreed with Justice Brennan (35 out of 59) involved criminal justice issues. Apart from criminal justice cases, where Justice Powell was most predictably aligned with the Court's conservatives, he was quite moderate indeed: where Justice Brennan and Chief Justice Rehnquist disagreed, Powell sided with Rehnquist in 24 cases and with Brennan in 20 cases.

The National Law Journal has summarized the Court's last term as follows:

> [Justice Powell's vote] was the crucial swing vote. Chief Justice Rehnquist and Justices Scalia, Byron R. White and Sandra Day O'Connor won it to build majorities in criminal justice, business and property cases; Justices Brennan, Blackmun, John Paul Stevens and Thurgood Marshall relied on it in abortion, affirmative action, civil rights and religion cases. (Id. at S-3.)

As discussed in Section III, Judge Bork's extensive record suggests his voting would not be equivalent to the votes cast by Justice Powell's in these latter cases.

2. The Response To Justice Powell's Retirement And Judge Bork's Nomination Also Suggests That The Direction Of The Court Is At Stake

As the response by the news media and to many affected groups indicates, the public recognizes that the direction of the Court is now at issue. Following Justice Powell's resignation, headlines declared: "Powell Leaves High Court... President Gains Chance to Shape the Future of the Court" (The New York Times, June

27); "Justice Powell Quits, Opens Way For Conservative Court" (The Los Angeles Times, June 28); "Reagan Gets His Chance To Tilt the High Court" (The New York Times, June 28).

Representatives of conservative groups confirm what is at issue with this nomination. Bruce Fein, formerly the General Counsel of the Federal Communications Commission and now at the Heritage Foundation, remarked that President Reagan "is relying on Bork's appointment to refashion constitutional jurisprudence and political discourse regarding social, civil-rights and criminal-justice matters to satisfy his constitutional backers." ("If Heart Is Gone, Can Bork Save The Soul?" Los Angeles Times, Aug. 16, 1987.)

Reverend Jerry Falwell has said that "[w]e are standing at the edge of history. Our efforts have always stalled at the door of the U.S. Supreme Court," and Bork's nomination "may be our last chance to influence this most important body." ("Groups Unlimber Media Campaign Over Bork," Washington Post, Aug., 4, 1987.) And on July 27, Christian Voice expressed a similar view:

> "[E]nsure a conservative America -- even after President Reagan leaves the White House in 1988....Now we have a prime opportunity to give the Supreme Court its first conservative majority since the 1930s....[D]id you realize that Justice Powell...was the deciding vote in winning the last 8 pro-abortion cases brought to the Supreme Court by the American Civil Liberties Union? Confirming Judge Bork would change all this. (Emphasis in original.)

Few observers, therefore, have any doubt as to what the nomination of Robert Bork is about.

3. As It Stretches To Find Moderate Allies, The White House Paper Misrepresents An Important Editorial Conclusion

The White House position paper concludes its review of the nominee's judicial record with a distortion of an assessment of Judge Bork by the Los Angeles Times. The White House paper states that "there can be no serious debate that the Los Angeles Times is correct" when it observed on July 2, 1987, that "'Bork has proved to be a judge who follows the law and legal precedent -- not his personal preferences -- in arriving at his opinions.'" (Chapter 2, at 8.) This selective quotation suggests that the Los Angeles Times, through its editorial board, has endorsed the nominee. In fact, the statement is simply part of a reporter's story.

More importantly, on the very same day, the editorial board of the Los Angeles Times did offer its considered opinion on the Bork nomination. In an editorial entitled "Hard-Right Rudder," it described Judge Bork as a "rock-solid right-winger," and not as the "moderate" described in the White House position paper:

> From his record, **it appears that Bork's addition to the court would cement a five-vote majority for undoing much of the social progress of the last three decades.** But we hope that if he is seated, the strands of flexibility that have occasionally appeared will come to the fore.
>
> From the outset of his Administration, Reagan has made clear his desire to fill the Judiciary with people who would decide cases as he would. Though the President's term will end in 18 months, the nomination of Bork gives Reagan the opportunity to write his views into the law for years to come. **The country would have been better served by a nominee more like Justice Powell,** who had few ideological commitments but who weighed each case on the facts before him and tried to decide what was right.
>
> In his five years on the Court of Appeals, Bork has not ruled on an abortion case. But he has made clear in other opinions that **he does not believe the Constitution contains a "right to privacy,"** which was the basis of the Supreme Court's landmark decision in Roe v. Wade, legalizing abortion. The last time the Supreme Court considered abortion, in 1986, it ruled 5 to 4 against restrictions imposed by a state. Powell's was the fifth vote. **Bork seems sure to vote the other way, moving the country back to the scandalous state of affairs that existed before 1973...**
>
> Bork's legal philosophy goes by the name judicial restraint, which is a code term used by whichever side dislikes what the courts are doing....The problem is that whenever ideologically committed people of either stripe get on the bench, they always find that the law supports their policy preferences. **If the Senate approves the President's nomination, Bork will likely do the same.** (Emphases added.)

III.

CONTRARY TO THE POSITION PAPER'S PORTRAYAL, THE NOMINEE IS A JUDICIAL ACTIVIST

The White House position paper emphasizes a number of generalizations about Judge Bork's adherence to "judicial restraint" and his "faithful application" of the precedent of the Supreme Court and of his own court. According to the White House position paper, for example, Judge Bork "is among the most eloquent and principled proponents of judicial restraint." (Chapter 2, at 1.) In support of its claim, the White House position paper asserts that, "as a judge, [Bork] has faithfully applied the legal precedents of both the Supreme Court and his own Circuit Court." (Chapter 3, at 2.) To demonstrate that "faithful application," the position paper relies on a "statistical analysis of Judge Bork's voting record." This analysis, it claims, shows that the nominee "is an open-minded judge who is well within the mainstream of contemporary jurisprudence." (Chapter 6, at 1.)

These statements are too general and abstract to provide any meaningful sense of Judge Bork's philosophy. As generalizations, moreover, they avoid the more important questions of whether Judge Bork, while sitting on the D.C. Circuit, has practiced restraint, and whether his writings evince a willingness to do so. Or do Judge Bork's opinions and other writings indicate that he has engaged in precisely the same kind of "activism" for which he has chided other jurists, including members of the Warren and Burger Courts?

Attention to specific decisions and writings shows that the picture painted by the White House position paper is inaccurate and incomplete. Among the omissions are clear examples of Judge Bork's advocacy and implementation of conservative activism, which demonstrate that he is not the apostle of judicial restraint and moderation described in the White House position paper.

A. The Position Paper's Compilation Of Statistics Seriously Distorts Judge Bork's Record

1. The Statistical Analysis Is Uninformative Since The Nominee, As A Circuit Court Judge, Has Been Constitutionally And Institutionally Bound To Follow Supreme Court Precedent

As an intermediate court judge, the nominee has been constitutionally and institutionally bound to respect and apply Supreme Court precedent. Indeed, Judge Bork has explicitly recognized that duty in some of his decisions. (Franz v. United States, 712 F.2d 1428 (D.C. Cir. 1983); Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984).) Relying on Judge Bork's lack of reversals to show his "faithful application" of Supreme Court precedents thus says nothing about his potential for activism if confirmed as an Associate Justice on the Supreme Court, where he would be free of such restraints. The "statistical analysis," therefore, is uninformative.

2. The Position Paper's Statistics Ignore The Rejection By A Unanimous Supreme Court Of Judge Bork's Dissent In A Recent Leading Case On Sexual Harassment In The Workplace

The focus in the White House position paper on the lack of reversals of Judge Bork's majority opinions ignores the rejection of one of Judge Bork's dissents by a unanimous Supreme Court. In a factually inaccurate and misleading description, the White House position paper claims that the Supreme Court "adopted positions similar to those of Judge Bork both on the evidentiary issues and on the issue of liability" in the case of Vinson v. Taylor, (753 F.2d 141, rehearing denied, 760 F.2d 1330 (D.C. Cir. 1985), aff'd sub nom. Meritor Savings Bank v. Vinson, 106 S. Ct. 2399 (1986)), the leading case on sexual harassment in the workplace. In fact, Justice Rehnquist's opinion for the full Court took a far more sensitive approach to liability for such harassment than did Judge Bork's dissent.

Vinson, a bank teller, claimed that her supervisor insisted that she have sex with him, and that she did so because she feared she would be fired if she did not. Vinson claimed that over the next several years, her supervisor made repeated sexual demands, fondled her in front of other employees, exposed himself to her, and forcibly raped her on several occasions. The trial court dismissed the claim, saying that their relationship was "voluntary." The D.C. Circuit reversed, holding that if the supervisor made "Vinson's toleration of sexual harassment a condition of her employment," her voluntariness "had no materiality whatsoever."

The D.C. Circuit was asked to rehear the case, and the full court declined. Judge Bork dissented from the denial of the rehearing. Attacking the original decision, Judge Bork argued that "voluntariness" should be a complete defense in a sexual harassment case. He said that "[t]hese rulings seem plainly wrong. By depriving the charged person of any defenses, they mean that sexual dalliance, however voluntarily engaged in, becomes harassment whenver an employee sees fit, after the fact, to so characterize it." (760 F.2d at 1330.)

Judge Bork's holding on the voluntariness issue was flatly rejected by a unanimous Supreme Court, with Justice Powell joining the opinion. (The Court did agree with Judge Bork on the evidentiary issue.) Justice Rehnquist wrote the Court's opinion, and held that the correct test for sexual harassment was whether the employer created "an intimidating, hostile, or offensive working environment." He concluded that "[t]he correct inquiry is whether [plaintiff] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." (106 S. Ct. at 2406.)

The White House position paper's statements about the Vinson case thus fail to comport with the clear factual record. And by distorting the facts, the position paper inflates Judge Bork's record with respect to review by the Supreme Court.

3. The Position Paper's Analysis Of Judge Bork's Supposed "Agreement" With Majority Opinions Often Distorts His More Substantive Rejection Of The Majority's Position

Throughout the White House position paper, Judge Bork is identified as having agreed with the majority opinion in a number of cases that purport to show his moderation and restraint. Typical of such attribution is the statement, made in connection with Planned Parenthood Federation v. Heckler (712 F.2d 650 (D.C. Cir. 1983)):

> Judge Bork showed his respect for statutory requirements by agreeing with a decision that the Health and Human Services Department violated the law in its attempts to require federally-funded family planning grantees to notify parents when contraceptives were provided to certain minors. Thus, the Department's so-called 'squeal' rule was overturned by the court. (Chapter 2, at 2.)

This description distorts the true nature of Judge Bork's opinion, which is anything but deferential and non-activist.

In Planned Parenthood, the plaintiffs challenged a federal regulation that required all family-planning centers to give notice to parents that their teenagers sought contraceptives. Because Congress explicitly stated that it did not intend to "mandate" family involvement in the delivery of services, but rather wanted the centers to "encourage" teenagers to bring their families into the process, the court held that the parental notification requirement was inconsistent with Congress's intent.

Although Judge Bork agreed that Congress intended that notification be voluntary on the teenager's part (id. at 665, 667), he concluded that Congress did not clearly prohibit the regulations. He conceded that HHS had misinterpreted the relevant law, but argued nonetheless that the authority necessary for the regulation might be found elsewhere. Noting that the regulations pertained to a "vexed and hotly controverted area of morality and prudence," (id. at 665), Judge Bork urged that the case be remanded to search for this unknown authority. The majority argued that a remand would be gratuitous, since it was clear that the Executive had violated the law.

4. None Of Judge Bork's Majority Opinions Has Ever Been Reviewed By The Supreme Court

One "statistic" cited by the White House position paper is that Judge Bork, author of more than 100 majority opinions, has never been reversed. It is more accurate to say, however, that no majority opinion of Judge Bork's has ever been reviewed. Until recently, in all of Judge Bork's majority opinions review had not been sought by either party (100 cases) or review had been denied (9 cases). While the Supreme Court has recently granted certiorari in one case in which he wrote a majority opinion (Finzer v. Barry, (798 F.2d 1450 (D.C. Cir. 1986), cert. granted, 107 S. Ct. 1282 (1987)), the Court has still never addressed the merits of any of Judge Bork's majority opinions.

5. Since Judge Bork Concedes That 90% Of His Docket Has Been Non-Ideological, His Circuit Court Record Says Nothing About His Suitability For The Supreme Court, Whose Docket Is Far More Controversial

The White House position paper goes to great pains to argue that because Judge Bork has never been reversed, he is entitled to sit on the nation's highest court. Its statistical assessment relies on more than 400 cases from the D.C. Circuit. Most of those cases, however, have little relevance to the Bork nomination. As noted by Judge Bork, the D.C. Circuit "is an ideologically divided court" but this "**[m]akes no difference on 9/10's of [our] cases.** (Notes for Untitled Speech, Federal Legal Council, Oct. 16, 1983, at 2.) (Emphasis added.)

Judge Bork himself has acknowledged that the caseload of the Supreme Court is quite different from that of the D.C. Circuit:

> [The Supreme Court] certainly has a distinct set of responsibilities. Everybody has an appeal as of right to this court and any circuit court. So we are much more in the business of settling disputes just because they are disputes. The Supreme Court, which has a discretionary jurisdiction, can't conceivably settle all of the disputes that come up through the federal courts or up through the state courts, and so it must pick and choose, and it picks and chooses bearing in mind its obligation to settle important, unresolved questions of law and to lay down guidelines. (District Lawyer Interview(1985) at 31-32.)

According to Judge Bork, therefore, 90% of his cases on the D.C. Circuit are non-ideological and, consequently, non-controversial. Judge Bork's affirmance ratio, as described by the White House position paper, thus says little, if anything, about his suitability for the Supreme Court, which agrees to hear only a small percentage of the cases for which review is sought and whose docket has far more ideological and controversial cases.

6. The Statistics Do Not Demonstrate That Judge Bork And Justice Powell Are Ideologically Similar

The position paper claims that Justice Powell has agreed with Judge Bork in 9 of 10 "relevant" cases that went to the Supreme Court. (Chapter 6, at 1.) It thus continues its transparent effort to depict Judge Bork as the ideological equivalent to the retired Lewis Powell. Such depiction has no basis in fact.

The "9 out of 10" figure, marshalled to show the similarity in the views of the two men, seriously misrepresents some of those cases. In Vinson v. Taylor, for example, the position paper reports that Judge Bork and Justice Powell were in agreement. In fact, as discussed above (Section III(A)(2)), the two were on opposite sides, with Judge Bork dissenting from a D.C. Circuit opinion that was unanimously affirmed by the Supreme Court. Furthermore, a careful analysis of the remaining cases cited by the position paper shows that Judge Bork and Justice Powell both wrote opinions in only two. (A summary of the 9 cases identified in the briefing book is included in Appendix A to this Rebuttal.) In order to identify the substantive distinctions between Justice Powell and Judge Bork, therefore, casual and selective analysis of statistics simply can not suffice. Rather, it is necessary to delve into the judicial philosophy, judicial method and substantive positions of the individuals, as is done in other sections of this Rebuttal.

B. An Accurate Portrait Of Judge Bork's Record Leaves No Doubt That He Has Been A Conservative Activist And Not A Practitioner of Judicial Restraint

Despite the constitutional and institutional restraints under which Judge Bork operated, his judicial record -- far from supporting the position paper's assertions of restraint -- is replete with examples of an activist approach. Indeed, Judge Bork's colleagues on the D.C. Circuit have made this quite clear.

1. Judge Bork's Novel Approach To Lower Court Constitutional Adjudication In Dronenburg Led Four Members Of The D.C. Circuit To Remind Him That "Judicial Restraint Begins At Home"

In Dronenburg v. Zech (741 F.2d 1388 (D.C. Cir. 1984)), Judge Bork's majority opinion affirmed the dismissal of the Navy's discharge of a nine-year veteran for engaging in consensual homosexual activity. After a lengthy recitation of the Supreme Court's line of privacy decisions for creating what he deemed as "new rights," (Id. at 1395), Judge Bork claimed that he could find no "explanatory principle" in them, and then argued that lower federal courts were required to give very narrow readings to them because the courts "have no guidance from the Constitution or...from articulated Supreme Court principle." (Id. at 1396.)

Judge Bork's theory of lower court constitutional jurisprudence in Dronenburg -- a theory that has never been expressed or endorsed by the Supreme Court -- as well as his criticism of the privacy decisions, led four members of the D.C. Circuit to caution Judge Bork, in their dissent from the denial of the petition for rehearing en banc, about the proper role of the court:

> [Judge Bork's] extravagant exegesis on the constitutional right of privacy was wholly unnecessary to decide the case before the court....**We find particularly inappropriate the panel's attempt to wipe away selected Supreme Court decisions in the name of judicial restraint.** Regardless whether it is the proper role of lower courts to 'create new constitutional rights,' surely it is not their function to conduct a general spring cleaning of constitutional law. **Judicial restaint begins at home.** (746 F.2d 1579, 1580.) (Emphasis added.)

2. Five Members Of The D.C. Circuit Have Charged Judge Bork With Evaluating En Banc Cases According To "Self-Serving And Result-Oriented" Criterion

Dronenburg is not the only case in which several members of the District of Columbia Circuit have charged Judge Bork with an pursuing his own agenda. In a series of recent orders issued by the full Court, a majority decided to reverse its decisions to grant en banc hearings in four cases. (Cases before the appeals court are normally heard by panels of three judges, but a party may seek review of a panel decision by asking for an en banc hearing before all members of the court.) Although Reagan nominee Lawrence Silberman disassociated himself, Judge Bork, in dissent, joined in the group attacking the majority's decisions. That dissent led Judge Edwards, writing on behalf of Chief Judge Wald and Judges Robinson, Mikva and Ginsburg, to charge the group led by Judge Bork with conducting their review of en banc cases according to "self-serving and **result-oriented** criterion." (United States v. Meyer, No. 85-6169, Slip op. at 2 (D.C. Cir. July 31, 1987).) (Emphasis added.)

Judge Edwards also noted that the conduct of the faction headed by Judge Bork had done

> **substantial violence to the collegiality that is indispensable to judicial decision-making.** Collegiality cannot exist if every dissenting judge feels obliged to lobby his or her colleagues to rehear the case en banc in order to vindicate that judge's position. **Politicking** will replace the thoughtful dialogue that should characterize a court where every judge respects the integrity of his or her colleagues. (Id. at 4.) (Emphasis added.)

C. Judge Bork's Unbroken Repudiation Of The Doctrines Preventing Unwarranted Governmental Intrusion Into The Intimacies Of Personal Life Ignores The Tradition And Text Of The Constitutution

Since 1971, the nominee has mounted a persistent attack on the long line of Supreme Court decisions protecting the intimacies of personal life from unwarranted governmental intrusion. The intensity and consistency of this attack raises substantial concern about the agenda the nominee might bring to the Court with respect to this line of decisions. It also is indicative of Judge Bork's willingness to discard the text, history and tradition of the Constitution in order to achieve the results he desires.

1. Judge Bork Has Dismissed Many Of The Supreme Court's Landmark Privacy Decisions

Judge Bork's rejection of consitutional protection against unwarranted intrusion into the intimacies of one's personal life is not limited to any one case or any one area of private relations. Rather, Judge Bork has dismissed many of the Court's decisions covering a wide range of personal conduct.

a. Judge Bork Has Opposed The Decision Upholding The Right Of Married Couples To Use Contraceptives

In Griswold v. Connecticut (381 U.S. 479 (1965)), the Supreme Court struck down a state law making it a crime for married couples to use contraceptives and for physicians to advise such couples about contraceptives. As a Law Professor at Yale, the nominee stated that Griswold "is an unprincipled decision, both in the way in which it derives a new constitutional right and in the way it defines that right, or rather fails to define it....The truth is that the Court could not reach its result in Griswold through principle." ("Neutral Principles" at 9.) He went so far as to say that there is nothing in the Constitution to distinguish between the desire of a husband and wife to be free to have sexual relations without fear of unwanted children and the desire of an electric utility to be free of a smoke pollution ordinance." ("Neutral Principles" at 9.)

In 1985, while sitting on the D.C. Circuit, Judge Bork stated: "I don't think there is a supportable method of constitutional reasoning underlying the Griswold decision." (Judge Bork Is a Friend of the Constitution," Conservative Digest Interview, Oct. 1985.)

In 1986, Judge Bork argued that replacing Justice Douglas's approach in Griswold with "a concept of original intent" was "essential to prevent courts from invading the proper domain of democratic government." (San Diego Law Review at 829.)

b. Judge Bork Has Described As "Unconstitutional" The Decision Upholding The Right Of A Woman To Decide With Her Doctor The Question Of Abortion

What is significant about the White House materials on Judge Bork's position on abortion is not simply what is said, but what is not said. The materials acknowledge that "Judge Bork, when...in academic life," criticized the Court's "right to privacy decision" and opposed legislative efforts to overturn Roe v. Wade (410 U.S. 113 (1973)). (Chapter 2, at 1-2.) That he views such legislative attempts as improper says nothing about whether the nominee would bring an agenda to the Court as an Associate Justice.

What is relevant to that determination is Judge Bork's testimony at the same hearings cited by the White House position paper. Said Bork: "I am convinced, as I think most legal scholars are, that Roe v. Wade is itself, **an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of state legislative authority.**" (Hearings Before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 97th Cong., 1st Sess., June 10, 1981, at 310.) (Emphasis added.) The nominee also said that the Constitution does not "allow" the Roe decision. (Id.)

c. Judge Bork Has Indicated That The Constitution Does Not Protect Against Mandatory Sterilization

The nominee has sharply criticized the Supreme Court's decision in Skinner v. Oklahoma (316 U.S. 535 (1942)), in which the Court struck down a law that mandated surgical and involuntary sterilization for any person convicted on three or more crimes "amounting to felonies involving moral turpitude." The Court said:

> We are dealing here with legislation which involves one of the basic rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the state conducts is to his irreparable injury.
>
> Sterilization for those who have thrice committed grand larceny with immunity for those who are embezzlers is a clear, pointed, unmistakable discrimination....If such a classification were permitted, the technical common law concept of a 'trespass'...could readily become a rule of human genetics. (Id. at 541-42.)

According to then-Professor Bork, Skinner was "as improper and intellectually empty as Griswold...." ("Neutral Principles at 12.) In his view:

> All law discriminates and thereby creates inequalities. The Supreme Court has no principled way of saying which non-racial inequalities are impermissible. What it has done, therefore, is to appeal to simplistic notions of 'fairness' or to what it regards as 'fundamental interest' in order to demand equality in some cases but not in others, thus choosing values and producing a line of cases...[such as] Skinner. ("Neutral Principles" at 11-12.)

Judge Bork also has addressed the sterilization issue while on the D.C. Circuit. In Oil, Chemical and Atomic Workers International Union v. American Cynamid Co. (741 F.2d 444 (D.C. Cir. 1984)), the owner of a manufacturing plant was sued because the release of lead into the plant air led to an increase in the level of lead in the blood of pregnant workers. The company adopted a policy that gave women of childbearing age a choice of being sterilized or losing their jobs. The Secretary of Labor concluded that Congress had not contemplated this policy when it passed the Occupational Safety and Health Act, which requires every employer to furnish "to each of his employees employment and a place of employment which are free from recognized hazards."

Judge Bork disagreed with this assessment. He found that the statute did not apply to the employer's "fetus protection policy," because the various examples of "hazards" cited in the legislative history all referred to poisons, combustibles, explosives, noises and the like, all of which occur in the workplace. Because the employer's policy, by contrast, was effectuated by sterilization performed in a hospital outside the workplace, Bork's opinion held that it was not covered by the Act. (Id. at 449.)

d. Judge Bork Has Argued That Visitation Rights Of Non-Custodial Parents Are Not Constitutionally Protected

In Franz v. United States (707 F.2d 582 (D.C. Cir. 1983), and 712 F.2d 1428 (D.C. Cir. 1983)), the Justice Department relocated a federal witness, his wife and her children by a former marriage, and then concealed the whereabouts of the children from their natural father, who had retained visitation rights. The natural father sued over this severance of his visitation rights, and the majority held that the total and complete termination of the relationship between a non-custodial parent and his minor children, without their participation or consent, violated their right to privacy.

After the court filed its opinion, Judge Bork issued a separate statement concurring in part and dissenting in part. He charged that the reasoning underlying the right to privacy doctrine was "ill-defined;" accused the majority of transforming mere emotional distress into a protectable constitutional interest; and disparaged the bond between a minor child and his or her parent by suggesting that its severance was constitutionally indistinguishable from severance of the bond between an adult draftee and his or her parent.

Judge Bork argued in Franz that "a substantive right [in] so tenuous a relationship as visitation by a non-custodial parent" may be created, if at all, only by the Supreme Court. He then explained why the Court should reject such a right. Families and the institution of marriage are protected, he said, because our "tradition is to encourage, support and respect them....That cannot be said of broken homes and dissolved marriages....[T]o throw substantive...constitutional protections around dissolved families will likely have a tendency further to undermine the institution of the intact marriage...." (712 F.2d at 1438.)

In an addendum to the opinion for the court, the majority noted that even Judge Bork admitted that his "dissatisfaction with the majority's interpretation of the [right to privacy] doctrine derives more from distaste for substantive due process theory than from disagreement regarding whether the principles established by the Supreme Court are fairly applicable to the instant case." (Id.)

e. Judge Bork Has Attacked Supreme Court Decisions Protecting The Rights Of Parents To Control The Upbringing Of Their Children

Judge Bork's wholesale rejection of the privacy doctrine includes an attack on the well-established decisions of the Supreme Court protecting the rights of parents to make fundamental decisions about raising their children.

In Meyer v. Nebraska (262 U.S. 390 (1922)), the Supreme Court struck down a state law that made it a crime to teach any foreign language in a public or parochial school. The Court reasoned that the "liberty" protected by the Due Process Clause included a right to decide how to raise and educate one's children.

Then-Professor Bork found Meyer to be "wrongly decided," arguing that the Due Process Clause should not be construed to protect any specific substantive liberties, since the Constitution fails to specify "which liberties or gratifications may be infringed by majorities and which may not." ("Neutral Principles" at 11.)

In Pierce v. Society of Sisters (268 U.S. 510 (1925)), the Court struck down a state law that required that all children between the ages of 8 and 16 be sent to a public school. The Court held that the law "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control....The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." (*Id*. at 535-36.)

Judge Bork has argued that *Pierce*, like *Meyer*, was "wrongly decided." At most, he conceded that "perhaps *Pierce's* result could be reached on acceptable grounds, but there is no justification for the Court's methods." ("Neutral Principles" at 11.)

2. Judge Bork's Wholesale Dismissal Of The Right To Privacy Conflicts With The Supreme Court's Longstanding Tradition Of Protection For Certain Fundamental Liberties

The Supreme Court has recognized on several occasions that certain fundamental liberties merit protection because they are the very foundation from which the Constitution was built. These liberties exist, furthermore, even though they are not specified in the text of the Constitution.

In *Palko v. Connecticut* (302 U.S. 319 (1937)), for example, the Court noted that there are certain fundamental liberties which, while not manifest in the text of the Constitution, are nonetheless "implicit in the concept of ordered liberty," (*Id*. at 325), such that "neither liberty nor justice would exist if [they] were sacrificed." (*Id*. at 326.) Echoing this same theme, Justice Powell described fundamental liberties in *Moore v. East Cleveland* (431 U.S. 494 (1977)) as those liberties that are "deeply rooted in this Nation's history and tradition." Powell reiterated his belief in "deeply rooted traditions" in *Zablocki v. Redhail* (434 U.S. 373, 399 (1978)(Powell, J., concurring)).

Chief Justice Burger also recognized that unenumerated rights merit protection. Writing for the Court in *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), in which the Court held that the right of the public and press to attend criminal trials is guaranteed under the First and Fourteenth Amendments, he stated:

> [A]rguments such as the state makes have not precluded recognition of important rights not enumerated. Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, **the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees.** For example, the rights of association and privacy...appear nowhere in the Constitituion or Bill of Rights. Yet these important but unarticulated rights have nonetheless been found to share constitutional protection with explicit guarantees. The concerns expressed by Madison and others have thus been resolved; **fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined.** (*Id*. at 580-581.) (Emphasis added.)

Judge Bork's dismissal of the history and tradition encompassed within these formulations as "not particularly helpful," (Dronenburg v. Zech, 741 F.2d at 396), and his claim that American institutions are weakened by "abstract philosophizing about the rights of man or the just society," ("Styles in Constitutional Theory," 26 South Texas Law Journal 383, 395 (1985)), simply ignore this history and tradition. Judge Bork also ignores the famous dissent of Justice Brandeis -- now recognized as expressing the Court's majority view -- in Olmstead v. United States (277 U.S. 438, 478 (1928)):

> The protection guaranteed by the [Fourth and Fifth] Amendments is much broader in scope. The makers of the Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be bound in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, **the right to be let alone -- the most comprehensive of rights and the right most valued by civilized man.** (Emphasis added.)

3. Judge Bork's Views Are Fundamentally At Odds With Those Of Justice Harlan, In Whose Tradition The Nominee Would Purportedly Follow

Justice Harlan -- in whose tradition the White House position paper asserts that Judge Bork would follow (Chapter 2 at 1)-- also recognized the tradition underlying the Constitutional right to privacy. Harlan dissented in Poe v. Ullman, (367 U.S. 497 (1961)), in which the majority dismissed challenges, on procedural grounds, to Connecticut statutes that prohibited the use of contraceptive devices and the giving of medical advice on their use. Poe, in other words, involved essentially the same issue presented to and decided by the Court four years later in Griswold. Justice Harlan argued not only that the challenges were justiciable, but that the statutes infringed the due process clause of the Fourteenth Amendment. (Id. at 555. (Harlan, J., dissenting)). His discussion of due process provides a cogent rejection of Judge Bork's views on fundamental liberties:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society....The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically

> departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgement and restraint. (*Id.* at 542.) (Emphasis added.)

Additional evidence that Judge Bork clearly would not follow in the Harlan tradition is provided in the latter's opinion in *Griswold*. Justice Harlan concurred in the judgment, writing separately to reiterate his view in *Poe* that the statutes infringed the Due Process Clause. He also invoked *Palko v. Connecticut* in stating that the statutes "violate[d] basic values 'implicit in the concept of ordered liberty.'" (*Griswold*, 381 U.S. at 500 (Harlan, J., concurring).)[1]

4. Judge Bork's Call For Ignoring The Ninth Amendment As A Source For Privacy Or Any Other Rights Cannot Be Squared With His Purported Adherence To The Text Of The Constitution

The Ninth Amendment states that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Judge Bork, as noted previously, repeatedly invokes the text of the Constitution as a principal source of "core values." Why, then, in light of such textual reliance, does Judge Bork ignore the Ninth Amendment to the Constitution?

Judge Bork refuses to accept the Amendment's clear command that the enumeration of certain rights not be taken as a denial of other unspecified rights. Instead, he asserts that there are alternative explanations of the Amendment.

> [I]f it ultimately turns out that no plausible interpretation can be given, the only recourse for a judge is to refrain from inventing meanings and **ignore the provision**, as was the practice until recently. ("Interpretation of the Constitution," 1984 Justice Lester W. Roth Lecture, University of Southern California, Oct. 25, 1984, at 16.) (Emphasis added.)

This suggested disregard for the Amendment is consistent with Judge Bork's general recommendation that

> [w]hen the meaning of a provision, or the extension of a provision beyond its known meaning is unknown, the judge has in effect **nothing more than a water blot** on the document before him. He cannot read it; any meaning he assigns to it is no more than judicial invention of a constitutional

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[1] As discussed below, Judge Bork also sharply attacked Justice Harlan's opinion in *Cohen v. California* (403 U.S. 15 (1971)).

> prohibition; **and his proper course is to ignore it.** (Id. at 11-12.) (Emphasis added)

These statements cannot be squared with either Judge Bork's own framework or the clear statements of the Supreme Court. Indeed, they are in direct conflict with the position of the revered Chief Justice, John Marshall, who stated in Marbury v. Madison (1 Cranch 137, 174):

> **It cannot be presumed that any clause in the Constitution is intended to be without effect.**

Judge Bork's statements also conflict with Chief Justice Burger's position in Richmond Newspapers:

> The Constitution's draftsmen...were concerned that some important rights might be thougt disparaged because not specifically guaranteed.
>
> Madison's efforts, **culminating in the Ninth Amendment**, served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others.

Thus, while it is no doubt true that the proper scope of the Ninth Amendment has been a topic of debate by courts and commentators, the Supreme Court has made clear that the Amendment has some meaning. According to Judge Bork, however, the text of the Amendment should simply be ignored.

5. The Bill Of Rights Was Not, As Judge Bork Claims, "A Hastily Drafted Document On Which Little Thought Was Expended"

The Bill of Rights can only be understood by reference to that heritage of "self-evident" truths and "free government." It was not, **as Judge Bork would have it, "a hastily drafted document on which little thought was expended,"** ("Neutral Principles" at 22) (emphasis added), with "rights...handed down to us...out of **particular** circumstances and **particular** sentiments and religious beliefs." (Conservative Digest Interview, (1985) at 93.) (Emphasis in original.) Indeed, Judge Bork's view is more than a misunderstanding; it is the "narrowed" definition of individual rights that the framers feared two hundred years ago.

The history and tradition recognized by the Supreme Court and ignored by Judge Bork lie at the very core of our political institutions. The state conventions that ratified the Constitution set forth the strongest intent to secure individual rights. Furthermore, the Constitution was nearly defeated in several states because of the lack of a Bill of Rights. For example, at John Hancock's suggestion, democratic firebrand Samuel Adams voted for the Constitution only "in full confidence that the amendments proposed will soon become a part of the system." (2

Elliot 179.) This promise of a Bill of Rights was critical to the Constitution's narrow approval in three key states.

Another critical role in securing the Bill of Rights was played by Thomas Jefferson, who, three months after the Constitutional Convention, found among the things "I do not like[, f]irst, the omission of a bill of rights....what the people are entitled to against every government on earth, and what no just government should refuse, or rest on inference." (Letter to Madison, Dec. 20, 1787, 12 Boyd 43-440.) Madison presented the concerns of Jefferson when he introduced the Bill of Rights into Congress three months later:

> I believe that the great mass of the people who opposed [the Constitution], disliked it because it did not contain effectual provisions against encroachments on particular rights, and those safeguards which they have long been accustomed to have interposed between them and the magistrate....If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive. (Debate of 8 June 1789, 1 Annals of Congress 440-460.)

Judge Bork's dismissal of the Bill of Rights is particularly striking in light of his self-described position as an "interpretivist" or "originalist." One who, like Judge Bork, takes others to task for ignoring "original intent" has a particular duty to adhere to that intent with respect to the entire Constitution, not just selected parts of it.

D. Judge Bork Has A Severely Limited View Of The Right To Advocate Political and Social Change

In his 1971 Indiana Law Journal article, Judge Bork articulated his view that only explicitly political speech is afforded First Amendment protection. But he removed from that category of constitutionally protected speech "any speech advocating the violation of law." ("Neutral Principles" at 31.) He reasoned that "political truth is what the majority decides it wants today." And the "process of 'discovery and spread of political truth,'" Judge Bork continued, "is damaged or destroyed if the outcome is defeated by a minority that makes law enforcement...impossible or less effective." (Id.) According to Judge Bork, therefore, advocacy of peaceful law violation should not be protected even if it presents no clear and present danger.

The thrust of Judge Bork's theory is plainly directed at civil disobedience. Had his theory been the governing rule in the 1960s, the right of Martin Luther King, Jr. to advocate sit-ins at lunch counters segregated by law would have been left to the discretion of each legislature or town council. The same would have been true of advocacy of boycotts, marches, sermons and peaceful demonstrations -- the tools that made possible the peaceful and lawful transformation in the South. And if Judge Bork's theory were the governing rule today, the Washington D.C. city council could prohibit individuals from advocating, however abstractly and without incitement, that protestors march in front of the Nicaraguan or South African embassies.

Judge Bork's 1971 views were repeated with renewed vigor in a 1979 speech at the University of Michigan. He sharply attacked in that speech the famous dissents of Justices Holmes and Brandeis in Abrams v. United States (250 U.S. 616 (1919)) and Gitlow v. New York (268 U.S. 652 (1925)), in which they argued there that speech aimed at government itself may be punished only when it presents a "clear and present danger." The Supreme Court has long come to accept these dissents as articulating the correct view of the First Amendment. Judge Bork remarked in 1979 that "the superiority of the [dissents]...is almost entirely rhetorical. Holmes' position lapses into severe internal contradictions, while Brandeis' dissents are less arguments than assertions." ("The Individual, the State, and the First Amendment," University of Michigan, 1979, at 19.) And he said in the "Neutral Principles" article that the "clear and present danger" requirement "is improper...because it erects a barrier to legislative rule where none should exist."

This attack on Holmes and Brandeis is nothing short of radical. These two Justices are recalled in American folklore as perhaps this nation's two most revered judges because of the very opinions with which Judge Bork disagrees -- opinions which afford citizens the opportunity to oppose governmental action and, to a point, to urge peope to disobey unjust laws.

Judge Bork also attacked two critically important First Amendment cases in the last 20 years: Brandenburg v. Ohio (395 U.S. 444 (1969)) and Hess v. Indiana (414 U.S. 105 (1973)). In Brandenburg, the Court overturned the conviction of a Klu Klux Klan leader who advocated violence, holding that such speech can be restricted only when it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." In Hess, the Court overturned a conviction of a demonstrator being removed from a campus street who told the police that "we'll take the fucking street later," holding that it was "mere advocacy of illegal action at some indefinite future time."

Judge Bork said that both these landmark cases "are fundamentally wrong interpretations of the First Amendment." (Michigan Speech at 21.) In addition, he repeated his indictment of civil disobedience: "Speech advocating the forcible destruction of democratic government or the frustration of such government through law violation has no value in a system whose basic premise is democratic rule." (Id.)

Another example of the nominee's rejection of case law protecting speech against state punishment is his criticism of the 1971 ruling of the Supreme Court in Cohen v. California (403 U.S. 15 (1971)). There, the Court, through the distinguished jurist John Marshall Harlan, held unconstitutional on First Amendment grounds a California statute that banned disturbing the peace by "offensive conduct." The statute had been applied against a person who had worn a jacket in a courthouse with the words "Fuck the Draft" on it. Reasoning that "one man's vulgarity is another's lyric," the Court stated that "it is largely because government officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."

In Bork's view, the language used by Justice Harlan -- to whom the White House position paper compares Judge Bork -- was far too protective of expression. Bork said Cohen

> might better have been decided the other way on the ground of public offensiveness alone. That offensiveness had nothing to do with the ideas expressed, if any ideas can be said to have been expressed at all....If the First Amendment relates to the health of our political processes, then, far from protecting such speech, it offers **additional reason for it suppression.** (Michigan Speech at 18.) (Emphasis added.)

Judge Bork's rejection of Justice Harlan's now famous opinion in Cohen is just one example of his view that it is the right of the community to impose its moral standards on the minority. ("Morality and Authority," Carleton College, 1978 at 5.) The critical question with respect to the application of this view to the First Amendment is who is to define "speech" and "advocacy." Once the judiciary refuses to make that determination -- as Judge Bork would have it do, based on his Michigan speech -- the community is left virtually unrestrained.

E. Judge Bork Would Bar From The Federal Courts Many Claimants Whose Right To Bring Suit Has Been Previously Recognized

Judge Bork has consistently taken a very narrow and crabbed view of the doctrine of access to the courts -- the doctrine that determines those claims that will be redressed by the courts. Judge Bork's opinions argue repeatedly for a sharply limited role for the federal courts. Those opinions take a number of novel and unprecedented positions.

1. Judge Bork Has Called For The Wholesale Rejection Of Congressional Standing

Judge Bork's views in two Congressional standing cases provide a valuable insight into his views of the role of the courts in our society. In these cases, the nominee argued that members of Congress should not be given standing to bring actions alleging that the Executive or other members of Congress have infringed upon Congressional lawmaking powers. In one case, House Republicans argued that the Democrats had not allowed them enough Committee seats (Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. (1983)). In another case, Democrats argued that President Reagan could not validly pocket veto a bill during the midterm recess. (Barnes v. Kline, 759 F.2d 21 (D.C. Cir. (1985).)

Judge Bork wrote separately in both cases, dissenting in Barnes and concurring in Vander Jagt. In Barnes, he called for **"renounc[ing] outright the whole notion of Congressional standing."** (759 F.2d at 41.) (Emphasis added.) He argued that "[e]very time a court expands the definiition of standing, the definition of interests it is willing to protect through adjudication, the area of judicial dominance grows and the area of democratic rule contracts." (Id. at 44.) Judge Bork then provided the rationale for his novel views on standing:

> Though we are obligated to comply with Supreme Court precedent, the ultimate source of constitutional legitimacy is compliance with the intentions fo those who framed and ratified the Constitution. (Id. at 56.)

This concept is important because it supplies the premise for overturning Supreme Court decisions that, in Judge Bork's view, are "illegitimate."

2. Judge Bork Has Taken Novel And Unprecedented Approaches With Other Doctrines To Reduce Access

Judge Bork has also used the doctrine of sovereign immunity (pursuant to which a state government can only be sued if it consents) to limit access to the courts. He took a particularly harsh position in Bartlett v. Owen (816 F.2d 695 (1987)), in which the plaintiff challenged certain provisions of the Medicare Act on constitutional grounds. The government argued that the claim should be dismissed because the Act denied judicial review of the plaintiff's claim. The majority rejected this contention, concluding that Congress did not intend to preclude the courts from considering constitutional challenges to the Act.

Judge Bork dissented, and in the words of the majority, he "relie[d] on an extraordinary and wholly unprecedented application of the notion of sovereign immunity to uphold the Act's preclusion of judicial review." (Id. at 703.) The majority said that Judge Bork took "great pains to disparage" a leading Supreme Court decision, which suggested that Congress could not preclude review, as Judge Bork would have it, of constitutional claims. And, continued the majority, Judge Bork "ignore[d] clear precedent" from his own circuit that followed that Supreme Court decision and made "no mention of the Supreme Court's very recent affirmation of [the decision] -- using exactly the same language." (816 F.2d at 702-03.)

The majority concluded that Judge Bork's view that Congress may not only legislate, but also may "judge the constitutionality of its own actions," would destroy the "balance implicit in the doctrine of separation of powers." (Id. at 707.) Thus, according to the majority, Judge Bork's

> sovereign immunity theory in effect concludes that the doctrine...trumps every other aspect of the Constitution. According to the dissent, neither the delicate balance of power struck by the framers among the three branches of government nor the constitutional guarantee of due process limits the Government's assertion of immunity. Such an extreme position cannot be maintained. (Id. at 711.)

Judge Bork also took an unprecedented approach in Haitian Refugee Center v. Gracey, 809 F.2d 794 (D.C. Cir. (1987)). There, a non-profit Center and two of its members challenged the legality of the seizure of certain Haitian vessels and the forcible return of their undocumented passengers to Haiti. The question before the court involved the plaintiffs' standing to sue. A plaintiff must have standing -- that is, must have suffered some actual or threatened injury that was fairly caused by the defendant -- before the court may hear the case. Here, the plaintiffs claimed injury to their ability to act together with a third party -- the passengers -- not before the court. Judge Bork held that the plaintiffs did not have standing because of the nature of the relationship between the named plaintiffs and the third parties whose rights they were seeking. Under Judge Bork's test, the plaintiff's claim to proceed only if the action by the defendant -- in this case, the government -- "purposefully interferred" with the relationship between the plaintiff and the third party. (Id. at 801.)

While concurring in the result, Judge Buckley chose not to adopt Judge Bork's "purposeful interference" test. In Judge Buckley's view, "an alternate analysis of the causation requirement [was] more readily inferred from Supreme Court precedent." (Id. at 816.)

In dissent, Judge Edwards described Judge Bork's approach as activist in nature, and found it to be "quite [an] extraordinary notion of 'causation,' both in the novelty of the majority's test and in its disregard of Supreme Court precedent." (Id. at 827.) (Emphasis added.) Said Judge Edwards:

> The majority seeks to abandon the Supreme Court's consistently articulated test of causation in favor of an entirely new test applicable only in cases such as this one....**[A]s even the majority recognizes, none of [the Supreme Court] cases enunciates a 'purposeful interference' test of causation. Indeed, the point is too obvious to be belabored**....In the absence of any precedent to support its new test of causation, the majority looks to considerations of separation of powers....[I]t is plain that even the majority recognizes that 'the Supreme Court has never said explicitly that the separation of powers concept leads it to deny causation where it otherwise might be found if it were a purely factual question.' This admission alone shows that **this novel view of standing cannot be adopted as the law,** especially given the Supreme Court's clear and consistent articulation of a different test of causation.
> (*Id*. at 827.) (Emphasis added.)

3. Judge Bork Has Consistently Ruled Against Individuals And Public Interest Organizations In Split Cases Involving Access

Judge Bork has participated in 14 split cases involving individuals or public interest organizations seeking access to the courts or to administrative agencies. In each of these cases, Judge Bork voted against granting access.

F. In The Antitrust Area, Judge Bork Has Called For Unprecedented Judicial Activism, Proposing That The Courts Ignore Almost One Hundred Years Of Judicial Precedents And Congressional Enactments

As previously noted, the White House position paper identifes Judge Bork as a leading proponent of judicial deference to the legislature. Like his selection of "constitutional values," however, that deference depends on the particular matter in question. In the antitrust area, for example, Judge Bork has advocated an unprecedented role for the courts and has expressed a sharp disdain for the legislature's clear policy preferences.

Importantly, Judge Bork's antitrust views are particularly relevant to his constitutional jurisprudence, since he has said that "antitrust law,...[because of] its use of highly general provisions and its open texture, resembles much of the Constitution." ("The Crisis in Constitutional Theory: Back to the Future," *The Philadelphia Society*, April 3, 1987, at 11-12.) Similarly, he Judge Bork has commented that his antitrust jurisprudence is "an instructive microcosm" of his views on "social policy and the lawmaking process." (*The Antitrust Paradox*.)

1. Judge Bork's Exclusive Focus on "Economic Efficiency" Is Inconsistent With The Legislative History Of The Antitrust Statutes

The nominee's antitrust views are set out in a lengthy book published in 1978, entitled The Antitrust Paradox. The paradox about which he writes derives from his view that the basic purpose of the Sherman Act (i.e., to preserve competition) has been perverted by legislation and judge-made law that is protectionist and anti-competitive. Judge Bork has not shied away from expressing his contempt for the ability of Congress to deal with complex economic issues. "Congress as a whole is institutionally incapable," Judge Bork has declared, "of the sustained rigor and consistent thought that the fashioning of a rational antitrust policy requires." (*Id*. at 412.)

For Judge Bork, the only legitimate goal of antitrust is increased economic efficiency, defined in his view as the enhancement of consumer welfare. (*Id*. at 51.) By this he means the avoidance of restriction of output. From this point of departure, Judge Bork justifies a wide variety of economic practices that have been widely regarded and defined for decades as anticompetitive and illegal.

It is important to recognize the special sense in which Bork uses the phrase "consumer welfare." It is a technical concept that relates to efficiency in an economy-wide sense. For example, if a practice resulted in efficiencies that led solely to greater profits for manufacturers, Judge Bork would call that "consumer welfare" even though consumers as a group paid higher prices.

Judge Bork's theory stems, in part, from his reading of the legislative history of the Sherman Act. That reading, however, conflicts sharply with the views of others. For example, Robert Pitofsky, Dean of the Georgetown Law School, states:

> The legislative histories of the major federal antitrust enactments show abundant concern for other matters besides operating efficiencies of businesses...[for example,] concern for concentration because it would create opportunities, in times of domestic stress or upheaval, for the overthrow of democratic institutions and their replacement with totalitarianism. Concentration was also thought likely to invite greater and greater levels of governmental intrusion into the affairs of free enterprise, because government would simply be unable to leave big, concentrated firms politically unaccountable...Later enactments, most notably the Robinson-Patman Act, for example, clearly took into account congressional concern regarding concentration at the expense of small businesses. (Pitofsky and Wallman, "Judge Bork's Views on Antitrust Law and Policy," Aug. 25, 1987.)

2. Judge Bork Has Attacked Virtually All Of The Basic Antitrust Statutes Enacted By Congress

Judge Bork's elevation of "efficiency" as the only goal of antitrust leads him to attack virtually all of the basic antitrust statutes passed by Congress since the Sherman Act. He has concluded, for example, that Congress erred when it enacted Section 3 of the Clayton Act, dealing with vertical integration, because "exclusive dealing and requirements contracts have no purpose or effect other than the creation of efficiency." ("The Antitrust Paradox," at 309.) Similarly, he has condemned price discrimination amendments to the Clayton Act as "pernicious economic regulation" (id. at 382) resting upon an erroneous congressional view that "free markets were rife with unfair and anticompetitive practices which threatened competition, small businesses and consumers." (Id.) Judge Bork has also attacked the 1950 Celler-Kefauver antimerger amendment to Section 7 of the Clayton Act (the primary statute under which mergers and acquisitions have been challenged) because "vertical mergers are means of creating efficiency, not of injuring competition," (id. at 226), and because "conglomerate mergers should not be prohibited." (Id. at 262.)

3. Judge Bork Has Rejected Many Of The Supreme Court's Leading Antitrust Decisions

Judge Bork has not limited his criticism to Congress; he is equally contemptuous of the antitrust decisions of the Supreme Court:

> In modern times the Supreme Court, without compulsion by statute and certainly without adequate explanation, has inhibited or destroyed a broad spectrum of useful business structures and practices. (Id. at 4)

The Supreme Court decisions that Judge Bork has condemned span the antitrust horizon:

-- Brown Shoe v. United States, 370 U.S. 294 (1962), which condemned anticompetitive horizontal and vertical mergers, is labeled "disastrous" (id. at 201), because it converted Section 7 of the Clayton Act to a "virtually anticompetitive regulation." (Id. at 198).

-- Federal Trade Commission v. Procter & Gamble Co., 386 U.S. 568 (1967), which articulated the Supreme Court's theory prohibiting some conglomerate mergers, is sharply criticized as "mak[ing] sense only when antitrust is viewed as pro-small business -- and even then it does not make much sense." (Id. at 255).

-- Standard Oil Co. v. United States (Standard Stations), 337 U.S. 293 (1949), a landmark case defining the limits of exclusive dealing arrangements, is condemned as resting "not upon economic analysis, not upon any factual demonstration, but entirely and astoundingly, upon the asserted inability of courts to deal with economic issues." (Id. at 301.)

-- Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), another landmark antitrust case holding vertical price fixing to be a per se violation of the Sherman Act, is rejected, notwithstanding the fact that a half-century of Supreme Court opinions have adhered to the rule enunciated in the case and that no Supreme Court opinion has suggested that the holding is questionable.

4. Judge Bork's Recommended Activist Role For The Courts Conflicts With His Statements Regarding "Judicial Restraint"

Thus, the failure to apply "correct" economic analysis, Judge Bork claims, has produced a line of Supreme Court decisions that, in the name of protecting the consumer and small business, are intolerably restrictive of business freedom. The combined failure of Congress and the courts to consider or understand economics then becomes Judge Bork's excuse to reject as "mindless law" those statutes and cases that have expanded application of the antitrust laws beyond what he perceives as their original objective. Judge Bork's proposed remedy is a simple one -- and one that would engage the courts in an unprecedented role in terms of statutory interpretation:

> No Court is constitutionally responsible for the legislature's intelligence, only for its own. So it is with the specific antitrust laws. **Courts that know better ought not to accept delegations to make rules unrelated to reality and which, therefore, they know to be utterly arbitrary.**
>
> * * * * * * *
>
> It would have been best...if the courts first confronted with the Clayton Act and later the Robinson-Patman Act had said something along these lines: We can discern no way in which tying arrangements, exclusive dealing contracts, vertical mergers, price differences, and the like injure competition or lead to monopoly....For these reasons, and since the statutes in question leave the ultimate economic judgment to us, we hold that, with the sole exception of horizontal mergers, the practices mentioned in the statutes never injure **competition and hence are not illegal under the laws as written.** (Id. at 410) (Emphasis added.)

Judge Bork expressed a similar view at a conference in 1983, after he came onto the bench:

> [P]recedent is less important in Sherman Act jurisprudence than elsewhere; and this just as well. There is no particular reason why courts have to keep doing harm, rather than good, once they understood economic reality.
>
> The Clayton Act and the Robinson-Patman Act are somewhat different animals....[T]hey tell the judge to prohibit... practices only when they may tend to injure competition. If the judge sees that they do not tend to injure competition, I think it is entirely proper for him to say so and to change prior doctrine, unless he is constrained by a precedent from a higher court. (Remarks, Antitrust Conference on "Changing Antitrust Standards. Judicial Precedent, Management" Responsibility and the New Economics, [illegible]83, at 6.)

In attempting to support such an active role for the courts, Judge Bork has analogized the legitimacy of a Supreme Court refusal to enforce antitrust statutes with the propriety of a court refusing to accede to the views of "a particularly benighted legislature" that enacts laws to curb automotive accidents by regulation of poltergeists. (Antitrust Paradox at 410.)

This recommended role for the courts in the antitrust field hardly comports with the judicial role that Judge Bork himself has advocated. He says, in effect, that a judge should refuse to enforce statutes or judicial precedents that do not adhere to that individual judge's understanding of the reasons behind an entire body of law. Such a view surely conflicts with the traditional notion of judicial restraint. Indeed, it places a judge in the radical posture of determining what the law ought to be -- the precise role that Judge Bork advocated, in The Antitrust Paradox, should be left to the legislature:

> [T]he modern tendency of the federal judiciary to arrogate to itself political judgments that properly belong to democratic processes...occurs...most obviously and dramatically in the modern expansion of constitutional law...but the same tendency is observable in statutory and common law fields as well. It occurs, for example, **through the skewed interpretation of statutes in order to reach results more to the liking of the judge.** (Id. at 419-20.) (Emphasis added.)

5. Judge Bork Has Put His Activist Ideas Into Practice On The Court Of Appeals

Judge Bork has not hesitated to put his activist ideas into practice. In Rothery Storage & Van Co. v. Atlas Van Lines, Inc., (792 F.2d 210 (D.C. Cir. 1986)), a large interstate van line required its local carrier agents to conduct competitive interstate business through a separate company, rather than continuing to use the national company's equipment and training to conduct their own independent business at the same time that they represented the national firm. The trial judge and all judges on the Court of Appeals agreed that the arrangement among the moving companies was reasonable.

Judge Bork used the occasion, however, to promote his extreme views on the role of market power in antitrust enforcement. Single-handedly repudiating numerous Supreme Court cases to the contrary, Judge Bork held that market power was the only criteria to use in determining whether a horizontal restraint was reasonable. While concurring in the result, Chief Judge Wald wrote separately to express her concerns about the breadth of Judge Bork's opinion, taking issue with his conclusion concerning market power as the only appropriate measure of anticompetitive conduct. In Judge Wald's words:

> If, as the panel assumes, the only legitimate purpose of the antitrust laws is this concern with the potential for decrease in output and rise in prices, reliance on market power alone might be appropriate. But, I do not believe that the debate over the purposes of antitrust laws has been settled yet. Until the Supreme Court provides more definitive instruction in this regard, I think it premature to construct an antitrust test that ignores all other potential concerns of the antitrust laws except for restriction of output and price raising. (Emphasis added.)
>
> Until the Supreme Court indicates that the only goal of antitrust law is to promote efficiency, as the panel uses the term, I think it more prudent to proceed with a pragmatic, albeit nonarithmatic and even untidy rule of reason analysis, than to adopt a market power test as the exclusive filtering out device for all potential violaters who do not commmand a significant market share. (Id. at 231-32.) (Emphasis in original.)

6. If Adopted, Judge Bork's Views Would Dramatically Impact Antitrust Policy

An important question that arises from Judge Bork's antitrust views is their impact if adopted. With respect to merger policy, Judge Bork has written that challenges should be limited to "horizontal mergers creating very large market shares (those that leave fewer than three significant rivals in any market)." (Antitrust Paradox at 406.) This means that Judge Bork would support an economy in which mergers led to the survival of only three firms in every industry. Presumably, therefore, any proposed merger in the oil (for example, Exxon-Texaco), steel (U.S. Steel-Bethlehem), supermarkets (Safeway-Kroger), or beer (Miller-Anheuser Busch) industries (to give some examples) would be acceptable.

With respect to vertical restraints, Bork has said that any such restraint should be lawful. If adopted, such a view would mean that a score of Supreme Court cases regulating every kind of vertical restriction would not survive. For example, the present

Supreme Court view that resale price fixing is illegal would be overruled. One consequence is that discount retailers would be put out of business or survive only if manufacturers approved of their discounting practices.

7. Summary

The White House position paper has told us "there would be no need to worry about `balance' on the Court" if only judges "would confine themselves to interpreting the law as given to them by statute or Constitution...." The antitrust statutes have been given to the courts to interpret and apply. According to Judge Bork, however, Congress was woefully misinformed when it adopted most of those statutes, and thus he recommends that judges reject them out of hand. Although the nominee has been portrayed as a practitioner of "judicial restraint", he seems willing to rewrite the law whenever he determines that he has a clearer understanding of what a statute ought to accomplish than the legislators who were responsible for its enactment. One must wonder what other statutes Judge Bork believes to be unworthy of enforcement because their authors wanted to achieve goals that he regards as undesirable. The position paper's assertion, therefore, simply ignores Judge Bork's antitrust views, which call for unprecedented judicial activism.

F. Judge Bork Has Generally Taken An Approach That Favors Big Business Against The Government But Which Favors The Government Against The Individual

The discussion in the White House position paper of Judge Bork's views on economic policy, governmental regulation and labor fails to make clear that the nominee's approach to business and regulatory matters generally follows a consistent pattern: He defers to the government when an individual or public interest group has brought suit, and he defers to big business when it is suing the government.

1. Judge Bork's Opinions Show A Decidedly Pro-Business Pattern

Judge Bork has written several opinions that favor business plaintiffs against the government in a variety of regulatory contexts.

In McIlwain v. Hayes (690 F.2d 1041 (D.C. Cir. 1982)), for example, the question was whether the Food and Drug Administration could continue to allow the sale of color additives 22 years after Congress required manufacturers to show that an additive was "safe" before they can use it. Congress had provided for a 2 1/2 year "transitional period" provision under which additives already on the market could continue to be used "on an interim basis for a reasonable period." During that period, the manufacturers would complete the testing necessary to prove that the additives were safe. Relying on that provision, the FDA had extended the transitional period for 20 years to allow many widely-used additives to remain on the market. Judge Bork held that the agency had the discretion to allow such extensions.

In dissent, Judge Mikva sharply challenged Judge Bork's ruling:

> Some 22 years [after Congress' amendments], the majority is willing to let the FDA and industry go some more tortured miles to keep color additives that have not been proven safe on the market. The majority has ignored the fact that Congress has spoken on the subject and allows industry to capture in court a victory that it was denied in the legislative arena. **The [congressional amendments] have been made inoperative by judicial fiat.** (Id. at 1050.) (Emphasis added.)

In Jersey Central Power & Light v. Federal Energy Regulatory Commission, an electric utility claimed that FERC's denial of a rate increase of $400 million amounted to a "taking" of its property without just compensation. The rate increase was necessary, the utility claimed, because of construction costs for an unfinished nuclear plant.

Judge Bork's first opinion in this case denied the utility's claim. (730 F.2d 816 (D.C. Cir.1984).) On rehearing, however, he adopted the opposite position, holding that as long as the higher rates sought by the utility did not exceed those charged by neighboring utilities, it would be a violation of due process for the agency to reject them. (768 F.2d 1500, 1505 and n.7 (1985), vacated, 810 F.2d 1168, 1175-76, 1180-81 and n.3 (1987)(en banc).)

The dissent stated that Judge Bork's final position was "the quiet announcement of a major new federal entitlement" for regulated corporations "to earn net revenues if they can earn them at rates lower than those charged by one or more corporations in the same line of business located nearby." (768 F.2d at 1512.) According to the dissent, Judge Bork breached his own admonition against the creation of new constitutional rights:

> What is most startling is that the court's opinion produces this new substantive right virtually out of thin air; the majority just makes it up. It is apparently of no concern to the majority that the Supreme Court has never suggested such a limit on the Commission's authority; indeed, the majority sees no need to refer to any decision by any court, or even a concurring or dissenting opinion, granting to investors in regulated industries anything like the conditional right to dividends recognized by the court today. (Id.)

2. Judge Bork's Opinions On Labor Issues Have Markedly Favored Employers

The White House position paper claims that "Judge Bork has joined or authored numerous decisions that resulted in important victories for labor unions," "vividly" demonstrating his "open-mindedness and impartial approach to principled decisionmaking...." In the overwhelming majority of the nonunanimous labor cases he has heard, however, Judge Bork has ruled against the union.

Even putting aside his quantitative record, some of Judge Bork's labor opinions show very unfavorable attitudes toward unions. In *Restaurant Corp. of America v. NLRB* (801 F.2d 1390 (D.C. Cir. 1986)), for example, the National Labor Relations Board had held that the employer discriminated against union activists in the enforcement of a broad no-solicitation rule, pointing to evidence that the employer had previously allowed employees to solicit during work hours for non-union causes. Judge Bork refused to enforce the Board's order directing the reinstatement of the fired union activists.

Judge Bork held that while the employer had allowed solicitation for *non-union* causes, it had done so to bring about an "increase in employee morale and cohesion." He then stated that the employer could refuse to allow employees to solicit for union causes because that solicitation was qualitatively different as a matter of law. In short, the employer was allowed to assume that union solicitation was per se disruptive and inconsistent with employee morale.

3. Judge Bork Has Narrowly Interpreted Statutes Promoting Workplace Safety

In *Prill v. National Labor Relations Board* (755 F.2d 941 (D.C. Cir. 1985)), Judge Bork showed an insensitivity to workplace safety. A driver for a non-union company had refused to drive a company tractor-trailer because it had faulty brakes and other unsafe features that had previously caused it to jackknife in a highway accident. When the employee called the State Police to inspect the trailer rather than following company orders to take the trailer back out on the road, the company fired him because "we can't have you calling the cops all the time." The NLRB found that the worker was not protected under the relevant statute unless he had expressly joined with others in rejecting unsafe work.

The majority rejected the NLRB's position. They concluded that the Board had ignored or misread a number of its prior decisions that had allowed protection for workers, even though their protests about unsafe work had not been closely joined with those of other workers.

Judge Bork voted to affirm the NLRB's decision in an opinion that could have far-reaching consequences if adopted as the governing rule. Judge Bork found that because the statute included the word "concerted," it forbids the NLRB to extend protection to workers who act by themselves, even if they act on a matter of common concern about which it may be presumed the other employees would agree. Judge Bork did not explain how this right could be exercised by workers such as truck drivers who work alone, in contrast to those who work in a factory or other single location, where they normally face common workplace problems.

Another workplace safety case in which Judge Bork found the applicable statute to be too narrow to protect employees is Oil, Chemical and Atomic Wokers International Union v. American Cyanamid Co. (741 F.2d 1984)), discussed previously in Section (B)(3). In this case, the Secretary of Labor had concluded that the employer's policy of giving women the option of fertilization if they did not want to leave the workplace was not what Congress had intended in enacting the Occupational Safety and Health Act. Judge Bork rejected that finding and approved of the employer's policy.

IV.

CRUCIAL OMISSIONS AS TO JUDGE BORK'S PUBLICLY EXPRESSED VIEWS CONTRIBUTE TO GRAVE DISTORTIONS IN THE WHITE HOUSE POSITION PAPER

The White House position paper omits many key statements made and positions adopted by Judge Bork that constitute a substantial portion of his public record. In many important areas, the examples proffered by the position paper are highly selective. These omissions render the position paper largely incomplete in such areas as civil rights, First Amendment protections and executive power. Here, we undertake to present a more complete picture of Judge Bork's record on these topics.

A. Throughout His Career, Judge Bork Has Opposed Virtually Every Major Civil Rights Advance On Which He Has Taken A Position

Using selective examples, the White House materials seek to convey the impression that Judge Bork is a strong advocate of civil rights and that, as a Supreme Court Justice, he would extend protection for minority groups. The position paper states that "Judge Bork has consistently advanced positions that grant minorities and females the full protection of civil rights laws." (Chapter 11, p. 1) This claim is not supported by the record, which, when examined fully, shows that the nominee has been a strong critic, rather than a supporter, of civil rights advances.

1. 1963: Judge Bork Opposed The Public Accomodations Bill

In an article published in August 1963 -- the same time that Martin Luther King gave his historic "I have a dream" speech -- the nominee, then a 36 year-old Yale law professor, argued against the Public Accomodations bill on the ground that it would mean "a loss in a vital area of personal liberty." He went on to say that "[t]he principle of such legislation is that if I find your behavior ugly by my standards, moral or aesthetic, and if you prove stubborn about adopting my view of the situation, I am jusitified in having the state coerce you into more righteous paths. That is itself a principle of unsurpassed ugliness." ("Civil Rights -- A Challenge," New Republic, 1963, at 22.)

Having concluded in the context of other issues that the majority is free to impose its views on individuals through government coercion on even the most intimate personal choices, (*see* the discussion in section III (C) above), in 1973 Judge Bork recanted his original position on the majority imposition of public morality on the issue of the Public Accomodations bill.

2. 1968: Judge Bork Opposed The Decision Advancing Open Housing

In 1968, Judge Bork argued that the Court's decision in Reitman v. Mulkey (387 U.S. 369 (1967)), was wrongly decided. In Reitman, the Supreme Court invalidated a California referendum that added to the state constitution a prohibition against any legislation that abridged "the right of any person...to declare to sell, lease or rent [real] property to such person or persons as he, in his absolute discretion, chooses." The effect of the referendum was to invalidate the state's open-housing statutes. The Supreme Court held that the referendum "was intended to authorize, and did authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State." (Id. at 381.)

In Judge Bork's view:

> [T]he extent to which [the Supreme] Court, in applying the Fourteenth Amendment, has departed from both the allowable meaning of the words and the requirements of consistent principle is suggested by Reitman v. Mulkey. There the Court struck down a provision...[that] guaranteed owners of private property the right to sell or lease, or refuse to do either, for any reason they chose. It could be considerd an instance of official hostility only if the federal Constitution forbade states to leave private persons free in the field of race relations. That startling conclusion can be neither fairly drawn from the Fourteenth Amendment nor stated in a principle of being uniformly applied. ("The Supreme Court Needs A New Philosophy," Fortune, Dec. 1968, at 166.)

3. 1968, 1971 and 1973: Judge Bork Opposed The Decisions Establishing The Principle Of One-Person, One-Vote

In Baker v. Carr (369 U.S. 186 (1962)) and Reynolds v. Sims (377 U.S. 533 (1964)), the Supreme Court established the familiar one-person, one-vote rule, which requires that the districts from which state or local officials are elected contain an equal population. Judge Bork has repeatedly disagreed with this premise.

In 1968, Judge Bork said that "on no reputable theory of constitutional adjudication was there an excuse for the doctrine it imposed....Chief Justice Warren's opinions in this series of cases are remarkable for their inability to muster a supporting argument." ("The Supreme Court Needs A New Philosophy," Fortune, Dec. 1968, at 166.)

In 1971 and 1973, Judge Bork reiterated his opposition, and called for approving any rational reapportionment scheme that would not permit "the systematic frustration of the will of a majority of the electorate." ("Neutral Principles" at 18-19.). He also said, "I think 'one-man, one-vote' was too much of a straightjacket. I do not think there is a theoretical basis for it." (1973 Confirmation Hearings at 13.)

4. 1971: Judge Bork Opposed The Decision Striking Down Racially Restrictive Covenants

In 1971, the nominee, still a Professor at Yale, attacked the landmark case of Shelley v. Kraemer (334 U.S. 1 (1948)), in which the Court held that the Fourteenth Amendment forbids state court enforcement of a private, racially restrictive covenant. Said then-Professor Bork:

> I doubt...that it is possible to find neutral principles capable of supporting...Shelley....The decision was, of course, not neutral in that the Court was most clearly not prepared to apply the principle to cases it could not honestly distinguish....Shelley...converts an amendment whose text and history clearly show it to be aimed only at governmental discrimination into a sweeping prohibition of private discrimination. There is no warrant anywhere for that conversion. ("Neutral Principles" at 15-16.)

5. 1972 and 1981: Judge Bork Opposed Decisions Banning Literacy Tests

In 1972, Judge Bork wrote that the Supreme Court, in Katzenbach v. Morgan (348 U.S. 641 (1966)), was wrong in upholding provisions of the 1965 Voting Rights Act that banned the use of literacy tests under certain circumstances. ("Constitutionality of the President's Busing Proposals," American Enterprise Institute, 1972, at 1, 9-10.) In 1981, he described Katzenbach and Oregon v. Mitchell (400 U.S. 112 (1970)), upholding a national ban on literacy tests, as "very bad, indeed pernicious, constitutional law." (Hearings on the Human Life Bill Before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 97th Cong., 1st Sess. (1982).)

6. 1973 And 1985: Judge Bork Opposed The Decision Outlawing Poll Taxes

In 1973, Judge Bork argued that Harper v. Virginia Board of Elections (383 U.S. 663 (1966)), in which the Supreme Court outlawed the use of a state poll tax as a prerequisite to voting, "as an equal protection case, it seemed to me wrongly decided." He said that "[a]s I recall, it was a very small poll tax, it was not discriminatory and I doubt that it had much impact on the welfare of the Nation one way or the other." (Solicitor General Confirmation Hearings, 1973, at 17.)

In 1985, after having sat on the D.C. Circuit for three years, Judge Bork renewed his attack on Harper:

> [T]he Court frequently reached highly controversial results which it made no attempt to justify in terms of the historic constitution or in terms of any other preferred basis for constitutional decision making. I offer a single example. In Harper..., the Court struck down a poll tax used in state elections. It was clear that poll taxes had always been constitutional, if not exacted in racially discriminatory ways, and it had taken a constitutional amendment to prohibit state imposition of poll taxes in federal elections. That amendment was carefully limited so as not to cover state elections. Nevertheless, the Supreme Court held that Virginia's law violated the equal protection clause.... ("Foreword" in G. McDowell, The Constitution and Contemporary Constitutional Theory, 1985, at vii.)

7. 1978: Judge Bork Opposed The Decision Upholding Affirmative Action

In 1978, then-Professor Bork argued against the landmark opinion in Regents of University of California v. Bakke (438 U.S. 265 (1978)), in which the Supreme Court said that a state medical school could give affirmative weight in admisssions decisions to the minority status of a candidate. He wrote that Justice Powell's opinion was "[j]ustified neither by the theory that the amendment is pro-black nor that it is colorblind," and concluded that "it must be seen as an uneasy compromise resting upon no constitutional footing of its own." ("The Unpersuasive Bakke Decision," Wall Street Journal, July 21, 1978.)

It also seems clear that Judge Bork would give little or no weight to past patterns of racial discrimination and exclusion as a basis for affirmative action. He also rejected Justice Brennan's argument that affirmative action was justified because "but for pervasive racial discrimination, [Bakke] would have failed to qualify for admission even in the absence of Davis's special admission progam." Judge Bork responded:

> Even granting the speculative premise, we cannot know which individuals under a hypothetical national history would have beaten out Bakke. Justice Brennan appears to mean, therefore, that the particular individuals admitted in preference to Bakke on grounds of race are proxies for unknown others. Bakke is sacrificed to person A because [the school] guesses that person B, who is unknown but of the same minority race as A, would have tested better than Bakke if B had not suffered pervasive societal discrimination. A is advanced to compensate for B's assumed deprivation, and Bakke pays the price. The argument offends both ideas of common justice and the 14th Amendment's guarantee of equal

protection to persons, not classes. ("The Unpersuasive Bakke Decision.")

8. 1987: According To A Panel Majority, Judge Bork's Views On Sovereign Immunity Could Defeat A Challenge To A Legislative Scheme Drawn Along Racial Lines

As discussed in Section III(E), Judge Bork's dissent in Bartlett v. Owen (816 F.2d 695 (1987)), in which he favored the preclusion of judicial review of certain constitutional claims, provoked a sharp response from the majority. They explained, in part, that under Judge Bork's view, the doctrine of sovereign immunity could defeat a constitutional challenge to a legislative scheme drawn along racial lines. As the majority described Judge Bork's view:

> Congress would have the power to enact, for example, a welfare law authorizing benefits to be available to white claimants only and to immunize that enactment from judicial scrutiny by including a provision precluding judicial review of benefits claims....Any theory that would allow such a statute to stand untouched by the judicial branch flagrantly ignores the concept of separation of powers and the guarantee of due process. **We see no evidence that any court, including the Supreme Court, would subscribe to the dissent's theory in such a case.** (Id. at 711.) (Emphasis added.)

9. Despite the White House's Emphasis on Judge Bork's Occasional Advocacy Of Pro-Civil Rights Positions As Solicitor General, A Comparison Of The Nominee With Other Solicitors General Demonstrates That Judge Bork Was Not A Consistent And Energetic Defender Of Civil Rights As Solicitor General

While the White House position paper identifies a few cases in which the nominee argued pro-civil rights positions as Solicitor General, a review of his over-all record hardly shows him to be a consistent or energetic defender of civil rights or civil liberties.

One scholar has studied three Solicitor Generals: Robert Bork, Erwin Griswold and Wade H. McCree (the first two appointed by Nixon, the third appointed by Carter). The study examined all of the amicus curiae briefs filed by the Solicitor General's office under these men, and evaluated the briefs in terms of their support of the constitutional rights of civil rights plaintiffs or criminal defendants. (O'Connor, "The Amicus Curiae Role of the U.S. Solicitor General in Supreme Court Litigation," Judicature, 1983 at 257.)

The study found that, as Solicitor General, the nominee argued in favor of the "pro-rights" position in 40.5% of his amicus briefs. In contrast, Griswold argued the "pro-rights" position in 62% of the cases, and McCree took the "pro-rights" position in 79% of all cases. While the statistics may reflect the fact that Bork was involved in more criminal cases, in which he never once sided with the rights arguments of a criminal defendant, the study shows that Judge Bork took the "pro-rights" positions substantially less often than his predecessor or successor.

10. Summary

While the White House position paper identifies several cases where Judge Bork joined in holdings that favored individual civil rights plaintiffs, these cases do little to rebut Judge Bork's extensive record of opposing civil rights advances. In most of the cases selected by the White House, Judge Bork merely joined in the opinions of others in unanimous decisions. In light of his lifelong record, the nominee can hardly be seen as a strong supporter of civil rights.

B. Judge Bork Has Indicated That Women Should Not Be Included Within The Scope Of The Equal Protection Clause And Has Opposed The Equal Rights Amendment

The White House position paper asserts that "Judge Bork has consistently advanced positions that grant minorities and females the full protection of civil rights laws." (Chapter 11, p. 1) In fact, Judge Bork has made a number of statements that raise substantial concern about his commitment to gender equality.

1. Judge Bork Does Not Include Women Within The Coverage Of The The Equal Protection Clause

In an interview two months ago, Judge Bork was asked about the scope of the Equal Protection Clause of the Fourteenth Amendment. Said Bork:

> Well, at this point, I suffer from a certain handicap. That is as a judge, I cannot speak freely about matters that are matters of current controversy. I do think **the Equal Protection Clause probably should have been kept to things like race and ethnicity.** (Worldnet, United States Information Agency, June 10, 1987, at 12.) (Emphasis added.)

Notably absent is the inclusion of women within Judge Bork's view of the Equal Protection Clause.

On another occasion, Judge Bork remarked:

> Various kinds of claims are working their way through the judicial system, and the Supreme Court may ultimately have to face them...[including] the rights of women....The Court

> should **refer many of these issues to the political process,** even though that will anger groups who have been thought to hope for easier, more authoritarian solutions. ("We Suddenly Feel That Law Is Vulnerable," *Fortune*, Dec. 1971, at 143.) (Emphasis added.)

And Judge Bork has criticised the courts for "legislating" with "made-up constitutional rights:"

> This is a process that is going on. It happens with the extension of the Equal Protection Clause **to groups that were never previously protected.** When they begin to protect groups that were **historically not intended to be protected by that clause,** what they are doing is picking out groups that should not have any disabilities laid upon them. ("Foundations of Federalism: Federalism and Gentrification," *Yale Federalist Society*, April 24, 1982, at 9 of questions and answers.) (Emphasis added.)

Judge Bork has expressed dismay that courts would even consider extending the Equal Protection Clause to women:

> It speaks volumes about the deterioration of the Equal Protection concept that it is even possible today to take seriously a challenge to the constitutionality of the male-only draft. (Untitled Speech, *Seventh Circuit*, 1981, at 8.)

One need not oppose the male-only draft or believe that it would be prohibited by the Equal Protection Clause in order to find that there is a "serious" argument for extending the Equal Protection Clause to women.

2. Judge Bork Has Opposed The Equal Rights Amendment

In 1986, when asked about his 1976 opposition to the Equal Rights Amendment, Judge Bork explained that he had opposed the ERA because it would constitutionalize issues of gender equality (though, he said, he no longer felt free to comment on the issue):

> Now the role that...men and women should play in society is a highly complex business, and it changes as our culture changes. What I was saying was that it was a shift in constitutional methods of government to have judges deciding all of those enormously sensitive, highly political, highly cultural issues. If they are to be decided by government, the usual course would be to have them decided by a democratic process in which those questions are argued out. (*Judicial Notice Interview*, June 1986.)

3. Summary

Judge Bork has indicated that the Equal Protection Clause should not include women and he has opposed the Equal Rights Amendment. As was the case with respect to racial discrimination, the cases cited by the White House -- in most of which Judge Bork simply joined the opinions of others -- do little to balance this lifelong record.

C. The White House's Repeated Invocation of Judge Bork's Ollman Opinion Cannot Change the Nominee's Overall Record Of Taking Extremely Restrictive Views On First Amendment Issues

The White House position paper devotes nearly 15 pages to Judge Bork's position on the First Amendment or his decision in Ollman v. Evans. The position paper asserts that "Judge Bork's First Amendment cases suggest a strong hostility to any form of government censorship," and that "his record indicates he would be a powerful ally of First Amendment values on the Supreme Court." Throughout the position paper, Judge Bork's concurring opinion in Ollman is held out as proof that the nominee is a strong supporter of broad First Amendment protections.

Ollman and some of the other First Amendment cases cited in the White House position paper are only one small portion of Judge Bork's over-all First Amendment jurisprudence. There is a much larger picture, which, upon close examination, demonstrates that the nominee is hardly the First Amendment ally that he has been portrayed as thus far by the White House. Indeed, Judge Bork's First Amendment views are more accurately represented by his concern with what he describes "as a radical expansion of the First Amendment...in the last twenty-five years." ("Federalism and Gentrification," Yale Federalist Society, April 24, 1982, at 7.)

Judge Bork's views on the First Amendment can be examined by reviewing four areas: freedom of the press, freedom of speech and expression and the related right of assembly, advocacy and the separation of church and state.

1. Judge Bork Has Attacked Supreme Court Cases That Have Protected Important Rights Of The Press

In the First Amendment area, one core issue is when, if ever, the government may restrain the press before publication. A second core issue relates to when the government may punish the press after publication. The answer to these questions, both of which relate to the power of the government vis-a-vis the press, are at the heart of First Amendment jurisprudence.

The nominee's views on these two critical issues are at odds with well-established Supreme Court case law. Accordingly, there is reason for substantial concern that Judge Bork would vote to reverse decided cases at the core of First Amendment protection.

a. Judge Bork Has Cast Doubt On Leading Supreme Court Decisions Limiting Governmental Prior Restraints on Speech

The best recalled prior restraint case in recent history is the 1971 Pentagon Papers case (403 U.S. 713 (1971)), in which the Supreme Court lifted an injunction against the New York Times, the Washington Post and other newspapers that had lasted over two weeks. In the Court's view, "news delayed was news destroyed."

According to Judge Bork, the Supreme Court's ruling was "stampeded through to decision without either Court or counsel having time to learn what was at stake." ("The Individual, the State, and the First Amendment," University of Michigan, 1979, at 10.) "The New York Times," said Judge Bork, "which had delayed for three months was able to convince the Court that its claims were so urgent, once it was ready to go, that the judicial process could not be given time to operate, even on an expedited basis." (Id.) In fact, the government was given the opportunity to introduce evidence before the District Court. Nor did the government argue before the District Court that it required more time to prepare its case. Judge Bork's view that the Court acted too precipitously in deciding the Pentagon Papers case is at odds not only with the majority of the Court in the case but with well-established First Amendment jurisprudence, which assumes the impermissibility of any prior restraint lasting any longer than absolutely necessary.

b. Judge Bork Has Sharply Criticized Key Supreme Court Decisions Limiting The Power Of Government To Punish Publication

The nominee has been sharply critical of a number of major First Amendment rulings of the Supreme Court protecting journalists and others against sanctions for their speech. One such case is Cox Broadcasting v. Cohn (420 U.S. 469 (1975)), in which an Atlanta broadcaster referred to the name of a victim of a crime while stating that a rape/murder case was commencing. At issue was a Georgia statute that barred the disclosure of the name of a rape victim. The Supreme Court unanimously held the statute unconstitutional insofar as it punished the disclosure of information contained in public court records. Judge Bork has rejected this unanimous ruling, arguing that "one may doubt that press freedom" required it. (Michigan Speech at 10.)

Similarly, in Landmark Communication v. Virginia (435 U.S. 829 (1978)), the Court found unconstitutional -- again unanimously

-- a statute that made it illegal to punish lawfully obtained information about a secret inquiry into alleged judicial misconduct. Bork again concluded that "one may doubt" that the First Amendment required the ruling, and asserted that the case, like Cohn, was an example of "extreme deference to the press that **is by no means essential or even important to its role.**" (Michigan Speech at 10.) (Emphasis added.)

c. Consistent With His Narrow View Of Protection Of The Press, Judge Bork Has Taken A Restrictive View Of The Right Of The Press To Obtain Information From The Government

Judge Bork's views on the right of the press to gather information can properly be gleaned from his decisions on requests under the Freedom of Information Act ("FOIA"). These cases often find the news media on one side of the issue, and the government on the other, with the latter seeking to control access.

In its "Summary of Judge Bork's Opinions on Media Issues," the Reporters Committee for Freedom of the Press found 17 cases in which Judge Bork joined the majority in dismissing or sharply curtailing requests under the FOIA or Sunshine Acts. No case is listed in which Judge Bork voted in favor of the release of more information than the least amount to be released by any other judge on his court.

d. Judge Bork's Restrictive View of Press Rights Contrasts Sharply With The Balanced Approach Of Justice Powell

In a 1979 article, Judge Bork adopted a restrictive view of several important press privileges. He argued that such issues as confidential sources and the disclosure of information about the editorial decision-making of the press "do not strike at the heart of either the sanctity of the law or the freedom of the press." ("The First Amendment Does Not Give Greater Freedom to the Press Than to Speech," Center Magazine, 1979, at 30.) He said that the Supreme Court decisions on these issues "could go either way without endangering either of those profound values." (Id.)

Judge Bork's narrow and restrictive view on these issues conflicts with the approach taken by Justice Powell. While Powell frequently provided the swing vote in cases that permitted the government to win majorities in reporter's privilege cases, he has limited the scope of the government's victory by his separate opinions in those cases.

One such case is Branzburg v. Hayes, (408 U.S. 665 (1972)). There, the majority in a 5-4 decision held that requiring newsmen to appear and testify before state or federal grand juries did not abridge the freedom of speech and press guaranteed by the First

Amendment. (*Id*. at 668.) Justice Powell joined in the majority opinion. He stressed, in what Justice Stewart, dissenting, termed an "enigmatic concurring opinion [which] gives some hope of a more flexible view in the future," (*id*. at 711), that the Court's holding was predicated on a finding of no abuse:"

> [N]o harassment of newsmen will be tolerated. If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without a remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions. (*Id*. at 711.)

This quotation illustrates Justice Powell's devotion to a case-by-case balancing approach. It contrasts sharply with Judge Bork's more narrow and absolute approach.

2. Despite Partial Recantations, Judge Bork Still Takes The Restrictive View That First Amendment Protection Only Extends To Speech That Relates To The Political Process

Any examination of Judge Bork's First Amendment views must begin with his "Neutral Principles" article. Written in 1971 when the nominee was a full Professor at Yale Law School, the article argues that constitutional protection should be accorded "only to speech that is explicitly political." Judges should never intervene, the nominee said, to "protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic." ("Neutral Principles" at 20.)

After serving as Solicitor General and returning to Yale as Professor of Law, the nominee reaffirmed his views in 1979:

> [T]here is no occasion...to throw constitutional protection around forms of expression that do not directly feed the democratic process. It is sometimes said that **works of art, or indeed any form of expression**, are capable of influencing political attitudes. But in these indirect and relatively remote relationships to the political process, verbal or

> visual expression does not differ at all from other human activities, such as sports or business, which are also capable of affecting political attitudes, but are not on that account immune from regulation. (Michigan Speech at 9-10.)(Emphasis added.)

It is difficult to appreciate the full impact of this theory without some specific examples. Under Judge Bork's formulation, a town council could ban James Joyce's Ulysses without any fear of being held to have violated a citizen's First Amendment rights. Another town council could ban all science books discussing Albert Einstein's theory of relativity. And another legislature could ban all books by Sigmund Freud.

In the January 1984 American Bar Association Journal, Judge Bork modified his First Amendment views. In a two-column letter responding to an article written by a professor in the Nation magazine, Judge Bork stated:

> I do not think that First Amendment protection should apply only to speech that is explicitly political....I have long since concluded that many other forms of discourse, such as **moral and scientific debate**, are **central to democratic government** and deserve protection....I continue to think that obscenity and pornography do not fit **this rationale** for protection. (Emphasis added.)

The precise language used in this letter is significant. Judge Bork could have elected to disavow completely the views expressed in his "Neutral Principles" article and Michigan speech. Instead, he chose to say only that First Amendment protection should extend to "moral" and "scientific" debate, as that debate is central to democratic government. Judge Bork did not say that protection should extend to artistic or literary expression, and he specifically repeated his opposition to extending such protection to anything that might be obscene or pornographic.

The White House position paper is significant in how it describes Judge Bork's 1984 ABA letter. "It is not true," says the paper, "that Judge Bork would extend the protection of the First Amendment only to political speech." Asserting that "Bork has sinced changed his views," the paper then quotes the section of the letter noted above. It also cites some of Judge Bork's opinions, which are addressed below.

What the position paper does not say is as important as what it does. It did not say that Bork meant to include within the protection of the First Amendment artistic or literary expression. And it cited no other writings or speeches to suggest that he might have broadened the terms of his letter.

In an interview two months ago, Judge Bork commented again on speech and expression:

> There is a lot of moral and scientific speech which feeds directly into the political process. There is simply no point in making people tack on "and therefore let's pass a law" in order to make a protected speech....I cannot tell you how much more than that there is a specturm of, I think political speech -- **speech about public affairs and public officials** -- is the core of the amendment, but protection is going to spread out from there, as I say, in the moral speech and the scientific speech, into fiction and so forth.....There comes a point at which the speech no longer has any relation to those processes. When it reaches that level, **speech is really no different from any other human activity which produces self-gratification**.... (Worldnet at 25.) (Emphasis added.)

Later in the interview, Judge Bork added:

> Clearly as you get into art and literature, particularly as you get into forms of art -- and if you want to call it literature and art -- which are pornography **and things approaching it** -- you are dealing with something now that is in any way and form the way we govern ourselves, and in fact may be quite deleterious. I would doubt that courts ought to throw protection around that. (Id. at 26-27.) (Emphasis added.)

Based on the terms of these statements, a broad area of expression traditionally viewed as included within the scope of the First Amendment would be unprotected. A Rubens painting still could not be hung in a museum if the city council chose to prohibit it. The same would be true of a ban on performances by the Alvin Ailey Dance Troupe. In addition, Judge Bork appears to believe that there is no First Amendment protection for an undefined category of non-obscene speech, which some might see as provocative or "approaching" obscenity.

Judge Bork has not had occasion to rule on any cases that involved exclusively artistic or literary expression. In his opinions, however, he has been careful to note that the expression being protected is "political."

In Ollman v. Evans, for example, Judge Bork said that the plaintiff had "placed himself in the political arena and became the subject of heated political debate." (750 F.2d at 1002.) In addition, the adversary of the press in Ollman was not the government, but a private party. It was not a case involving the government's attempt to restrain the press from publishing information or to prevent access to information. Rather, it was a Marxist professor challenging two conservative columnists. As discussed above, Judge Bork is far less protective of the press when its adversary is the government.

In other cases in which the expression could have been classified as artistic or scientific and given protection as such, Judge Bork has emphasized its political aspects in bringing it within the coverage of the First Amendment. (Lebron v. WMATA, 749 F.2d 893, 896 (D.C. Cir. 1984)); McBride v. Merrell Dow & Pharmaceuticals, 717 F.2d 1460, 1466 (D.C. Cir. 1983).) Indeed, as the White House position paper states with respect to Lebron, "the poster [which was the subject of the case] clearly represented political speech."

3. Judge Bork Has Taken A Narrow View Of The Right Of Assembly

Judge Bork has taken a very narrow view in his opinions of the rights of political demonstrators. In White House Vigil for ERA v. Watt (717 F.2d 568 (D.C. Cir. (1983)), for example, the majority, while deciding that protestors could not demonstrate as they wanted in front of the White House, expressly allowed the protestors to keep parcels of leaflets with them in order to be able to hand them out without having to leave for a storage area after each handful was disseminated. Judge Bork argued in dissent that the individuals should have been forbidden from keeping the parcels of leaflets with them. (Id. at 573.)

In Finzer v. Barry (798 F.2d 1450 (D.C. Cir. 1986), cert. granted, 107 S. Ct. 1282 (1987)), Judge Bork upheld the constitutionality of a statute barring demonstrations within 500 feet of any foreign embassy if -- but only if -- the speech is critical of the foreign government. He thus showed more deference to the sensibilities of foreign states than to the rights of American citizens peacefully to demonstrate.

The description in the White House position paper of Judge Bork's opinion in Finzer is telling as to the length the White House is willing to go to excuse Judge Bork's views. The position paper states:

> Judge Bork's opinion...shows that, while hostile to government regulation of speech as such, he is not completely unwilling, in extremely limited circumstances, to find certain government interests sufficiently weighty to justify some narrowly drawn suppression of speech, especially in matters involving foreign relations.

In fact, Finzer demonstrates that Judge Bork is far too willing, after the mere incantation of the words "foreign relations," to permit the rights of Americans to express themselves to be overcome.

4. In Canvassing Judge Bork's First Amendment Views, The White House Position Paper Omits Any Reference To The Strong Indications That The Nominee Objects To Bedrock Principles Supporting The Separation of Church And State

Judge Bork has expressed grave doubts on several landmark Supreme Court decisions interepreting the religion clauses of the First Amendment. He has endorsed the view that the framers intended the Establishment Clause to do no more than ensure that one religious sect should not be favored over another, and was not intended to mean that the government should be entirely neutral toward religion -- a view rejected by eight Justices in Wallace v. Jaffree.

Norman Redlich, Dean of the New York University School of Law, recalls that in a 1984 speech at the law school, Judge Bork criticized the Court's decision in Engel v. Vitale (370 U.S. 421 (1962)) as a "non-interpretivist opinion." In Engel, the Court held that the establishment clause forbids state officials to compose an official school prayer and require its daily recital, even if the prayer is denominationally neutral and students could opt to be silent or absent from the classroom during such recital.

In a letter to Judge Bork dated May 3, 1982, Dean Redlich took issue with Judge Bork's assertion that the Court had strayed from "interpreting" the Constitution in Engel and that the decision was therefore, in Bork's terms, "non-interpretivist." In Dean Redlich's view, the decision was a plausible interpretation of the establishment clause. Judge Bork has denied taking a position on the constitutionality of school prayer (Washington Post, July 28, 1987), but that denial does not amount to a repudiation of what Dean Redlich reports Judge Bork to have said.

In speeches delivered in 1984 and 1985, Judge Bork rejected the Supreme Court's three-part test set forth in Lemon v. Kurtzman (403 U.S. 602 (1971)), for evaluating challenges that a given law establishes a state religion. Under Lemon, the statute must, first, have a secular legislative purpose. Second, its principal or primary effect must be one that neither advances nor inhibits religion. Third, the statute must not foster an excessive government entanglement with religion.

Judge Bork has attacked each part of the test. The first, he says, "cannot be squared with governmental actions that we know to be constitutional" and "appears to be inconsistent with the historical practice that suggests the intended meaning of the Establishment Clause." ("Religion and the Law," University of Chicago, Nov. 13, 1984, at 5.) With respect to the second part of the test, Judge Bork notes: "The Court can hardly quantify the effects of laws that are not on their face directed to religion.

In any event, the historical evidence cuts against this test, too." (Id. at 6.) Judge Bork finds that the third part is "impossible to satisfy. Government is inevitably entangled with religion. The test is self-stultifying because the test itself requires a determination of what qualifies as religion in order to know whether government is entangled with it." (Id.)

Judge Bork also has argued against the Supreme Court's decision in Aguilar v. Felton (473 U.S. 402 (1985)), which, together with a companion case, invalidated New York City's use of federal funds to pay public school employees teaching in parochial schools. Justice Powell was the swing vote in Aguilar. According to Judge Bork, Aguilar "illustrates the power of the three-part test to outlaw a program that had not resulted in any advancement of religion but seems entirely worthy." (Untitled Speech, Brookings Institution, Sept. 12, 1985, at 3.) In addition, Judge Bork stated:

> A **relaxation** of current rigidly secularist doctrine would in the first place permit some sensible things to be done. Not much would be endangered if a case like Aguilar went the other way and public school teachers permitted to teach remedial reading to that portion of educationally deprived children who attend religious schools. I suspect that the greatest perceived change would be in the **reintroduction of some religion into public schools** and some greater religious symbolism in our public life. (Id. at 11.)(Emphasis added.)

D. Judge Bork Has Consistently Deferred To The Executive Branch And Has Supported Executive Powers Essentially Unlimited By Law

The White House position paper makes no mention of Judge Bork's consistent deference to the executive branch and support for the exercise of broad executive powers.

1. Judge Bork Has Opposed Legislation Creating A Special Prosecutor

When he was Acting Attorney General, the nominee expressed his opposition to legislation that would create a Special Prosecutor. He testified that "such a course would almost certainly not be valid and would, in any event, pose more problems than it would solve." ("Special Prosecutor and Watergate Grand Jury Legislation," Hearings Before the House Subcommittee on Criminal Justice of the Committee on the Judiciary, 93d Cong., 1st Sess., 1973, at 252.) Judge Bork's view is that a Special Prosecutor independent of the President is an unconstitutional interference with the separation of powers.

2. Judge Bork Has Shown Broad Deference To The Executive In National Security Matters

Judge Bork has been a proponent of broad deference to the Executive in national security matters, particularly with respect to press access to information. He has advocated, for example, amending the espionage laws to forbid newspapers from disclosing national security information deemed of "no public interest." ("Symposium on Foreign Intelligence: Legal and Democratic Controls," American Enterprise Institute, Dec. 11, 1979, at 15.) This is a notion that even former Central Intelligence Director William Colby saw as inconsistent with the First Amendment. (Id. at 21.)

3. Judge Bork's Opinions Have Declined To Exercise Any Meaningful Scrutiny Of Claims Against The Executive

In Abourzek v. Reagan (785 F.2d 1043 (D.C. Cir. 1986)), Judge Bork's dissent sounded a familiar theme: deference to the Exective's handling of foreign affairs and its interpretion of statutes. The majority held that the district court needed to restudy the Secretary of State's denial of non-immigrant visas to aliens who sought to visit the United States to give speeches in response to requests by U.S. citizens. The majority wanted additional proof that the Secretary had interpreted the statute consistently.

In Judge Bork's view, the power to exclude aliens is "largely immune from judicial review." (Id. at 1073.) The Executive, he said, may base its decision to exclude aliens upon the content of their beliefs. Finally, Judge Bork charged that the majority had begun "a process of judicial incursion into the United States' conduct of its foreign affairs." (Id. at 1076.)

Judge Bork has also deferred to local executives. In Williams v. Barry (708 F.2d 789 (D.C. Cir. 1983)), the court determined the extent to which the Constitution requires that due process be accorded the homeless before the District of Columbia could close their shelters. The lower court had held that the proposed closing implicated a protectable property interest, a ruling that was not appealed. It also had held that notice and an opportunity to be heard were necessary, but the majority on the Court of Appeals held that the question was not ready for judicial review until the District made a final decision.

In his concurrence, Judge Bork addressed the question of whether the homeless had any constitutional protection from arbitrary governmental action in the form of due process rights. Judge Bork said that it is "revolutionary" to subject what he described as "political decisions" to procedural due process requirements and to judicial review:

> The Mayor is an elected official and his decision on the shelters is a political one. From the beginning of judicial

review it has been understood that such decisions need not be surrounded and hemmed in with judicially imposed processes. Indeed, the reasons for judges not interferring with the methods by which political decisions are arrived at are closely akin, if not identical, to the considerations underlying the political question doctrine....(Id. at 793.)

V.

THE WHITE HOUSE HAS GIVEN AN INACCURATE AND INCOMPLETE DESCRIPTION OF THE COURT'S DECISION THAT JUDGE BORK'S FIRING OF ARCHIBALD COX WAS ILLEGAL

In its section on "Robert Bork's Role in the 'Saturday Night Massacre,'" the White House position paper briefly describes Judge Gesell's opinion in Nader v. Bork (366 F. Supp. 104 (D.D.C. 1973)), the action challenging Bork's discharge of Watergate Special Prosecutor Archibald Cox. At best, the position paper's description is inaccurate and incomplete. More importantly, its omissions involve an issue that is fundamental to understanding the seriousness of Judge Bork's actions in October 1973.

A. Background

The plaintiffs in Nader v. Bork were Ralph Nader and three congressmen, who sought a ruling on the legality of the discharge of Archibald Cox as the Watergate Special Prosecutor. The sole defendant was Robert Bork, who at the time was the Acting Attorney General. As set forth in the position paper, Judge Bork was the Justice Department official who fired Mr. Cox.

As authorized by statute, a formal Department of Justice regulation set forth the duties and responsibilities of the Watergate Special Prosecutor: to investigate and prosecute offenses arising out of the Watergate break-in, the 1972 Presidential election, and allegations involving the President, members of the White House staff or presidential appointees. The Special Prosecutor was to remain in office until a date mutually agreed upon between the Attorney General and himself, and the regulation stated that "[t]he Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part." (Id., at 107 and nn. 4-5.)

On the same day that this regulation was promulgated, Mr. Cox was designated as Watergate Special Prosecutor. Less than four months later -- on October 20, 1973 -- he was fired by Judge Bork under circumstances that Bork admitted did.not constitute an extraordinary impropriety. (Id.) Thereafter, on October 23, Judge Bork rescinded the underlying Watergate Special Prosecutor regulation, retroactively, effective as of October 21. (Id.)

B. The Position Paper's Description Is Inaccurate and Incomplete On Several Important Issues

The position paper describes Judge Gesell's opinion as follows:

> The rescission of the regulations granting Cox independent prosecution authority was challenged by Ralph Nader in the

D.C. District Court. Judge Gesell entered an order declaring the rescission to be illegal, because the grant of independence implied a requirement that Cox consent to any rescission. (Chapter 8, at 3.)

For several reasons, this description is inaccurate and incomplete, and thus ultimately misleading. The White House position paper clearly implies that the only issue in Nader was a rather technical question of the validity of "the rescission of the regulations granting Cox independent prosecution authority." This creates the impression, in turn, that the legality of Judge Bork's firing of Special Prosecutor Cox was unchallenged, and that the issue was merely whether Judge Bork had taken the correct procedural steps in the proper order.

In fact, the plaintiffs in Nader challenged both "whether Mr. Cox was lawfully discharged by [Judge Bork] while the regulation was still in existence, and, if not, whether the subsequent cancellation of the regulation lawfully accomplished his discharge." (Nader v. Bork, 386 F. Supp. at 107.) The rescission question was thus but one of two questions addressed by Judge Gesell. The threshold question -- ignored by the White House position paper -- was whether the firing itself was lawful.

Moreover, Judge Gesell did not enter an order "declaring the rescission to be illegal." Rather, the Order specified: "The Court declares that Archibald Cox, appointed Watergate Special Prosecutor pursuant to 28 C.F.R. 0.37 (1973), was illegally discharged from that office." (Id. at 110.) Thus, the Order did not even deal with the rescission of the regulation; instead, it declared that Cox's firing by Bork was illegal.

As a result, the White House position paper's misstatement of the Order distorts the real thrust of the court's ruling. Consistent with his Order, Judge Gesell's first concern was whether Mr. Cox's firing was lawful, and he held that "[t]he firing of Archibald Cox in the absence of a finding of extraordinary impropriety was in clear violation of an existing Justice Department regulation having the force of law and was therefore illegal." (Id. at 108.)

Finally, the White House paper distorts even Judge Gesell's holding on the rescission of the underlying regulation. The paper asserted that "the grant of independence implied a requirement that Cox consent to any recission," suggesting perhaps that Judge Gesell's holding simply addressed some sort of formal, technical-sounding consent requirement. Judge Gesell did not find any consent requirement, but rather that Judge Bork's rescission of the regulation was "arbitrary and unreasonable." (Id. at 109)

Moreover, he found

> that this turnabout [abolishing the Office of Watergate Special Prosecutor and then reinstating it three weeks later to appoint Leon Jaworski] was simply a ruse to permit the discharge of Mr. Cox without otherwise affecting the Office of the Special Prosecutor--a result which could not legally have been accomplished while the regulation was in effect. (Id.)(Emphasis added.)

Thus, Judge Gesell ruled (1) that Judge Bork's discharge of Mr. Cox was illegal, and (2) that Judge Bork's rescission of the underlying regulation was arbitrary and unreasonable. These rulings were separate and independent. The firing itself was therefore unlawful because the regulation was still in place when Cox was actually fired on October 20. Moreover, the firing would not have been legal even if the regulation had been rescinded before the events leading up to the Saturday Night Massacre (i.e., the controversy surrounding Mr. Cox's subpoena of the White House tapes), because the rescission would still have been arbitrary and unreasonable in light of those events.

Judge Gesell's opinion and Order in Nader v. Bork is widely recognized as one of the most significant events of the Watergate era. For that reason, presumably, the drafters of the White House position paper felt compelled to address them. It is regrettable that the White House did so in such a distorted manner.

VI.

STARE DECISIS: RESPECT FOR AND ADHERENCE TO PRECEDENT

Apparently recognizing the longstanding and extensive attack that has been mounted by Judge Bork on a wide range of Supreme Court doctrines, the White House has attempted to portray the nominee as a man who would be humbled by elevation to the nation's highest court. However excessive his views may have been in the past, the White House seems to say, Judge Bork would, upon ascension to the Supreme Court, be reigned in by respect for the institution and its position as a co-equal branch of government. Simply put, this picture is not borne out by Judge Bork's extensive record.

A basic question that the Senate will face as it considers the nomination is this: What are Judge Bork's views on "stare decisis," the crucial doctrine that counsels respect for and adherence to precedent? According to the White House, while some fear that Bork will "seek to 'roll back' many existing precedents...,[t]here is no basis for this view in Judge Bork's record." The position paper also attempts to explain Judge Bork's criticism of "the reasoning of Supreme Court opinions" as something "that law professors do." And, the position paper claims that, "as a judge, [Bork] has faithfully applied the legal precedents of both the Supreme Court and his own Circuit Court." Finally, the position paper contends rather generally that Judge Bork "believes in abiding by precedent." A complete review of the nominee's record demonstrates conclusively the error of each assertion.

A. Judge Bork Has Conceded, In Clear And Unambiguous Terms, That His Views As A Judge "Have Remained About What They Were" When He Was An Academic

The suggestions in the White House position paper that Judge Bork's sweeping attacks on landmark decisions of the Supreme Court have simply been the typical musings of an academic seeking to provoke debate are flatly contradicted by Judge Bork's own statements to the contrary. His statements belie any assertion that his writings and speeches criticizing Supreme Court cases are merely abstract academic exercises, divorced from his leanings as a potential Justice.

Less than a year ago -- and more than four years after he began sitting as a member of the D.C. Circuit -- Judge Bork commented on his roles as an academic and as a jurist. In clear and unambiguous terms, the nominee stated:

> **Teaching is very much like being a judge and you approach the Constitution in the same way.** (Interview with WQED, Pittsburgh, Nov. 19, 1986.) (Emphasis added.)

In a similar vein, Judge Bork said in a 1985 interview:

> **[M]y views have remained about what they were** [since becoming a judge]. After all, courts are not that mysterious, and if you deal with them enough and teach their opinions enough, you're likely to know a great deal. **So when you become a judge, I don't think your viewpoint is likely to change greatly.** (*District Lawyer Interview*, 1985, at 31.) (Emphasis added.)

Any remaining doubts about whether the suggestions in the White House position paper are disingenuous should be put to rest by Judge Bork's additional comment in the same 1985 interview:

> Obviously, when you're considering a man or woman for a judicial appointment, you would like to know what that man or woman thinks, **you look for a track record**, and that means that **you read any articles they've written**, any opinions they've written. **That part of the selection process is inevitable, and there's no reason to be upset about it.** (*Id.* at 33.) (Emphasis added.)

And, finally, to the extent that one may question whether Judge Bork's 1971 *Indiana Law Journal* article is relevant to the Senate's inquiry, the nominee leaves no doubt: "I finally worked out a philosophy which is expressed pretty much in that 1971 *Indiana Law Journal* piece." (*Conservative Digest Interview*, 1985 at 101.)

Judge Bork's own clear statements, therefore, inform the Senate as to where it should look in determining the nominee's jurisprudential views. Beyond these statements, there are several other reasons for carefully considering the Judge Bork's extra-judicial as well as his judicial record.

First, many of Judge Bork's "musings" have taken the form of testimony before Congress, where he was offering his opinions on issues upon which that body would presumably base legislation. Second, Judge Bork has maintained his drumbeat of criticism in articles, speeches and interviews while sitting as member of the D.C. Circuit; such criticism, in other words, did not cease upon the nominee's departure from academia. Third, the attempt to minimize the effects of Judge Bork's writings gives short shrift to the legal academic community and belittles the important contributions that scholarship has made to the development of the law.

Judge Bork's complete 25-year record, then, is relevant to his nomination. The attempt to limit the Senate's consideration to his opinions on the D.C. Circuit should be rejected.

B. There Is Considerable Basis In Judge Bork's Record For Concern That He Would Overturn Many Landmark Supreme Court Decisions

The claim that "no basis" exists in Judge Bork's record for concern that he would overturn precedents if confirmed as an Associate Justice is without merit. In fact, the record is replete with specific statements by the nominee that give great cause for concern.

1. Judge Bork Has Said That The Appointment Power Should Be Used To Correct "Judicial Excesses"

One indication of Judge Bork's views on stare decisis stems from his remarks on the appointment power. He has said that the "answer" to "judicial excesses" can "only lie in the selection of judges, which means that the solution will be intermittent, depending upon the President's ability to choose well and his opportunities to choose at all." ("'Inside' Felix Frankfurter," The Public Interest, Fall Book Supplement, 1981, at 109-110.) During the 1982 hearings on his nomination to the D.C. Circuit, Judge Bork stated that "[t]he only cure for a Court which oversteps its bounds that I know of is the appointment power." ("Confirmation of Federal Judges," Hearings Before The Senate Judiciary Committee, 1982, at 7.) In a 1986 article, Judge Bork wrote that "[d]emocratic responses to judicial excesses probably must come through the replacement of judges who die or retire with judges of different views." ("Judicial Review and Democracy," Society, Nov./Dec. 1986, at 6.)

2. Judge Bork Has Said That "Broad Areas Of Constitutional Law" Ought To Be Reformulated And That An Originalist Judge Should Have "No Problem" In Overruling A Non-Originalist Precdeent

On several occasions, Judge Bork has expressed a clear willingness to overturn precedent. For example, in a January 1987 speech, Judge Bork, after describing himself as an "originalist," stated:

> Certainly at the least, I would think that an orginalist judge would have **no problem** whatever in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy. It comes from nothing that the framers intended. (Remarks on the Panel "Precedent, the Amendment Process, and Evolution of Constitutional Doctrine," First Annual Lawyers Convention of the Federalist Society, Jan. 31, 1987, at 124, 126.) (Emphasis added.)

Judge Bork also asserted in this same speech that:

> [T]he role of precedent in constitutional law is less important than it is in a proper common law or statutory model.
>
> [I]f a constitutional judge comes to a firm conviction that the courts have misunderstood the intentions of the founders, ...he is freer than when acting in his capacity as an interpreter of the common law or of a statute to overturn a precedent. (Id. at 125-26.)

While Judge Bork cautioned that a judge is not "absolutely free" in this regard (id.), these statements provide a keen insight into the nominee's views on the role of precedent in our constitutional system.

Also significant are Judge Bork's remarks in his well-known Indiana Law Journal article:

> Courts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution....It follows, of course, that **broad areas of constitutional law ought to be reformulated.** ("Neutral Principles" at 11.)(Emphasis added.)

Yet another indication of Judge Bork's eagerness for the Supreme Court to revisit certain fundamental issues appears in a 1985 local bar interview. When pressed about whether he could identify those constitutional doctrines he thought ripe for reconsideration by the Supreme Court, Judge Bork stated **"Yes I can, but I won't."** ("A Talk With Judge Bork," District Lawyer, June 1985, at 32.)(Emphasis added.)

One such doctrine may the development of the Bill of Rights. In a 1986 speech, Judge Bork posed the question of "whether, given the state of the precedent, a judge that wanted to return to basic principles could do so." ("Federalism," Attorney General's Conference, Jan. 24-26, 1986, at 9.) Judge Bork answered:

> **The court's treatment of the Bill of Rights is theoretically the easiest to reform.** It is here that the concept of original intent provides guidance to the courts and also a powerful rhetoric to persuade the public that the end to [judicial] imperialism is required and some degree of reexamination is desirable. (Id.) (Emphasis added.)

Judge Bork also has said that "constitutional law...is at least as badly in need of reform as antitrust," (Untitled Speech, William Mitchell College of Law, Feb. 10, 1984), about which he has remarked that "[a] great body of wrong, indeed, thoroughly perverse, Supreme Court [law] remains on the books...." (Untitled Speech, Lexecon Conference, Oct. 30, 1981.)

3. The Record Strongly Suggests That Judge Bork, If Confirmed, Would Vote To Overturn A Substantial Number Of Supreme Court Decisions

It is at this juncture difficult to identify precisely which doctrines "Justice" Bork would seek to reconsider immediately. The record strongly suggests, however, that the number would be substantial.

In a 1982 speech in which he discussed the debate over the different methods of constitutional interpretation, Judge Bork said:

> [N]o writer on either side of the controversy thinks that any **large proportion** of the **most significant** constitutional decisions **of the past three decades** could have been reached through interpretation [of the Constitution]. (Untitled Speech, Catholic University, March 31, 1982, at 5.) (Emphasis added.)

Similarly, with respect to the Supreme Court's landmark decisions in such cases as Griswold v. Connecticut (381 U.S. 479 (1965)) and Roe v. Wade (410 U.S. 113 (1973)), Judge Bork remarked:

> In not one of those cases could the result have been reached by interpretation of the Constitution, and these, of course, are only a **small fraction** of the cases about which that could be said. (*Id.* at 4.)(Emphasis added.)

Judge Bork's 1981 testimony on the Human Life bill also strongly suggests that he might vote to overturn a large number of cases. In the context of criticizing the decision in Roe v. Wade, Judge Bork testified that it is "by no means the only example of...unconstitutional behavior by the Supreme Court." ("The Human Life Bill," Hearings Before The Subcommittee on Separation of Powers, 1981, at 310.) In his written testimony, Judge Bork stated:

> The judiciary have a right, indeed, a duty, to require basic and unsettling changes, and to do so, despite any political clamor, when the Constitution fairly interpreted demands it. The trouble is that nobody believes the Constitution allows, much less demands, the decision in Roe...or in **dozens of other cases in recent years**. (*Id.* at 315.) (Emphasis added.)

Along these same lines, Judge Bork has commented:

> [T]he Court...began in the **mid-1950s** to make...decisions for which it offered little or no constitutional argument....Much of the new judicial power claimed cannot be derived from the text, structure, or history of the Constitution. ("Judicial Review and Democracy," Encyclopedia of the American Constitution, Vol. 2, at 1062 (1986).)

What are the "large proportion" of significant constitutional cases in the "last three decades" that could not have been reached through interpretation of the Constitution? What are the "dozens of cases" not "allowed" by the Constitution? What are the cases since the mid-1950s that are not supported by the Constitution? These are fundamental questions for the hearings in September, but they may not be answered there. But the Senate need not operate on a blank slate in such a case, because Judge Bork has already told us to look at his "track record," including "any articles" he has written. (District Lawyer, "Interview" at 33.)

Accordingly, Senators may turn for valuable insight to the nominee's many attacks on past precedents -- precedents that he would likely encounter during the two decades he might serve if confirmed to the Court. These attacks, only some of which are listed in Appendix B, may be the only available window to the "dozens of cases" that Judge Bork believes are not "allowed" by the Constitution.

C. Judge Bork's Application Of His Academic Views To His Judicial Decisions Is Illustrated By His Attack On The Privacy Cases In Dronenburg

Judge Bork has not only **said** that he approaches the Constitution "in the same way" both in academia and on the bench; he has actually **done** so. Indeed, in contrast to the suggestion in the White House position paper that Judge Bork has limited his criticism of Supreme Court cases to academia, the record shows that such criticism also has been leveled from the bench.

In Dronenburg v. Zech (741 F.2d 1388 (D.C. Cir. 1984)), for example, Judge Bork critically evaluated the entire line of the Supreme Court's privacy cases, commencing with Griswold v. Connecticut. His attack led four members of the D.C. Circuit, in their dissent from the denial of the petition for rehearing en banc, to caution the nominee that "surely it is not the function [of lower courts] to conduct a general spring cleaning of constitutional law." (746 F.2d 1579, 1580.)

D. Judge Bork's "Faithful Application" Of Supreme Court Precedent While A Circuit Court Judge Is Irrelevant Since He Has Been Constitutionally And Institutionally Bound To Follow The Supreme Court As A Lower Court Judge

As discussed previously, that Judge Bork may have "faithfully applied" Supreme Court precedents while on the D.C. Circuit, as claimed by the White House position paper, is irrelevant to his potential actions on the Supreme Court. As an intermediate court judge, he has been constitutionally and institutionally bound to respect and apply that precedent. As a Supreme Court Justice, he would not be so bound.

E. Judge Bork Has Consistently Given Only One Example Of A Constitutional Doctrine That He Regards As Too Well-Settled To Overturn

The White House position paper stresses that, according to Judge Bork, even "questionable" precedent should not be overturned if "it has become part of the political fabric of the nation." The position paper may be referring to Bork's statement in a 1985 District Lawyer interview that there are certain decisions around which "so many statutes, regulations, governmental institutions, [and] private expectations" have been built that "they have become part of the structure of the nation." Importantly, the sole example Judge Bork has ever given of the type of precedent that would meet this test is the interpretation of the commerce clause. (See District Lawyer Interview at 32; Federalist Society Convention Speech, Jan. 31, 1987, at 4.) He has never, based on the information reviewed thus far, offered any other example.

Judge Bork's rationale for invoking the commerce clause in this context is quite telling. He is willing to uphold decisions under the commerce clause because of his respect for government and for the institutional arrangements that have been built around the clause. This is far different from arguing that precedent should be upheld because of one's respect for his or her predecessors on the Court and their reasons for reaching a particular decision. Elevation to the Supreme Court should be a humbling experience -- but Judge Bork's reasons for upholding decisions expanding the commerce clause suggest that he would feel no such humility.

F. Judge Bork Has Distinguished Between Precedents From Higher Courts And Those Within The Same Court

Importantly, Judge Bork has drawn a distinction between a judge's duty with respect to precedents from a higher court and those within the same court. At his 1982 confirmation hearings, Bork stated:

> I think that as a court of appeals judge one has to adhere to [stare decisis] very strongly, and that is to follow the lead of the Supreme Court. It is less clear, for example, about precedent within a single court and whether that court should follow it or not. ("Confirmation of Federal Judges," Hearings Before the Senate Judiciary Committee, 1982, at 13.)

This strongly suggests that were the constitutional and institutional constraints that apply to an intermediate court judge removed, Bork would be more willing to overturn precedents.

G. In Contrast To Judge Bork, Justice Powell Emphasized That Stare Decisis Is A Doctrine That "Demands Respect In A Society Governed By Rule Of Law"

Respect for precedent was a powerful element of Justice Powell's jurisprudence. In his view, "the doctrine of stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that **demands respect in a society governed by the rule of law.**" (City of Akron v. Akron Center For Reproductive Health, Inc., 462 U.S. 416, 419-420 (1983).) (Emphasis added.)

Justice Powell also underscored the "especially compelling reasons for adhering to stare decisis in applying the principles of Roe v. Wade." (Id. at 420 n. 1.) Roe, said Powell,

> was considered with special care. It was first argued during the 1971 Term, and reargued -- with extensive briefing -- the following Term. The decision was joined by the Chief Justice and six other Justices. Since Roe was decided in January 1973, the Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy. (Id.)

H. Many Commentators Doubt That Judge Bork Would Abide By Precedent

Several commentators do not agree with the White House's assessment that Judge Bork, if confirmed, would abide by precedent. Owen Fiss, the Alexander Bickel Professor of Public Law at Yale University, has written:

> As if to reassure the liberal coalition on the abortion issue, Mr. [Lloyd] Cutler insists that Judge Bork's 'writings reflect a respect for precedent.' **Nothing could be farther from the truth:** What Judge Bork's writings -- spanning almost 20 years as a professor -- reflect is not a concern for precedent but a **dogmatic commitment to a comprehensive or general theory and a willingness to deride decisions that do not agree with his theory.**
>
> Judge Bork's performance on the Court of Appeals has not revealed a change in outlook. Indeed, his recent effort to confine the right-to-privacy decisions of the Supreme Court earned him a rebuke by he colleagues, who insisted that 'it is not...[the] function [of lower court judges] to conduct a general spring cleaning of constitutional law.' **Elevating Judge Bork to the Supreme Court is not likely to instill within him a new reverence for authority, but rather to give him the power to write his views into law.** (Letter to The New York Times, July 31, 1987.) (Emphasis added.)

Similarly, Oxford and New York University Professor Ronald Dworkin has recently commented:

> Bork's views do not lie within the scope of the long-standing debate between liberals and conservatives about the proper role of the Supreme Court. Bork is a constitutional radical who rejects a requirement of the rule of law that all sides in that debate had previously accepted. He rejects the view that the Supreme Court must test its interpretations of the Constitution against principles latent in its own past decisions as well as other aspects of the nation's constitutional history. (Dworkin, "The Bork Nomination," New York Review of Books, Aug. 13, 1987.)

I. The Effects Of Reversing The Important Bodies Of Constitutional Law That Judge Bork Has Criticized Would Be Grave

The doctrine of stare decisis is a cornerstone of our constitutional and jurisprudential foundations. Like most such doctrines, of course, it is not absolute. As Archibald Cox states in his recently published book, some overruling of precedent is part of our constitutional tradition. (Cox, The Court and the Constitution (Houghton Mifflin Co. 1987) at 364.) "[W]hen taken with discretion," the step "is essential to the correction of errors." (Id.)

What happens when the step is not taken with discretion? If "Justice" Bork were to act on his criticism of any number of the decisions identified above -- were he, in other words, to overrule even the shortest of these lines of settled law -- the consequences would be grave. Such action could well carry the suggestion, in Mr. Cox's words, that "constitutional rights depend on the vagaries of individual Justices and the politics of the President who appoints them....Constitutionalism as practiced in the past could not survive if, as a result of a succession of carefully chosen Presidential appointments, the sentiment of a majority of the Justices shifted back and forth...so that the rights to freedom of choice [and] freedom from State-mandated prayer...were alternately recognized and denied." (Id. at 364.)

APPENDIX A

The following is a brief summary of the nine cases cited by the White House position paper in its comparison of Justice Powell and Judge Bork.

1. Goldman v. Secretary of Defense, 739 F.2d 657, aff'd, 475 U.S. 503. Judge Bork had no role in the original panel opinion, and simply joined an eight member per curiam decision denying rehearing en banc. (Judges Starr, Ginsburg and Scalia dissented from the denial.) Justice Powell joined the majority opinion (by Rehnquist) and a concurring opinion by Stevens (also joined by White). Although Powell's decision to join Stevens' concurring opinion may give some insight into the views of Powell, the reason Judge Bork decided against a rehearing is unclear. It seems highly speculative to assume that Judge Bork's decision to vote against a rehearing was based on the same legal reasoning which led Powell to vote against Goldman.

The facts of the case involve an Air Force captain's attempt to wear his yarmulke, in violation of Air Force rules. The D.C. Panel and the Supreme Court upheld the Air Force, and denied the right of the captain to wear the yarmulke.

2. National Association of Retired Federal Employees v. Horner, 633 F.Supp. 511, aff'd, 107 S.Ct 261 (1986). Judge Bork was part of an unsigned, per curiam opinion by a three judge panel. The plaintiffs sought a declaratory judgment that the Gramm-Rudman-Hollins Act deprived them of property without compensation by suspending scheduled COLA for retired federal employees. The panel granted summary judgment to defendant, holding that the statute providing COLA's did not establish a property right in the scheduled adjustment.

The Supreme Court summarily affirmed, unanimously, in a one paragraph notice. Even assuming that Judge Bork's reasoning can be determined from the unsigned, per curiam decision, it again seems highly speculative to assume that Powell agreed with all of Judge Bork's reasoning. Because of the inherently unclear reasoning behind a summary affirmation, these affirmations are given limited procedural effect. See Mardel v. Bradley, 432 U.S. 173 (1977). A summary affirmance represents an approval of the judgment below, but should not be taken as an endorsement of the reasoning of the lower court. Fusari v. Steinberg, 419 U.S. 379 (1975). Thus, arguing that Powell accepted Judge Bork's reasoning based on the Supreme Court's summary affirmance of a per curiam decision seems at least twice removed from reality.

3. Chaney v. Heckler, 724 F.2d 1030, rev'd, 470 U.S. 831 (1985). This is an administrative law case, discussing the scope of a court's review under the APA. The case involved an attempt by death row inmates to require the FDA to investigate and approve drugs used for lethal injections. The D.C. panel, of which Judge Bork was not a member, held that the FDA action was reviewable, and that FDA's refusal to take action was an abuse of discretion. The D.C. Court of Appeals, en banc, denied a motion for rehearing, with Scalia dissenting from the denial. Bork, Wilkey and Starr all joined Scalia's dissent (Scalia also dissented from the original panel decision).

The Supreme Court unanimously reversed the D.C. Panel. Rehnquist wrote the majority opinion; Brennan wrote a concurring opinion and Marshall concurred in the judgment. It is likely that Judge Bork would have agreed with the decision which limits judicial review over an agency. It is difficult to determine Powell's exact reasoning, other than to note that he did join Rehnquist's opinion.

4. CCNV v. Watt, 703 F.2d 586, rev'd, 468 U.S. 288 (1984). This case involved protestors sleeping in Lafayette Park. Judge Bork joined dissents by Scalia and Wilkey. Scalia's dissent was also joined by MacKinnon; Wilkey's was also joined by Tamm, MacKinnon and Scalia. Scalia's dissent flatly denied that sleeping can ever be worthy of first amendment protection, and sought to end all protection for symbolic speech.

The Supreme Court reversed. Powell did not write an opinion or concurrence but simply joined a seven-person majority in an opinion written by White. Brennan and Marshall dissented.

5. Catrett v. Johns-Manville Corp., 756 F.2d 181, rev'd, 106 S.Ct. 2548 (1986). This case involved a widow bringing a wrongful death action for her husband resulting from exposure to asbestos. The district court granted defendant's summary judgment motion, based solely on the plaintiff's failure to produce credible evidence to support her claim. Defendant offered no affidavits, declarations or evidence in its own behalf.

The Court of Appeals reversed the district court, holding that defendant's failure to offer any evidence in its behalf rendered its motion fatally defective. Judge Bork dissented, arguing that the district court had the discretion to accept the summary judgment motion, and that such motion may be accepted if no triable facts exist, regardless of any evidence offered. Judge Bork also argued that only admissible evidence may be used to defend against a summary judgment motion.

The Supreme Court, per Rehnquist, reversed the Court of Appeals. The Court held that the moving party in a summary judgment motion need not enter affirmative evidence on its own behalf. It also held that the "nonmoving party need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment," thus disagreeing with part of Judge Bork's dissent. Rehnquist's opinion was joined by White, Marshall, Powell and O'Conner; Brennan's dissent was joined by Burger and Blackmun; Stevens also dissented. Thus Powell again joined in the opinion without writing anything, so it is not clear the extent to which he agrees with Judge Bork. Rehnquist's opinion is in partial agreement, and partial disagreement, with Judge Bork's dissent.

6. Paralyzed Vets of America v. CAB, 752 F.2d 694, rev'd 106 S.Ct. 2705 (1986). Organizations representing disabled citizens challenged the final regulations of the CAB with respect to commercial airlines. The organizations sought to have the anti-discrimination statutes applicable to all commercial airlines because of federal financial assistance to airports. The Court of Appeals upheld the challenge, holding that all airlines are required to meet the standards of section 504 of the Rehabilitation Act. Judge Bork dissented from a denial of rehearing en banc, by arguing that the court's opinion conflicted with Grove City College v. Bell.

The Supreme Court, per Powell, reversed the court of appeals, relying largely on Grove City. In this case, the views of Powell and Judge Bork seem similar. Marshall, Brennan and Blackmun dissented from the Court's holding.

7. Hohri v. United States, 793 F.2d 304, vacated, 55 U.S.L.W. 4716 (1987). This case involved an action by a Japanese-American organization and individuals seeking damages and declaratory relief for the World War II internment of Japanese-Americans. The district court concluded that all the claims were barred by either sovereign immunity or the statute of limitations. Respondents appealed to the Court of Appeals, which ruled that it had jurisdiction over a case involving both the Little Tucker Act and the Federal Tort Claims Act (FTCA), though claims involving the Little Tucker Act are within the exclusive jurisdiction of the Court of Appeals of the Federal Circuit. On the merits, the court held that the statute of limitations did not begin to run until 1980. Judge Bork was not on the panel that decided the case.

Judge Bork dissented from the denial of rehearing, on both the jurisdictional grounds and the substantive issue. Powell, writing for a unanimous Supreme Court, reversed only on the jurisdictional issue, not reviewing the substantive claims. Thus, Powell agreed with part of Judge Bork's analysis, and did not reach the issue substantively discussed in his opinion. The substantive portion of Judge Bork's dissent is approximately 75%

of the dissent, while only 25% is spent on the procedural questions.

8. *Sims v. CIA*, 709 F.2d 95 (D.C. Cir. 1983), *aff'd in part, rev'd in part*, 471 U.S. 159 (1985). Freedom of Information Act suit was brought seeking disclosure by the CIA of names of individuals and institutions who conducted secret research for the agency. The urt of Appeals required that a court must focus on the CIA's practical necessity of secrecy in determining whether the information should be released and that under FOIA information may be kept confidential only when the CIA proves that confidentiality was necessary to obtain the information. Judge Bork, in contrast, argued that an agency promise of secrecy automatically qualifies the agent as an intelligence source, and thus outside the boundary of the FOIA. He argued that the CIA's need to promise secrecy in return for information outweighed any rights of disclosure under FOIA.

The Supreme Court, in a unanimous opinion by Burger, affirmed in part and reversed in part. Marshall filed an opinion concurring in the result which Brennan joined. Burger's opinion held that no proof for the need of secrecy was necessary, and the FOIA did not apply if the intelligence sources were engaged in helping the CIA perform its statutory function. The Court seemed comfortable with the reasoning in Judge Bork's opinion, and generally granted the CIA broad discretion to withhold information under FOIA. The Court held that judges after the fact could not decide the issue of whether a grant of confidentiality was appropriate.

Powell only joined the majority opinion. Thus, it is againimpossible to determine the extent to which he agrees with Judge Bork's language.

9. *Vinson v. Taylor*, 760 F.2d 1330, *aff'd and remanded*, 106 S.Ct. 2399 (1986). The issue in this case is whether sexual harassment states a cause of action under Title VII. The D.C. Panel said yes, and further held that the fact that the parties later had a sexual relationship or that the plaintiff wore provocative clothing are not relevant factual matters. In a dissent from a denial of rehearing, Judge Bork argued that evidence of provocative clothing and the voluntary nature of a later sexual relationship should be admissible. Judge Bork also argued that employers should not be vicariously liable for a superirvisor's sexual harassment when the employer was unaware of the situation.

The Supreme Court unanimously upheld the court of appeals. Again Powell did not write, but merely joined the majority opinion written by Rehnquist. The Rehnquist opinion clearly contradicts almost the entire Bork dissent; the only issue which Bork and Rehnquist agree upon is that evidence of the employee's sexually provocative actions may be admissible. However, even on this issue, Rehnquist takes a far more limited view of admissibility than Judge Bork.

In short, if Powell's views are to be understood from Rehnquist's opinion, then Powell and Judge Bork seem to be quite far apart on this issue. Judge Bork voted for rehearing to reverse the court of appeals. Powell voted to affirm the decision. The White House position paper is flatly incorrect in stating that Judge Bork and Justice Powell agreed in this case.

APPENDIX B

LIST OF LANDMARK SUPREME COURT CASES REJECTED BY JUDGE BORK

CIVIL RIGHTS

(1) **Shelley v. Kraemer**, 334 U.S. 1 (1948) (Court held that the Fourteenth Amendment forbids state court enforcement of a private, racially restrictive convenant). Judge Bork "doubted" that it was possible to find a "neutral principle" which would "support" *Shelley*. ("Neutral Principles and Some First Amendment Problems," 47 *Indiana Law Journal* 1 (1971)).

(2) **Reitman v. Mulkie**, 387 U.S. 369 (1967) (Court invalidated a state referendum that prohibited open housing statutes, holding that the referendum "was intended to authorize, and did authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic polices of the state.") Judge Bork has written that the "startling conclusion [in *Reitman*] can be neither fairly drawn from the Fourteenth Amendment nor stated in a principle capable of being uniformly applied." ("The Supreme Court Needs a New Philosophy," *Fortune*, Dec. 1968, at 166.)

(3-4) **Baker v. Carr**, 369 U.S. 186 (1962); **Reynolds v. Sims**, 377 U.S. 533 (1964) (state legislative reapportionment cases in which the Court adopted the principle of one-person, one vote). Judge Bork has stated that "on no reputable theory of constitutional adjudication was there an excuse for the doctrine it imposed...." ("The Supreme Court Needs a New Philosophy"). In 1971, Judge Bork reiterated his opposition. ("Neutral Principles"). In 1973, he testified that "I do not think there is a theoretical basis for [the principle of] one-man, one-vote." (*Hearings on Nomination of Robert Bork to be Solicitor General* (1973)).

(5-6) **Katzenbach v. Morgan**, 348 U.S. 641 (1966); **Oregon v. Mitchell**, 400 U.S. 112 (1970) (In *Katzenbach*, the Court upheld the provisions of the 1965 Voting Rights Act that banned the use of literacy tests in certain circumstances. In *Mitchell*, the Court upheld a national ban on literacy tests.) In 1972, Judge Bork wrote that the decision in *Katzenbach* was improper. (*American Enterprise Institute for Public Policy Research*, "Constitutionality of the President's Busing Proposals," May 1972). In 1981, he stated that the two cases were "very bad, indeed pernicious, constitutional law." (*Hearings on the Human Life Bill Before the Subcommittee on Separation of Powers of the Senate Judiciary Committee*, 97th Cong., 1st Sess. (1982).)

(7) **Harper v. Virginia Board of Elections**, 383 U.S. 663 (1966) (the Court outlawed the use of a state poll tax). In

1973, Judge Bork said that "as an equal protection case, [it] seemed to me wrongly decided." He went on to note that "[a]s I recall, it was a very small poll tax, it was not discriminatory and I doubt that it had much impact on the welfare of the Nation one way or the other." (Hearings on Nomination of Robert Bork to be Solicitor General). Judge Bork reiterated his opposition in 1985, giving Harper as an example of a case where the Court "made no attempt to justify [its decision] in terms of the historic constitution or in terms of any other preferred basis for constitutional decisionmaking." ("Foreword" in G. McDowell, The Constitution and Contemporary Constitutional Theory, 1985.)

(8) Bakke v. Board of Regents, 438 U.S. 265 (1978) (Court, with Justice Powell casting the crucial vote, held that universities may not use raw racial quotas but may consider race, among other factors, in making admissions decisions). Judge Bork has written that Justice Powell's majority opinion was "[j]ustified neither by the theory that the amendment is pro-black nor that it is colorblind," and concluded that "it must be seen as an uneasy compromise resting upon no constitutional footing of its own." (Wall Street Journal, "The Unpersuasive Bakke Decision," July 21, 1978).

PRIVACY

(9) Griswold v. Connecticut, 381 U.S. 479 (1965) (Court struck down a state law making it a crime to advise married couples about birth control.) Judge Bork has described it as an "unprincipled decision" ("Neutral Principles"), has stated that there is no "supportable method of constitutional reasoning underlying" it ("Judge Robert Bork is a Friend of the Constitution," 11 Conservative Digest 91 (1985)), and Judge Bork has stated that replacing Justice Douglas's approach in Griswold with "a concept of original intent" was "essential to prevent courts from invading the proper domain of democratic government." ("The Constitution, Original Intent, and Economic Rights", 23 San Diego Law Review 823 (1986)).

(10) Skinner v. Oklahoma, 316 U.S. 535 (1942) (Court struck down a law that authorized the involuntary sterilization of criminals). Judge Bork has said that Skinner was "as improper and intellectually empty as Griswold...." ("Neutral Principles".)

(11) Roe v. Wade, 410 U.S. 113 (1973) (recognizing a constitutional right to abortion). Judge Bork has testified that Roe "is, itself, an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of state legislative authority." (Hearings on the Human Life Bill).

RELIGIOUS AND ETHNIC MINORITIES IN PUBLIC EDUCATION

(12) **Meyer v. Nebraska,** 262 U.S. 390 (1923) (Court held that there was a right to teach or study a modern foreign language in school). Judge Bork described it as "wrongly decided." ("Neutral Principles.")

(13) **Pierce v. Society of Sisters,** 268 U.S. 510 (1925) (Court held that there was a right to operate or attend private schools). Also described as "wrongly decided," at most Judge Bork conceded that "perhaps Pierce's result could be reached on acceptable grounds, but there is no justification for the Court's methods." ("Neutral Principles.")

(14) **Engle v. Vitale,** 370 U.S. 421 (1962) (Court held that public school officials may not require students to recite a state-sanctioned prayer at the beginning of each day). Norman Redlich, Dean of the New York University School of law, reported that Judge Bork criticized this decision as "noninterpretivist" in a 1982 speech at New York University Law School.

(15) **Lemon v. Kurtzman,** 403 U.S. 602 (1971) (Court established a three-part test for evaluating challenges that a given law establishes a state religion. First, the statute must have a secular legislative purpose. Second, its principal or primary effect must be one that neither advances nor inhibits religion. Third, it must not foster an excessive governmental entanglement with religion.) Judge Bork has attacked each part of this test, arguing that it is "inconsistent" with the intended meaning of the Establishment Clause and that it is impossible to satisfy. ("Religion and the Law," Speech at the University of Chicago, November 13, 1984.)

(16) **Aguilar v. Felton,** 473 U.S. 402 (1985) (Court invalidated New York City's use of federal funds to pay public school employees teaching in parochial schools). Judge Bork has argued that Aguilar "illustrates the power of the three-part test to outlaw a program that had not resulted in any advancement of religion but seems entirely worthy." (Untitled Speech, Brookings Institution, September 12, 1985).

FREEDOM OF SPEECH

(17) **The Pentagon Papers,** 403 U.S. 713 (1971) (the Court dissolved an injunction against the Washington Post and New York Times and permitted them to publish the Pentagon Papers despite the government's claims of national security, finding that news delayed was news destroyed). Judge Bork placed this case in a list of cases of which he remarked that "[i]n some of these cases, it is possible to believe, the press won more than perhaps it ought to have." He went on to

state that "[s]urely, however, Pentagon Papers need not have been stampeded through to decision without either Court or counsel having time to learn what was at stake." He concluded his remarks about the Pentagon Papers case by stating that "[t]hese cases are instances of extreme deference to the press that is by no means essential or even important to its role." ("The Individual, the State, and the First Amendment," Speech delivered at the University of Michigan in 1979.)

(18) **Landmark Communication v. Virginia,** 435 U.S. 829 (1978) (the Court blocked the criminal prosecution of a newsman who published the name of a judge who was being secretly investigated by the state judicial review commission). Judge Bork remarked that "one may doubt that press freedom requires permission...to publish the details of an investigation which the State may lawfully keep secret." He also described it as an instance "of extreme deference to the press that is by no means esssential or even important to its role." (1979 Michigan Speech.)

(20) **Cox Broadcasting Corp. v. Cohn,** 420 U.S. 469 (1975) (the Court struck down a statute that prohibited publication of a rape victim's name). Judge Bork commented that "one may doubt that press freedom requires permission to publish a rape victim's name," and also remarked that the case was an instance of "extreme deference to the press that is by no means essential or even important to its role." (1979 Michigan Speech.)

(20) **Buckley v. Valeo,** 424 U.S. 1 (1976) (the Court sustained the Federal Election Campaign Act's limitations on contributions to a candidate for office, but struck down its limits on a candidate's personal expenditures). Judge Bork stated that "[i]t is arguable that [Buckley was] the most important First Amendment case in our history...and it was there that the Amendment went soft at its center." (1979 Michigan Speech.)

(21-24) **Cohen v. California,** 403 U.S. 15 (1971); **Rosenfield v. New Jersey,** 408 U.S. 901 (1972); **Lewis v. New Orleans,** 408 U.S. 901 (1972); **Brown v. Oklahoma,** 408 U.S. 901 (1972) (In Cohen, the Court struck down a criminal conviction of an individual who wore a T-shirt with the slogan "Fuck the Draft." The Court held that suppressing words risks suppressing ideas, and wrote that "one man's vulgarity is another's lyric....The Constitution leaves matters of taste and style so largely to the individual." In the other three cases, the Court summarily vacated similar "offensive language" convictions.) Judge Bork has written that "[t]hese cases might better have been decided the other way on the ground of public offensiveness alone....If the First Amendment relates to the health of our political processes, then, far from protecting such speech, it offers additional reason for its suppression." (1979 Michigan Speech.) In 1985, Bork reiterated his attack on Cohen as "moral relativism." ("Tradition and Morality in Constitutional Law," The Francis Boyer Lectures on Public Policy, 1985.)

Note: Bork has also criticized Justice Holmes's dissents (joined by Justice Brandeis) in Abrams v. United States, 250 U.S. 616 (1919) **and Gitlow v. New York,** 268 U.S. 652 (1925) **where Holmes created the test that the government may only forbid speech when it presents a "clear and present danger".** While these opinions were dissents, they have been historically adopted as superior. Judge Bork himself notes that "these dissents gave direction to, and may be said to have shaped, the modern law of the First Amendment." But Judge Bork has also said that "[t]he 'clear and present danger' requirement [is improper] because it erects a barrier to legislative rule where none should exist. The speech concerned has no political value within a republican system of government." ("Neutral Principles".) Later, he added that "in fact the superiority of the famous dissents by Justice Holmes and Brandeis is almost entirely rhetorical...." (1979 Michigan Speech.)

(25-26) Brandenburg v. Ohio, 395 U.S. 444 (1969); **Hess v. Indiana,** 414 U.S. 105 (1973). In Brandenburg, the Court struck down a conviction of a KKK leader who advocated violence, holding that such speech can only be restricted when it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." In Hess, the Court overturned a conviction of a demonstrator being removed from a campus street who told police that "We'll take the fucking street later (or again)," holding that it was "mere advocacy of illegal action at some indefinite future." Judge Bork has called these two cases "fundamentally wrong interpretations of the First Amendment." (1979 Michigan Speech.)

(27-28) Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); **Bates v. State Bar of Arizona,** 433 U.S. 350 (1977). In Virginia Board, the Court struck down a statute prohibiting advertising the prices of prescription drugs. In Bates, the Court struck down a rule against lawyer advertisements. Judge Bork remarked that he was tempted to call these an "eccentric discovery," and said that he was tempted to see them as a reflection of a trend "in which the Constitution becomes diffuse and trivialized at the hands of an activist judiciary," but "that is not the sole force at work...the First Amendment seems to have gone soft at its center [as well]." ("The Individual, the State, and the First Amendment".)

ANTITRUST

(29) Brown Shoe v. United States, 370 U.S. 294 (1962) (Court outlined the factors to be used in assessing the effects of a merger and documented a congressional intent under the antitrust laws to protect small businesses). Judge Bork has said that "Brown Shoe was a disaster for rational, consumer-oriented merger policy." (The Antitrust Paradox).

(30) Federal Trade Commission v. Procter & Gamble Co., 368 U.S. 568 (1967) (Court articulated its theory prohibiting some conglomerate mergers). Judge Bork has said that this case "makes sense only when antitrust is viewed as pro-small business -- and even then it does not make much sense." (The Antitrust Paradox).

(31) Standard Oil Co. v. United States, 337 U.S. 293 (1949) (Court defined the limits of exclusive dealing arrangements). Judge Bork has said this case rested "not upon economic analysis, not upon any factual demonstration, but entirely and astoundingly, upon the asserted inability of courts to deal with economic issues." (The Antitrust Paradox).

(32) Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) (Court created a per se rule forbidding Resale Price Maintenance). Bork has described this as a "decisive misstep that has controlled a whole body of law." (The Antitrust Paradox).

THE JUDICIAL RECORD OF JUDGE ROBERT H. BORK

Public Citizen
Litigation Group
Washington, D.C.

ACKNOWLEDGEMENTS

An undertaking of this magnitude obviously could not have been completed in such a short period of time without the assistance of numerous people in addition to the attorneys at the Public Citizen Litigation Group who researched and wrote this report.

We are particularly grateful to Philip Bender, a computer programmer who donated his weekends and nights in order to design a program for organizing and retrieving the data that we collected on the cases in which Judge Bork participated. We could not have completed this project without the valuable assistance of Claire Sylvia, a recent law school graduate whose services the Children's Defense Fund donated to us for a week but who then donated her own nights and weekends, and of Ellen Friedman, our summer law clerk. We were also fortunate to have the help of Jesse Shadoan, a talented high school student who volunteered for us for the summer and spent much of his time helping us find and keep track of the data that we recorded for this project. Catherine Baker, Leslie Mink, Michelle Warren, Millie Stearman, Lauren Kannee, and Dolores Brandow all provided invaluable help, sometimes at very inconvenient times, with the production of the manuscript. Finally, People for the American Way and the Alliance for Justice provided us with copies of Judge Bork's articles and other assistance.

PUBLIC CITIZEN LITIGATION GROUP

The Public Citizen Litigation Group is one component of Public Citizen, a public interest organization founded by Ralph Nader in 1971. The Litigation Group brings lawsuits to enforce the rights of unrepresented and under-represented citizens against the large institutions in our society that have the power to affect their lives -- governments, corporations, labor unions, and others. Its lawsuits promote food, drug, automobile, and product safety; safe working conditions; nuclear safety; government accountability; policing the professions; access to government information; and union democracy. Since 1972, attorneys in the Litigation Group have represented clients in approximately 150 cases in the United States Court of Appeals for the District of Columbia Circuit and have argued 18 cases before the United States Supreme Court, prevailing 11 times. Its ten attorneys have been practicing law 4 to 21 years, and for an average of 11 years.

The Litigation Group works in tandem with four other groups that operate under the umbrella of Public Citizen. Congress Watch monitors and lobbies for legislation on Capitol Hill. The Health Research Group fights for protections against unsafe foods, drugs, and workplaces, and for greater consumer control over health decisions. The Critical Mass Energy Project works for safe, efficient, and affordable energy. And Buyers Up is a non-profit purchasing project that enables consumers to use their collective buying power to obtain lower prices and better services.

Public Citizen is a nonprofit, tax-exempt organization. It is supported principally by individual contributions from citizens throughout the country who believe that there should be full-time advocates of democratic principles working on their behalf. The Public Citizen Foundation supports the educational activities of Public Citizen with tax-deductible contributions. Neither organization accepts government or corporate grants.

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INTRODUCTION

On July 1, 1987, President Reagan nominated Judge Robert H. Bork to be an Associate Justice of the Supreme Court of the United States. The nomination was instantly controversial because in recent years the man Judge Bork would replace -- Associate Justice Lewis F. Powell, Jr. -- has been the swing vote in many 5-4 cases.

Both his supporters and opponents have argued that Judge Bork should be evaluated on the basis of his record. An important source of data is Judge Bork's performance as a member of the United States Court of Appeals for the District of Columbia Circuit, popularly known as the "D.C. Circuit." Many legal observers consider this court to be second only to the Supreme Court in terms of influence, primarily because it hears a large number of important cases involving the federal government that can affect people across the nation.

Judge Bork has served on the D.C. Circuit for over five years. Prior to his nomination, he had participated in approximately 400 cases in which there were published opinions, and he had written 144 majority, concurring and dissenting opinions. Shortly after the nomination was announced, the Public Citizen Litigation Group undertook a detailed examination of these cases.

The Public Citizen Litigation Group lawyers were aware of Judge Bork's decisions in cases involving their own clients and knew that in cases involving public interest organizations and government, Judge Bork had regularly sided with the executive branch.[1] Recognizing, of course, that this experience was not necessarily an accurate reflection of his overall record, we undertook a study of all his pre-nomination cases, to discern if any common themes or trends could be identified.

This analysis focuses on Bork's role in those cases where the judges disagreed with each other. We identified 56 "split decisions" in which Judge Bork participated -- those cases in which one or more judges disagreed with the majority on how the case should be resolved and filed a dissenting statement. Judge Bork's votes in split decisions are significant for several reasons. First, it is likely that these votes made a difference in the outcome. In addition, although most D.C. Circuit cases are decided by a unanimous three-judge panel, the cases in which judges disagree publicly tend to be the more controversial cases, some of which will ultimately reach the Supreme Court for resolution. Finally, these are the "tough cases" because by definition split decisions are cases in which at least one judge disagreed with Judge Bork.

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[1] A list of the Public Citizen Litigation Group cases in which Judge Bork has participated appears in the Appendix.

A. Summary of Findings

An analysis of Judge Bork's record on the D.C. Circuit demonstrates that:

*Judge Bork's performance on the D.C. Circuit is not explained by the consistent application of judicial restraint or any other judicial philosophy; instead in split cases, one can predict his vote with almost complete accuracy simply by identifying the parties in the case;

*In split cases where the government is a party, Judge Bork voted against consumers, environmental groups, and workers almost 100% of the time and for business in every such case;

*In 14 split cases, Judge Bork denied access to the courthouse every time; among the many losers was the United States Senate, which, according to Judge Bork's dissent, could not bring a case of major constitutional significance to the federal courts;

*Judge Bork has expressed a desire to reformulate broad areas of antitrust law, and to narrow the constitutional protections of individuals;

*Judge Bork is far less a friend of the First Amendment than some have suggested, as evidenced by four cases in which he voted against the First Amendment claims of political demonstrators;

*On several occasions, Judge Bork's colleagues have been extremely critical of him for misinterpreting Supreme Court precedent and going beyond the facts of a particular case.

Judge Bork is widely credited as being a proponent of judicial restraint, a judicial philosophy that in administrative law cases requires courts to defer to the executive branch. Our analysis of his decisions, however, found that Judge Bork generally adhered to this philosophy only in cases brought by individuals or organizations other than a business (referred to as "non-business cases").

In the field of administrative law, Judge Bork adhered to an extreme form of judicial restraint if the case was brought by public interest organizations. His vote favored the executive in every one of the 7 split decisions in which public interest organizations challenged regulations issued by federal agencies. These cases included environmental issues, the regulation of potentially carcinogenic colors in foods, drugs, and cosmetics, the regulation of television and radio licensees, and a requirement that family planning clinics notify parents of teenage girls who sought birth control information and devices. The single non-business general regulatory issue on which Judge Bork voted in favor of the individual involved challenges by President Reagan and Senator Kennedy to a decision of the Federal Election Commission regarding the treatment of campaign expenses.[2]

Judge Bork also deferred to the executive branch in labor cases brought to benefit employees, where he voted for the government in 4 out of 5 cases in which the court split.[3] And in cases brought under the Freedom of Information Act ("FOIA") and related statutes, he voted for the agency and against the requester in all 7 of the cases in which the court split, even though Congress has made it clear in the statute that no deference is to be accorded the executive branch agencies in those cases.

In the area of constitutional law, the doctrine of judicial restraint has a similar meaning: it requires judges to be reluctant to find new rights in the Constitution or to expand existing ones. Once again, in civil rights and civil liberties cases brought by individuals, Judge Bork adhered to this philosophy. In the 6 split decisions where the government was a party, he voted against the individual every time. The pattern in criminal cases was the same; Judge Bork voted for the prosecution in the 2 split criminal decisions. Indeed, he voted against the criminal defendant in 23 of the 24 criminal cases in which he participated on the D.C. Circuit.

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[2] None of the cases were brought by the "conservative" public interest organizations such as the Heritage Foundation.

[3] In the single vote that favored employees' interests, Judge Bork voted to remand that case to the Merit Systems Protection Board after upholding a worker's discharge on the merits, so that the agency could explain its reasons for a strictly procedural ruling in favor of the executive.

A summary of Judge Bork's votes in split decisions involving the federal government and a party other than a business appears below:

JUDGE BORK'S VOTES IN SPLIT DECISIONS
IN CASES AGAINST THE EXECUTIVE
NOT BROUGHT BY BUSINESS

	Public Interest Group, Worker, Individual, FOIA Requester, Candidate	Executive
Administrative Law:		
General Regulatory Cases	1	7
Labor Cases	1	4
Freedom of Information Cases	0	7
Constitutional Law	0	6
Criminal Law	0	2
TOTAL	2	26

However, Judge Bork did not consistently adhere to the principles of judicial restraint. To the contrary, when a private corporation or business group (referred to as a "business interest") sued the government, he was a judicial activist. Thus, in the 8 split decisions where a business interest challenged the government, Judge Bork voted for the business every time. Five of these are rate-making cases where the court's decisions directly affected the cost of services provided to consumers, and 3 are labor cases in which the losers were workers. The other victory by a business interest reversed the Department of Agriculture's so-called "junk food rule," which prohibited the sale of soft drinks and other products in competition with nutritious meals being served in school lunch programs.

Judge Bork's votes in split administrative law cases in which a business interest was a party appear in the table below:

JUDGE BORK'S VOTES IN SPLIT DECISIONS
IN ADMINISTRATIVE LAW CASES BROUGHT BY BUSINESS

	Business	Executive
Federal Energy Regulatory Commission, Interstate Commerce Commission, Department of Agriculture Cases	5	0
Labor Cases	3	0
TOTAL	8	0

The only split case in which a business interest asserted a constitutional right is Jersey Central Power & Light Co. v. FERC, 768 F.2d 1500 (1985) and 810 F.2d 1168 (1987)(en banc), which also raised administrative law issues. Judge Bork's opinions in favor of Jersey Central in this case, as well as his position in several other cases, suggest that he is much more willing to find a constitutional violation where business is asserting a property interest, such as a taking of property without just compensation, than when individuals are seeking constitutional protection for their non-economic rights.

Not only did Judge Bork consistently rule against individuals and public interest organizations on the merits, but in many cases he did not even let them through the courthouse door. Thus, in the 14 split cases involving questions of access to the courts or to administrative agencies, Judge Bork voted against granting access on every occasion. He voted to dismiss cases against prison inmates, social security claimants, Haitian refugees, handicapped citizens, the Iranian hostages, and the homeless. Judge Bork did not reach the merits in any of these cases; rather, he refused to decide the claims raised. And in one case, he affirmed a decision of the Nuclear Regulatory Commission denying the Attorney General of Massachusetts an opportunity to participate in a proceeding concerning the safety of a nuclear power plant in Massachusetts.

The most significant expression of Judge Bork's views on access are contained in his dissent in Barnes v. Kline, 759 F.2d 21 (1985). There Judge Bork voted to preclude the United States Senate, the House of Representatives, and 33 Members of Congress from litigating an issue of major constitutional importance (whether the President had effectively exercised the pocket veto), even though the President's attorney had conceded that the plaintiffs could sue. According to Judge Bork, the courts are not available to resolve major constitutional controversies between the President and Congress; instead, those issues must be decided in the political arena.

Judge Bork's opinions in Barnes and other standing cases strongly suggest that, if he were on the Supreme Court, he would vote to deny standing in a large variety of cases challenging executive action, including many cases brought by public interest organizations. Because his theory of standing is grounded on his own interpretation of Article III of the Constitution, only a constitutional amendment could alter the result. A summary of Judge Bork's votes on access cases appears below:

JUDGE BORK'S VOTES IN SPLIT DECISIONS IN CASES INVOLVING ACCESS TO THE COURTS

Granted Access	0
Denied Access	14

Taken together, Judge Bork's decisions in the fields of administrative, constitutional, and criminal law and his rulings on access present a clear theme: where anybody but a business interest challenged executive action, Judge Bork exercised judicial restraint either by refusing to decide the case or by deferring to the executive on the merits. However, when business interests challenged executive action on statutory or constitutional grounds, Judge Bork was a judicial activist, favoring the business interest in every split decision in which he participated. In summary, when split cases in which Judge Bork participated during his five years on the D.C. Circuit are combined, on 48 out of 50 occasions (or 96% of the time) Judge Bork voted to deny access, voted against the claims of individuals who had sued the government, or voted in favor of the claims of business which sued the government.

B. Methodology

The analysis in this report is based principally on a review of 462 cases, obtained from LEXIS (a legal computer research tool), in which Judge Bork participated while he was on the D.C. Circuit.[4] Of these cases, 409 are reported in the Federal Reporter. We also reviewed recent slip opinions to identify cases that were not included in the LEXIS data base. We generally limited our review to cases decided prior to Judge Bork's nomination, although the report notes if his subsequent opinions provide new information.[5]

Eighty-six percent of the reported decisions in which Judge Bork participated were unanimous. Many of the cases raised relatively simple or noncontroversial issues, and the court simply affirmed the decision of the administrative agency or the district court. There were 56 cases in which a three-judge panel or the full court split, i.e., there was at least one dissenting vote. Forty-seven of these cases were decided by a panel of three judges, and 9 were decided by the court en banc (by the full court). This report focuses on the 56 split decisions in which Judge Bork participated and on the 144 opinions that he wrote between February 12, 1982, when he joined the D.C. Circuit, and the time of his nomination.

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[4] The LEXIS search was conducted on July 2, 1987, by searching for the word "BORK" within 15 words of the word "Before" and within 15 words of the word "Circuit." This should identify all of the decisions in which Judge Bork participated because the official reporter begins by indicating that the case is "Before [judges' names]" and then identifying the members of the court as "Circuit Judges."

[5] All but 16 of the cases were decided by three-judge panels. The remainder were heard by the full court.

In determining whether to count the case as a split decision, we looked only at the court's judgment. If at least one judge dissented on any issue, we recorded it as a split decision. In identifying split decisions, we did not evaluate concurring opinions, even if the concurrence was based on a fundamental disagreement about the law.[6] And we recorded a case as a victory against the government if the individual, organization, or business prevailed on any significant issue affecting the judgment.

We have not counted any case as a split decision based solely on the existence of a dissent from denial of rehearing en banc, because judges often decide whether or not to rehear cases en banc for reasons that do not reflect their views on the merits, such as the importance of the issue and whether the panel's decision is inconsistent with another decision of the court. Had we counted such dissents, however, Judge Bork's record would have appeared even more starkly anti-individual.

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[6] Judge Bork has often issued concurring opinions in order to express disagreement with decisions favoring individuals or against businesses. For example, in Center for Auto Safety v. Thomas, 806 F.2d 1071 (1986), Judge Bork concurred in the majority's holding that the consumer group had standing solely because an earlier panel decision had upheld standing in an identical case and the second panel was bound by that ruling even if the judges believed that the prior decision was incorrect, as did Judge Bork. Nonetheless, we did not count the case as a split.

On occasion, the judges voted twice in the same case. Typically, this occurred where the full court reviewed a case that the panel previously decided, or a panel granted a petition for rehearing and issued a second decision. When either of these scenarios occurred, the first decision was vacated, and the second decision became the law of the case. Thus, for this study, we counted only the votes in the second case.[7]

In preparing this report, we also reviewed many of the articles written by Judge Bork. A list of his articles, which was compiled by People for the American Way, appears in the appendix. We have included references to these articles and to other sources in the report where they are helpful to understand Judge Bork's record.

Chapters I (Administrative Law), II (Constitutional Law), III (Criminal Law), and IV (Access) begin with a table of split decisions. In several instances, the split decisions involved disagreements about more than one issue. Nevertheless, we have counted each decision only once in our calculations, although we have discussed several opinions in more than one chapter. The tables account for 50 of the 56 split decisions.[8]

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[7] For example, in McGehee v. CIA, 697 F.2d 1095 (1983), Judge Bork dissented from the panel's decision that the Central Intelligence Agency had acted in bad faith. Because that part of the decision was vacated and the panel was unanimous in the decision that it ultimately issued, 711 F.2d 1077, McGehee was not counted as a split decision.

Where a chapter includes a table on split decisions, we have included a footnote providing a list of numbers that identify the cases counted in the table. The case numbers ("Case No. __") correspond to the list of Split Decisions that appears in the appendix. At the beginning of every chapter, we included a list of references to the opinions by Judge Bork that we reviewed in connection with that chapter. The reference numbers on those lists ("Opinion No. __") correspond to the list of Opinions that appears in the appendix.

Finally, we have included in the appendix a list of Supreme Court cases and doctrines that Judge Bork has criticized and the places where those criticisms can be found.

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[8] Four cases were excluded because the government was not a party. Two of these are important First Amendment cases in which, as discussed in Chapter II, Judge Bork's vote could be characterized as recognizing rights under the First Amendment. Ollman v. Evans, 750 F.2d 970 (1984); Reuber v. United States, 750 F.2d 1039 (1984). The other non-government cases, Catrett v. Johns-Manville Sales Corp., 756 F.2d 181 (1985), and Northland Capital Corp. v Silva, 735 F.2d 1421 (1984), are disputes between private parties. We omitted Reagan for President Committee v. FEC, 734 F.2d 1569 (1984), because it is a companion case to Kennedy for President Committee v. FEC, 734 F.2d 1558 (1984), which was counted. Finally, in Weisberg v. Department of Justice, 763 F.2d 1436 (1985), the court split on whether the appeal should have been filed in the D.C. Circuit or the U.S. Court of Appeals for the Federal Circuit. Although it arguably could be counted as an access case, we have omitted it because the plaintiff agreed with Judge Bork that the case should be transferred.

I. ADMINISTRATIVE LAW[9]

JUDGE BORK'S VOTES IN SPLIT DECISIONS IN ADMINISTRATIVE LAW CASES NOT BROUGHT BY BUSINESS

	Public Interest Group, Worker, FOIA Requester, Candidate	Executive
General Regulatory Cases	1	7
Labor Cases	1	4
Freedom of Information Act Cases	0	7
TOTAL	2	18

JUDGE BORK'S VOTES IN SPLIT DECISIONS IN ADMINISTRATIVE LAW CASES BROUGHT BY BUSINESS

	Business	Executive
FERC, ICC, Department of Agriculture Cases	5	0
Labor Cases	3	0
TOTAL	8	0

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[9] Judge Bork participated in the following split administrative law decisions: Case Nos. 8, 10, 19, 45, 49, 50, 55, 61 (public interest); 13, 14, 21, 24, 26, 31, 48 (labor/worker); 2, 3, 9, 10, 16, 18, 51 (Freedom of Information Act ("FOIA") and related statutes); 40, 41 (Federal Election Commission ("FEC")); 1, 5, 25, 34, 37, 44, 104 (business/Federal Energy Regulatory Commission ("FERC"), Interstate Commerce Commission ("ICC"), Department of Agriculture); 11, 26 (business/labor). He also wrote the following opinions: Opinion Nos. 1, 4, 6, 17, 24, 40, 55, 61, 68, 84, 87, 101, 111, 113, 118, 125; 18, 19, 31, 39, 69, 76, 116, 135 (consumer/environmental); 89 (FCC); 8, 10, 14, 22, 54, 56, 57, 80, 86, 97, 100, 102 (FERC); 29, 48, 58, 60, 63, 71, 82, 83 (ICC); 5, 20, 38, 53, 66, 67, 122, 133 (FOIA); 3, 9, 11, 23, 26, 30, 32, 52, 75, 85, 88, 93, 96, 99, 110, 114, 120, 121, 131, 139 (labor); 12, 15, 25, 42, 49, 51, 59, 60, 65, 69, 71, 92, 104 (other administrative law). A similar list will be included at the beginning of every chapter. The cases and opinions appear in the appendix.

The largest portion of cases litigated in the D.C. Circuit involve challenges to the decisions of federal administrative agencies. In many of these cases, one of the underlying issues is economic. Will the Federal Energy Regulatory Commission ("FERC") allow a utility to increase its rates? Will the Federal Communications Commission ("FCC") renew a radio station's license? Will the Nuclear Regulatory Commission ("NRC") grant an operating license to a nuclear power plant?

Most of these cases also have a direct impact on the public. FERC rate decisions affect consumer energy prices. FCC licensing proceedings influence the content and quality of radio programs. And NRC licensing decisions have obvious safety implications for workers and those who live near nuclear reactors. Depending on which way the agency rules, it may be aligned with either consumer or business interests if the matter goes to court. For example, if the NRC grants an operating license to a nuclear power plant and is sued by an environmental group, the NRC will, in effect, be advocating the position favored by the utility, even if the utility is not a party in the case (which rarely occurs since the utility would ordinarily intervene). On the other hand, if the NRC denies a license and is sued by the utility, the NRC will, in effect, be representing environmental interests, regardless of whether an environmental group chooses to participate.

Judge Bork has expressed his view that the courts should show great deference to administrative agencies and rarely overturn their decisions. We have reviewed his administrative record on the D.C. Circuit with this principle of judicial deference in mind and have divided the results into three sections. In the section A, the study confirms that Judge Bork has applied judicial deference consistently whenever consumer, environmental, or other non-business interests are seeking judicial review of agency action: he voted for the executive in 7 out of 8 split cases brought by non-business parties, as well as in the 7 split decisions brought under the Freedom of Information Act ("FOIA"). The sole exception was in an election case involving the committees for two 1980 presidential candidates -- Ronald Reagan and Edward Kennedy. Judge Bork overturned a decision of the Federal Election Commission ("FEC") concerning a candidate's repayment obligations from matching federal funds. Although technically there are two reported split decisions, we have treated them as one case for statistical purposes because the second case, Reagan for President Committee v. FEC, 734 F.2d 1569 (1984), simply adopted the analysis and holding in Kennedy for President Committee v. FEC, 734 F.2d 1558 (1984), which was decided on the same day. Section A also demonstrates that in cases in which businesses challenged agency decisions, Judge Bork often overturned the agency and ruled in favor of the business interests, even though the same rules of judicial restraint theoretically apply. Thus, he voted in favor of business in each of the 5 split decisions involving business challenges.

In section B, we evaluate Judge Bork's decisions in the labor field. Many of these cases are disputes between business and labor before the National Labor Relations Board ("NLRB"), while others involve labor disputes within the federal government. In all but one of the 5 split decisions involving cases brought by workers against the executive, Judge Bork sided with the federal government. Included in the table for labor cases as a loss for the individual is Shultz v. Crowley, 802 F.2d 498 (1986), in which the issue on which the court was divided was whether workers who had prevailed in an employment discrimination case should be awarded attorneys' fees. It is discussed in Chapter IV on access, along with other attorneys' fees cases not involving claims by workers. In the one exception, Judge Bork voted to send a case back to the Merit Systems Protection Board for a statement of the reasons why the Board ruled against the workers.

Conversely, in the 3 split decisions in which business was suing, Judge Bork voted for the business interest every time. Included in the table for labor cases as a victory for business is National Treasury Employees Union v. Federal Labor Relations Authority, 800 F.2d 1165 (1986), in which a union objected to an agency decision that regulated its "business" of representing workers by requiring it to provide attorneys for nonmember employees.

In section C, we consider Judge Bork's opinions in cases under the Freedom of Information Act and other open-government statutes, and once again his record is consistent: in 7 split decisions, Judge Bork voted for the executive every time.

A. General Regulatory Cases

We identified 13 regulatory split decisions in which there was an identifiable business and consumer interest, and in each of those cases Judge Bork voted in favor of the business interest and against the consumer or environmental group. Judge Bork voted to uphold the agency's position, and thereby to protect the business interests at stake in 7 cases: in 2 consumer challenges to FCC decisions; and in 5 separate challenges by public interest groups to decisions of the Nuclear Regulatory Commission, Environmental Protection Agency, the Food and Drug Administration, the Department of the Treasury, and the Department of Health and Human Services. On the other hand, in 5 cases in which businesses challenged agency action, 3 involving decisions by FERC, one by the ICC, and one by the Department of Agriculture, Judge Bork voted to overturn the agency. This sharp contrast between Judge Bork's votes when the complaining party is a consumer or public interest organization and his votes when the complaining party is a private corporation or other business raises serious questions about his commitment to judicial deference in cases challenging decisions of administrative agencies.

As we have already stated, in split cases involving challenges by consumers, environmentalists, and other public interest groups, Judge Bork showed great deference to the agency's position. The first of these cases, McIlwain v. Hayes, 690 F.2d

1041 (1982), raised the question of whether the Food and Drug Administration ("FDA") had the authority to continue to allow the sale of color additives 22 years after Congress passed the 1960 Color Additive Amendments to the Food, Drug, and Cosmetic Act, which requires manufacturers to show that an additive is "safe" before they can use it. In enacting the law, Congress provided for a 2-1/2 year "transitional" provision under which additives already on the market could continue to be used "on an interim basis for a reasonable period" during which the manufacturers would complete the animal testing necessary to prove their safety. That provision further permitted the FDA to extend the 2-1/2 years for a particular additive if further scientific studies were needed, as long as the studies were completed "as soon as practicable."

Relying on this provision, the FDA had extended the transitional period for a total of 20 years to allow 23 additives, which comprised the bulk of the most widely used dyes in food, drugs, and cosmetics to remain on the market. The plaintiffs argued that the agency's actions violated both the letter and spirit of the law, especially since the legislative history showed that Congress had imposed the burden of proving safety on the manufacturers because "it would take 20 years" for the agency to complete the testing. Congress had determined that "this cannot be justified on any grounds," since "[d]uring that time the public would have to run the risk of daily exposure to dyes which have not been clearly proven to be safe." 690 F.2d at

1051, quoting 106 Cong. Rec. 14,350 (1960)(remarks of Rep. Delaney).

Judge Bork agreed with the FDA that the transitional provisions gave the agency ample discretion to continue to allow the sale of the additives. In so concluding, he ruled that, under the "plain meaning" of the statute, the agency had the discretion to continue to postpone the transitional period long after the original 2-1/2 year period had lapsed. 690 F.2d at 1046. He premised his plain language interpretation largely on the fact that "[t]he statute also sets no time limit" for the expiration of any extensions of the transitional period, a fact that he found to be "particularly significant since Congress has set such time limits in analogous statutes." Id.

Judge Abner Mikva's dissent began with his summary of Judge Bork's decision:

> Some twenty-two years [after the Color Additive Amendments were enacted], the majority is willing to let the FDA and industry go some more tortured miles to keep color additives that have not been proven safe on the market. The majority has ignored the fact that Congress has spoken on the subject and allows industry to capture in court a victory that it was denied in the legislative arena. The 1960 Color Additive Amendments have been made inoperative by judicial fiat.

Id. at 1050. Judge Mikva responded to Judge Bork's remark that although the additives had been on the market for 22 years without the requisite proof of safety, "[p]erfection is not a requirement of the statute." According to Judge Mikva, "[s]uch a perception of 'perfection' suggests that the court may not think this dispute as important as [plaintiffs] or the Congress seem to believe," and "[o]ne may marvel at the tolerance and patience that the majority exhibit toward the administrative process, but one equally must be dismayed at the short shrift given a clear legislative mandate." Id. at 1053. Judge Mikva concluded by noting that "[t]his charade of the regulation of color additives is a pungent example of the administrative process at its worst." Id.

Judge Bork also sided with business interests against public interest plaintiffs in the only two split Federal Communications Commission ("FCC") cases in which he participated. Telecommunications Research and Action Center v. FCC, 801 F.2d 501 (1986), involved one of the most controversial issues currently facing the FCC: the continued vitality of the "fairness doctrine." It is rooted in the notion that broadcasters, as public trustees of the airwaves on which they transmit television and radio signals under licenses granted by the FCC, have a duty to discuss fairly and impartially both sides of controversial public issues. Consumer groups have long sought to protect the fairness doctrine, and conversely, broadcasters have long sought its abolition, claiming that it restricts their freedom to choose what to broadcast. Recently, the FCC was called upon to decide whether teletext -- a means of broadcasting textual and graphic material such as news, sports, weather, and advertising to the television screens of home viewers -- is subject to the fairness doctrine.

In TRAC v. FCC, Judge Bork sided with the broadcasters and upheld the FCC's decision to exempt teletext broadcasters from the fairness doctrine on the ground that when Congress amended the Communications Act in 1959, it failed explicitly to embrace and codify the fairness doctrine; hence he noted that the FCC is free to modify or even abandon it. Judge Bork's opinion also raised questions about the continuing constitutional justification for the fairness doctrine for all television and radio broadcasters, even though only the teletext question was before the court:

> Perhaps the Supreme Court will one day revisit this area of the law and either eliminate the distinction between print and broadcast media, . . . or announce a constitutional distinction that is more usable than the present one. In the meantime, neither we nor the Commission are free to seek new rationales to remedy the inadequacy of the doctrine in this area.

801 F.2d at 509. As he recognized elsewhere in the opinion, this would require overruling Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) -- the Court's seminal decision upholding the constitutionality of the fairness doctrine. 801 F.2d at 509 & n.5.[10]

Judge George MacKinnon dissented, and the full court split 5 to 5 on whether to rehear the case, which resulted in the denial of rehearing. In a dissent from the court's denial of rehearing en banc, Judges Mikva and Harry Edwards charged that Judge Bork had engaged in "overreaching to undo" Congress's will:

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[10] In an opinion issued on July 21, 1987, Branch v. Federal Communications Commission, ___ F.2d ___, No. 86-1256, Judge Bork renewed the debate over the continued validity of the fairness doctrine under the First Amendment. Although he restated his position that only the Supreme Court could overturn Red Lion, and noted that the Court had recently rejected such a challenge, Slip Op. at 20-21 & n.13, 24-26, he suggested certain steps that the FCC could take to force the issue on the Supreme Court. Id. at 21 & n.13, 25-26 & n.15.

> **The primacy of Congress as policy-maker should not be blunted or eviscerated by courts which find either the policy or policy-makers in error. When Congress ratifies an administrative determination, it converts an agency decision into positive, affirmative law. While such a conversion ought not be lightly inferred, neither should it be arrogantly disregarded when the history is as clear as it is here.**

806 F.2d at 1118.

In the other split FCC case, Black Citizens for a Fair Media v. FCC, 719 F.2d 407 (1983), Judge Bork upheld a decision to simplify license renewal procedures to the point where a broadcaster need only complete a postcard. The stakes in this case were high because during license renewal proceedings consumer organizations often argue that the license should be awarded to another broadcaster because the current holder has not adequately served the public interest, as required by the Communications Act. Although the FCC had previously required broadcasters to demonstrate that their programming promoted the public interest, the Commission effectively shifted the burden of proof from the broadcaster to the public, which must now prove that the station's programming is not in the public interest. In his dissent in Black Citizens, Judge Skelly Wright characterized as "extravagant" Judge Bork's claim that his decision was consistent with the congressional intent. In Judge Wright's view, after so many years of settled construction of the law, which had long been accepted by Congress, an agency could not simply do an about-face and rely on public complaints to assure diverse programming and satisfy the other goals of the Act. Id. at 434-35.

During his tenure on the D.C. Circuit, Judge Bork participated in 13 environmental cases brought by environmental or similar organizations. Two of these cases resulted in split decisions on the merits and are included in the table at the beginning of this chapter. In Natural Resources Defense Council v. Environmental Protection Agency, 804 F.2d 711 (1986), Judge Bork upheld the Environmental Protection Agency's ("EPA's") withdrawal of proposed regulations that would have imposed strict limits on, and ultimately eliminated, the amount of vinyl chloride emissions permitted under the Clean Air Act. No one disputed that vinyl chloride, which is used in the manufacture of plastics, is a "strong carcinogen." In fact, the EPA had concluded that it appeared to create a risk to health at all levels of emissions. Nevertheless, the agency withdrew the proposed regulations because they would have imposed "unreasonable" costs on the industry and because there was some uncertainty regarding the availability of the technology to reduce vinyl chloride emissions.

The case turned on the interpretation of section 112 of the Clean Air Act, which directs the EPA to set emission standards for hazardous air pollutants so as to provide "an ample margin of safety to protect the public health." The petitioners argued that this language required the EPA to rely only on health considerations in setting such standards, and did not permit the agency to consider economic and technological factors, particularly since the purpose of the Clean Air Act was to force industry to develop new technology to eliminate hazardous air pollutants. The EPA and the chemical industry intervenors argued that the language of the statute gave the agency sufficient discretion to consider any factors it wished, as long as the factors were "reasonable." Judge Bork agreed with this interpretation.

In reaching his conclusion, Judge Bork first found that the statutory language "ample margin of safety" was vague. He therefore turned to the legislative history to discern Congress's intent, which he also found inconclusive. Therefore, relying on the Supreme Court's decision in Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984), which directs courts to defer to an agency's reasonable interpretations of its statute, Judge Bork upheld the EPA's decision. Id.

In dissent, Judge Wright wrote that the clear meaning of the statute demonstrated that protection of the public health was the only factor that Congress intended to govern the setting of emission standards. Id. at 730-32. He also found the majority's decision inconsistent with a substantial body of environmental cases demonstrating that Congress knows how to write statutes that instruct an agency to weigh economic and technological feasibility factors in the standard setting calculus, but did not do so here. Id. at 736-37. Thus, Judge Wright concluded that "[t]he majority's interpretation muddles what has been a remarkably coherent body of law addressing the proper place of technological and economic feasibility considerations under the Clean Air Act." Id. at 731. As to Judge Bork's reliance on Chevron, Judge Wright observed that the "majority uses 'ambiguous' legislative history . . . to indict a provision that is otherwise clear on its face," and that "[t]his is a contorted approach to statutory interpretation." He concluded that "[t]his approach comes perilously close to establishing an absolute rule of judicial deference to agency interpretations." Id. at 733.

Finally, Judge Wright explained that "Congress did not enact the Clean Air Act in order to reach a 'reasonable' accommodation between air free of hazardous pollutants and economic considerations," but instead "moved with grim determination to clear the skies of these toxics, and imposed upon the country a policy of stringent 'technology-forcing' regulation as a 'drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution.'" He concluded that, "in diluting the effectiveness of that remedy, this court ignores both the letter of the Act and the uncompromising spirit behind it." Id. at 738.[11]

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[11] The case was reheard by the full D.C. Circuit (excluding Judge Wright who is now retired), and on July 28, 1987, the court issued a unanimous opinion written by Judge Bork. While Judge Bork's opinion for the full court did not retract his earlier ruling that EPA may consider cost and technological feasibility in some circumstances, the court ruled that EPA may do so only after it determines that, based solely on health considerations, a particular level of a substance provides "an ample margin of safety," which is the term used in the statute. Because EPA had not made the requisite safety finding before considering cost and technical feasibility, the court remanded the case for further proceedings before EPA.

Judge Bork also wrote the majority opinion for the en banc court in San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission, 789 F.2d 26 (1986). The case presented the question of whether citizens living near the Diablo Canyon nuclear power plant in California had been denied their statutory right to a hearing under the Atomic Energy Act. The citizen groups contended that the Nuclear Regulatory Commission ("NRC") regulations dealing with emergency planning required the agency to consider the potential complicating effects of earthquakes on emergency responses in deciding whether to grant a license to the utility company to operate the plant. The design and operation of the plant had been in controversy for over ten years, largely because the Diablo Canyon plant was located only three miles from an active fault line. However, a divided Commission had decided that the probability of an earthquake occurring at the same time that there was a nuclear accident at the plant was so remote that the earthquake issue did not have to be considered in the licensing proceeding.

In upholding the NRC's decision, Judge Bork gave "great" deference to the agency's interpretation of its own regulations. Id. at 30. However, in doing so, he sidestepped evidence demonstrating that in the past the agency had interpreted the hearing requirement as encompassing consideration of complications from earthquakes, and instead ruled that, since the agency's present interpretation was reasonable, it must be upheld. Id. at 35-36. In reaching this conclusion, he was particularly persuaded by the agency's calculations demonstrating that the probability of an earthquake causing or occurring at the same time as a nuclear accident at the plant was extremely low:

> At some point the probability of an occurrence becomes so infinitesimal that it would be absurd to say that a hearing about it is required. Thus, no one would argue, or so we assume, that the Commission had to consider the possibility that a space satellite might fall on the Diablo Canyon plant.

Id. at 37. In a dissent joined by three other judges, Judge Patricia Wald found that "[t]he NRC's absolute refusal to consider any evidence of complications caused by earthquakes which might cause or occur simultaneously with a radiologic release at Diablo Canyon is inexplicable in legal, logical, or common sense terms." Id. at 60.

There is another split environmental case, Bellotti v. NRC, 725 F.2d 1380 (1983), which concerned the NRC's consideration of safety concerns involving the Pilgrim Nuclear Power Station in Massachusetts. Judge Bork ruled in favor of the NRC and the utility on procedural grounds, holding that the Attorney General of the State of Massachusetts had no right to intervene in the NRC's proceeding to raise the safety issues. The decision, the dissent, and their ramifications are discussed under Access, in Chapter IV, Section A.

The final case in which Judge Bork differed from his colleagues on the extent to which an agency's position was entitled to deference did not involve business interests, but instead involved a challenge to regulations issued by the Department of Health and Human Services ("HHS"), which required that notice be given to parents whenever federally funded family planning programs prescribe contraceptives for teenage girls. Planned Parenthood Federation of America v. Heckler, 712 F.2d 650 (1983). The majority found that the notice requirement was illegal because Congress had adopted the legislation to improve access by minors to family planning services in an effort to prevent unwanted pregnancies. Because Congress explicitly stated in amending the Act that it did not intend to "mandate" family involvement in the delivery of services, but rather wanted the programs to "encourage" teenagers to bring their families into the process, the court held that the parental notification requirement was inconsistent with Congress's intent.

Although Judge Bork agreed with the majority that Congress intended that parental notification be voluntary on the teenager's part, id. at 665, 667, he argued that, because the regulations pertained to "a vexed and hotly controverted area of morality," id. at 665, the agency should be given another chance to issue the regulations. To justify this position, Judge Bork relied on the general provisions of the statute that contained a broad delegation of rulemaking authority to the agency. Id. at 667. Thus, Judge Bork's dissent took the position that, even where specific statutory provisions and legislative history on the specific issue indicate that Congress intended to forbid the agency from issuing certain regulations, the courts are free to uphold those regulations based on broader delegations of authority to the executive branch, unless the regulations are explicitly barred by the statute.

Judge Bork's willingness to defer to agency decisions is much less pronounced when the objecting party is a business. Without question, the most controversial case in this category is Jersey Central Power & Light v. Federal Energy Regulatory Commission, which spawned three opinions from the court, the final one en banc. In 1982, Jersey Central, an electric utility, filed requests for rate increases with the Federal Energy Regulatory Commission which were designed to recover $397 million that the utility lost when it suspended construction of a nuclear plant at Forked River, and to obtain a return on its lost investment in the plant. Like all rate cases, FERC's decision has a direct impact on the utility's customers who bear the economic brunt of any rate increase. In keeping with its longstanding policy regarding abandoned facilities, FERC allowed an increase in rates to recover the expense of building the cancelled project, but denied the company any return on its investment. FERC also rejected the company's argument that it was entitled to a hearing so that it could demonstrate that FERC's order was unreasonable because the utility was in "precarious" financial condition and could not, without the requested increases, recover a reasonable return on its investment.

When Jersey Central's challenge to FERC's decision first came before the Court, Judge Bork, writing for an unanimous court, rejected all the utility's arguments. 730 F.2d 816 (1984). After Jersey Central asked the court to reconsider its decision, however, Judge Bork switched his position and wrote two opinions siding with the utility, one on behalf of a regular panel of the D.C. Circuit, 768 F.2d 1500 (1985), and a second one on behalf of the full court, 810 F.2d 1168 (1987).

In his new approach to the case in the second panel opinion, Judge Bork emphasized the importance of "[j]udicial protection of the investor interest [in a utility]," and he focused on whether FERC's order allowed Jersey Central's shareholders a "reasonable" return on their investment in the aborted nuclear power plant. 768 F.2d at 1503. In suggesting that FERC's order did not provide for sufficient profits, Judge Bork took the unprecedented step of comparing Jersey Central's rates to those charged by "neighboring utilities." Under Judge Bork's analysis, if Jersey Central's higher rates did not exceed those of other utilities, as the company had contended, it would be unfair for FERC to reject them, regardless of the impact that they might have on Jersey Central's own customers. Id. at 1502. Judge Bork ordered FERC to hold a hearing and to "promptly grant a rate increase" if Jersey Central's factual contentions are borne out by the record created during the hearing. Id. at 1505. Judge Mikva disagreed with Judge Bork's reasoning and result. He charged that Judge Bork had "profoundly misconstrue[d]" the Supreme Court's decision in Federal Power Commission v. Hope Natural Gas, 320 U.S. 591 (1944), and had departed from Judge Bork's own cardinal rules of judicial restraint. Id. at 1506.

In the Court's en banc ruling, Judge Bork repeated his prior justification for siding with the utility. 810 F.2d 1168. Once again, Judge Mikva dissented, joined by Judges Wald, Edwards, and Spottswood Robinson. Judge Mikva's dissent criticized Judge Bork's ruling for three basic reasons. First, Judge Bork refused to defer to FERC's decision in favor of Jersey Central's ratepayers, although he has repeatedly argued that judges should accord great respect to decisions of expert executive agencies. Id. at 1197-1204. Second, in requiring FERC to hold a hearing, Judge Bork ignored a 1978 Supreme Court decision, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 591 (1978), which directs courts not to impose their own ideas of proper procedures on administrative agencies. In Judge Mikva's words, the ruling "constitutes a blatant interference with the ratemaking procedures adopted by the Commission" which "would have been deemed outrageous even in the days before Vermont Yankee" and cannot be regarded as "unobjectionable in this age of judicial deference." Id. at 1194 (citation omitted).

Judge Mikva also criticized Judge Bork's decision as showing great solicitude for the interests of corporations but displaying callousness for consumers. He noted that Judge Bork's opinion simply assumed that Jersey Central's "neighboring utilities" do not exploit their own customers by charging high rates and that Jersey Central's costs are no lower than those of other utilities. Judge Mikva found these assumptions unwarranted because utilities are natural monopolies and costs vary widely among utilities. Id. at 1206-12.

Judge Bork also sided with the utilities in another important FERC case that resulted in a split panel. The principal question presented in Middle South Energy, Inc. v. FERC, 747 F.2d 763 (1984), was whether FERC has the authority to "suspend" initial rate filings. By making an initial filing a utility may charge higher rates between the time it applies for the increase and the time FERC rules on the application, which can be several months or longer. The issue in Middle South was whether FERC can require utilities to refund these interim rate increases if it disapproves the application. Unless FERC has such authority, utilities can charge exorbitant rates during the time FERC is considering the rate increase, and those rates will not be subject to a refund order. Thus, the case had enormous significance to consumers.

After Trans Alaska Pipeline Rate Cases, 436 U.S. 631 (1978), in which the Supreme Court construed a provision of the Interstate Commerce Act that was parallel to FERC's suspension powers, FERC reversed its prior position and concluded that it did have the authority to make initial rate filings subject to a refund order. This new policy came into play in Middle South when a consortium of utilities created a wholly owned subsidiary to operate a new nuclear power plant and submitted what it described as an "initial rate filing" to FERC. Not only did FERC question whether the subsidiary could make an "initial rate filing," as opposed to a modification of an existing one, but it also found that the proposed rates might be unlawful. It therefore "suspended" the rates, which means that the rate structure in the initial filing takes effect, but is thereafter subject to a refund order.

When the utility challenged FERC's statutory authority to suspend its filing, Judge Bork sided with the utility, concluding that the Federal Power Act did not give the agency that authority. In so ruling, Judge Bork rejected the Commission's construction of its own statute and substituted a reading of the Act that he deemed more plausible. Moreover, he dismissed the Commission's "fears that utilities will be able to charge unreasonable rates with impunity, and will retain the unlawful proceeds even after the Commission has ordered them to cease," but he provided no explanation as to why those fears were not justified. 747 F.2d at 771.

Judge Ruth Ginsburg filed a lengthy dissent, taking Judge Bork to task for two major reasons. First, she criticized him for rejecting the agency's construction of its own statute without even citing, much less discussing, the Supreme Court's ruling in Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984), which held that, absent clear evidence that an agency's construction of its statute is incorrect, the agency's interpretation merits considerable deference. 747 F.2d at 774. Judge Ginsburg also faulted Judge Bork for failing to read the statute in a manner which comports with the overall purpose of the Act. According to Judge Ginsburg, by denying the agency the power to suspend initial rate filings, the court was interfering with the agency's ability to fulfill its statutory mission. Id. at 774-77.

Judge Bork also ruled against the consumer interests and in favor of those of business in National Soft Drink Association v. Block, 721 F.2d 1348 (1983). In that case the soft drink industry sued the Department of Agriculture after the Department prohibited the sale of sodas and other "junk foods" in schools during those times when students were being served meals under the school lunch and breakfast programs. The agency had concluded that the ban was necessary to ensure that students did not consume junk foods instead of the more nutritious school meals, and that decision had been upheld by the district court. Judge Bork joined in a panel ruling, over the dissent of Judge Malcolm Wilkey, which found that the agency's interpretation of its own statute was in error and that it did not have the authority to ban the sale of soft drinks in schools during mealtime. Id. at 352.

B. Labor Cases

In the labor area, as throughout his judicial record, Judge Bork has been deferential to agency decisions that upheld the rights of business institutions, but non-deferential to those agencies that ruled in favor of workers or their unions. Of 8 cases in which the members of the court disagreed about the proper outcome, Judge Bork voted against the workers' claims 7 times (one of which was a vote against the workers' claim against their union; in another case, the only issue involved an attorneys' fee claim). The only vote in favor of an employee came in a case in which Judge Bork voted against the worker on the principal issue, by upholding an employer's decision to discharge the worker, but remanded the case for the agency to explain a procedural ruling made against the worker, although the terms of the remand were such that defeat for the worker was nearly inevitable. York v. Merit Systems Protection Board, 711 F.2d 401 (1983).

Three of Judge Bork's decisions reflect marked insensitivity to problems of workplace safety. In Prill v. National Labor Relations Board, 755 F.2d 941 (1985), a driver for a nonunion company refused to drive a company tractor-trailer because it had faulty brakes and other unsafe features that had previously caused it to jack-knife in a highway accident. When Prill called the state police to have them perform a safety inspection, rather than following company orders to take the truck back out on the road, the company fired him because "we can't have you calling the cops all the time." In one of their first major decisions, President Reagan's appointees to the National Labor Relations board ("NLRB") reversed prior precedent that had given protection to workers who complained to state safety agencies about working conditions of common concern to other workers. Instead, the Board ruled that the National Labor Relations Act ("NLRA") forbade it to extend such protection unless the worker in question expressly joined with others in rejecting unsafe work.

The Court of Appeals rejected the NLRB's decision. Without reaching a final determination about whether the NLRA actually affords protection to workers such as Prill, the majority opinion (written by Judge Edwards, formerly a law professor and management-side labor lawyer) noted that shortly after the NLRB's decision was issued, the Supreme Court had decided that a worker for a union company who refuses to take out unsafe equipment is protected by the NLRA and that individual workers are protected even when they act alone. Id. at 951-53. Moreover, the majority concluded that the Labor Board had ignored or misread a number of decisions that had allowed protection for workers, even though their protests about unsafe work had not been closely joined with those of other workers, and thus it could not be said that the statute was so narrow as to forbid protection in Prill's case. Id. at 953-56. Finally, according to the majority, not only did the Board's decision leave the anomaly that the NLRA would protect union workers for doing something for which non-union workers were left unprotected, but the Board was also allowing a worker to be discharged for refusing to do work declared unsafe by a state's officers "despite the fact that both the employee and the company were under a legal obligation not to operate the vehicle." Id. at 957. Thus, since the NLRB has been given very broad leeway to develop the meaning of the NLRA in light of the realities of the workplace, the majority sent the case back to the Board to exercise its discretion to construe the statute in light of the fact that the statute did not forbid protection.

Judge Bork voted to affirm the Board's decision. Although his decision would uphold the Board's decision in the particular case, his opinion actually goes much further, because it would preclude the Board from exercising its discretion to interpret the statute as the Board had previously done. Id. at 961-63. Because the statute includes the word "concerted," Judge Bork concluded that the law forbids the Board to extend protection to workers who act by themselves, even if they act on a matter of common concern about which it may be presumed (and the NLRB had previously presumed) the other employees would generally agree. Id. at 964 n.7. Judge Bork made no effort to explain how this right could be exercised by workers such as truck drivers who work alone, in contrast to those who work in a factory or other single location, where they normally face workplace problems at the same time and place. He also attempted to supply a justification for protecting union workers while denying protection to non-union workers, and thus for ruling that the Board was forbidden to protect the latter group. Id. at 966. But, as the majority observed, Judge Bork's lengthy discussion of these issues "only underscore[s] the failure of the Board to provide a reasoned basis for such a distinction in its own opinion." Id. at 957. In effect, Judge Bork was attempting to substitute his own understanding of industrial realities and desirable federal labor policies for the analysis that might be forthcoming if the administrative agency were permitted to address those issues in the first instance.

Another workplace safety case in which Judge Bork found a statute to be too narrow to protect employees against a plain hazard is Oil, Chemical and Atomic Workers International Union v. American Cyanamid Co., 741 F.2d 444 (1984). In that case, a manufacturing plant had so much lead in the air that the levels of lead in the blood of pregnant workers would endanger their fetuses. Rather than take the lead out of the air or undertake other protective measures which the plaintiff argued were feasible, the company chose to take the fetuses out of the women, i.e., it told all women workers between the ages of 16 and 50 that they would be removed from their jobs unless they presented proof that they had been sterilized.

The Secretary of Labor concluded that this policy of "fixing the worker" instead of "fixing the workplace" was not what Congress had in mind when it passed the Occupational Safety and Health Act and required every employer to furnish "to each of his employees employment and a place of employment which are free from recognized hazards . . .." 29 U.S.C. § 654(a)(1). However, Judge Bork, writing for a unanimous panel, disagreed. Over the plaintiff's heated objection, he strongly implied that the company could do nothing to reduce the hazard posed by the lead, and that its drastic sterilization policy was the only "realistic and clearly lawful" measure it could employ to avoid harming the fetuses. Id. at 446. He then found that the plain meaning of the statute did not apply to the employer's "fetus protection policy," because the various examples of "hazards" cited in the legislative history all referred to poisons, combustibles, explosives, noises and the like, all of which occur in the workplace. Because the fetus protection policy, by contrast, was effectuated by sterilization performed in a hospital outside the workplace, the court held that it was not covered by the Act, and thus an employer may require its female workers to be sterilized in order to reduce employer liability for harm to the potential children.

In reaching this result, Judge Bork gave no deference to the judgment of the Secretary of Labor that the Act which he enforces protects women's right to a safe workplace without undergoing compulsory sterilization. Under Judge Bork's view, the Secretary exceeded his authority under the Act in seeking to protect the jobs of women who have been given a choice between continued employment and sterilization.[12]

A third safety case in which Judge Bork sided with a business is Simplex Time Recorder Co. v. Secretary of Labor, 766 F.2d 575 (1985). The court's majority, including Judge Bork, upheld several findings that a business employer had violated the Occupational Safety and Health Act by failing to maintain sufficient protection against fires in the workplace. The Secretary of Labor appealed the Occupational Safety and Health

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[12] The Occupational Safety and Health Review Commission had rejected the Secretary's position, but in cases under the analogous Mine Safety Act, the D.C. Circuit has held that it is the Secretary of Labor, not the Review Commission, that is entitled to judicial deference. Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 537 & n.2 (1986). Although the court has left open the question of whether deference is due to the Secretary as opposed to the Review Commission, it was scarcely principled decision-making to have decided American Cyanamid without even considering the issue.

Review Commission's refusal to find that the violations were "serious," thus warranting a more severe penalty, despite the fact that a worker had died in a fire, but the majority rejected the Secretary's appeal. Judge Wald dissented from this ruling because the evidence that the hazardous conditions may have caused the fire was "compelling and essentially uncontradicted," and the Commission had improperly required proof of too strong a likelihood of causation. Id. at 592.

Judge Bork again exhibited a willingness to overturn an administrative agency that ruled against a business in Restaurant Corporation of America v. NLRB, 801 F.2d 1390 (1986). Over a strenuous dissent, Judge Bork's opinion overturned an NLRB decision reinstating two employees who had been fired for distributing union sign-up cards to employees. Although employees have no absolute right to talk about the union on the job, the NLRB has a general rule that, if the employer allows talk about other subjects during working hours and in working areas, it cannot discriminate by barring only union discussion. Because the employer in Restaurant Corporation had allowed its workers to solicit each other to contribute money for various purposes, the Board ruled that it was discriminatory to fire workers who had simply promoted the union to their co-workers during working hours.

Judge Bork found that the Board had not presented proof that the other solicitations had created "substantially equivalent potentials for disruption" in the workplace. Because he concluded that solicitation for the union had the potential to create such disruption, Judge Bork allowed the employer to forbid it even though it permitted other solicitations. Id. at 1394. According to Judge Bork, it would be difficult to imagine a pleasant workplace in which interpersonal solicitations could not occur, and thus employers should not be penalized for allowing workers to socialize over non-union matters since any "disruptive effect such solicitations may have is counter-balanced by an accompanying increase in employee morale and cohesion." Id. Judge Bork expressly denied that he was rejecting any Board rules, but simply said that his ruling was based on the lack of "substantial evidence" to support the Board's factual findings. Id. at 1394 n.2.

In fact, Judge Bork's decision, which overrode the NLRB's considered judgments about the realities of labor relations, is based on his personal value judgments about what should and should not be permitted in the workplace in order to make it pleasant (or "gratifying," to use a term that he disdained as a basis for judicial decision making in his seminal law review article -- Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 9-11 (1971)). As Judge MacKinnon pointed out in his dissent, Judge Bork cited no NLRB decisions as authority for his analysis of the "potential for interference," and indeed the NLRB rule is quite the opposite of that set forth in Judge Bork's opinion. Id. at 1404. Judge MacKinnon charged that, despite the pretense of reliance on substantial evidence, Judge Bork was disingenuously applying a new legal standard without any deference to the Board's role in formulating national labor policy: "Despite the clarity of the controlling law, the majority opinion ignores it and trenches on important policymaking prerogatives of the [NLRB]." Id. at 1403. Given the pro-business bias of the Reagan Labor Board, there are rarely any pro-worker rulings coming from it. Thus, Judge Bork's decisions opposing the few pro-worker Board rulings can fairly be seen as quite extreme.

In another NLRB case, Amalgamated Clothing Textile Workers Union v. National Labor Relations Board, 736 F.2d 1559 (1984), Judge Bork joined the majority in upholding an NLRB decision against an employer, but he wrote a concurring opinion, which found narrower grounds for the ruling than did the majority, and which also allowed the NLRB less discretion in the area.[13] Judge Bork's concurring opinion is of interest for another reason. The majority had criticized a Fourth Circuit opinion, principally relied on by the employer, and Judge Bork complained that the Court had "needlessly criticized another Circuit . . . . The majority would have done better to have confined its discussion to the Board's findings without ranging far afield to lay down controversial but irrelevant principles and to decide hypothetical cases." Id. at 1571-72. Whether the criticism was "needless" or not, Judge Bork's statement stands in stark contrast to his use of his own opinions as a podium from which to comment on broad patterns and trends in the law, not only in other courts of appeals, but even in the Supreme Court. Cf., e.g., Dronenburg v. Zech, 741 F.2d 1388 (1984); United States v. Mount, 757 F.2d 1315 (1985); Telecommunications Research and Action Center v. Federal Communications Commission, 801 F.2d 501 (1986); Wolfe v. Department of Health and Human Services, 815 F.2d 1527 (1987).

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[13] Although the caption of the case suggests that the union was seeking to overturn the NLRB's decision, the union's objection was to a minor aspect of this agency's decision, on which all three judges were in agreement. The principal issue in court was the validity of the NLRB's basic order, to which the employer had filed its own objections, and which the court of appeals rejected.

Similar lack of deference is apparent in National Treasury Employees Union v. Federal Labor Relations Authority, 800 F.2d 1165 (1986). Although this is the only split case in which Judge Bork ruled in favor of a labor union, he did so by ruling against the claim of a worker who was in disagreement with the union. The issue was whether, under the duty of fair representation, a federal employees' union may refuse to provide an attorney to represent nonmembers on the same basis that it provides attorneys to members. The duty of fair representation for private unions, which had been implied from the general statutory scheme of the NLRA, requires equal representation only in collective bargaining and contractual grievance procedures. Nevertheless, the Federal Labor Relations Authority ("FLRA") held that, inasmuch as the statute governing federal employee labor relations explicitly requires equal representation and is not expressly limited in the same way as the NLRA's implied doctrine, the federal employee scheme should be read more broadly.

Despite these differences, Judge Bork decided that Congress intended to allow the FLRA to do no more than replicate the private sector duty. He cited no legislative history to support this construction, but instead based it on what he regarded as sound policy, id. at 1170-71, and his willingness to presume that Congress would not reject such a limitation without express reference in the legislative history. Id. at 1171. Although he paid lip service to the rule of deference to agency decision-making, id. at 1168, he appeared to give no deference to the agency's construction of the statute which it enforces. As Judge Luther Swygert argued in dissent, the question was not whether Congress "intended" to create a different duty of fair representation than was applied in the private sector, but rather whether Congress considered, and rejected, the application of a different standard. Id. at 1173. If Congress had no intent with respect to the reach of the statute, then the administrative agency should have discretion to make that determination as a policy matter under Chevron, 467 U.S. 837 (1984). But again, when deference to agency policy making collides with Judge Bork's desire to reinforce the position of established institutions, deference appears to give way.

Our study demonstrates quite clearly that, in close cases, Judge Bork sided regularly with management (either business or government against labor). Moreover, he has been more than willing to take these positions even when he must deny federal agencies the deference that he has so regularly accorded them when workers (or other non-business parties) contest agency decisions.

Although this report does not count votes for or against rehearing before the full court as splits for purposes of the various tables included in it, there is one labor case in which Judge Bork wrote an opinion dissenting from the denial of rehearing which is worthy of note. In *Vinson v. Taylor*, 753 F.2d 141 (1985), the court decided that a victim of sexual harassment by her supervisor had a right to sue her employer under Title VII for sex discrimination, without having to prove that she had actually been discharged or denied monetary benefits, and Judge Bork dissented from a denial of rehearing *en banc* on several grounds. 760 F.2d 1330 (1985). First, he attacked the panel's rejection of a defense based on the "voluntariness" of the employee's participation in a sexual relationship with her supervisor. *Id.* at 1330. The panel excluded such evidence on the ground that the courts should look at whether the sexual advances were unwelcome, and not whether a victim "capitulated" to sexual demands, making the actual sexual interactions arguably "voluntary." 753 F.2d at 146. Second, Judge Bork decried the panel's decision to hold an employer vicariously liable for a supervisor's sexual harassment of an employee. He argued that, since the employer had a written policy against discrimination and was unaware of the supervisor's actions, it should have been relieved of liability. 760 F.2d at 1331. Additionally, in an opinion replete with smirking references to "sexual escapades" and "sexual dalliance," Judge Bork went so far as to question the propriety of treating sexual harassment as a form of discrimination prohibited by Title VII. Id. at 1333. n.7. Although the Equal Employment Opportunity Commission was not a party to the case, its regulations supported the panel's position, and Judge Bork expressly refused to defer to the agency's expert judgment because he did not find its position "persuasive." Id. at 1332 n.6.

On appeal to the Supreme Court, Judge Bork's views on all of these issues were rejected by all nine Justices. Meritor Savings Bank v. Vinson, 106 S. Ct. 2399 (1986).[14] In an opinion written by Justice Rehnquist (joined by five other Justices), the Court first embraced the rule that sexual harassment and an environment of harassment violate Title VII. Id. at 2404-06. Next the Court specifically affirmed the court of appeals' rejection of a defense based on the employee's voluntary relationship with the supervisor and, like the court of appeals, looked instead to whether the sexual advances were unwelcome. Id. at 2406. Justice Rehnquist also specifically rejected the view that an employer's mere adoption of a policy against discrimination, coupled with ignorance of the harassment, could insulate it from liability, although he found it unnecessary to decide under precisely what circumstances vicarious liability should be imposed. Id. at 2408-09. Four Justices distanced themselves even further from Judge Bork's position on employer liability, concluding that employers are strictly liable for sexual harassment by a supervisor of an employee acting within his authority. Id. at 2409-11.

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[14] Judge Bork also objected to the panel's exclusion of evidence of the plaintiff's "sexually provocative" dress and speech, an objection with which the Supreme Court later agreed. 106 S.Ct. 2399, 2407.

C. Freedom of Information Act and Related Statutes

The Freedom of Information Act ("FOIA") requires federal agencies to allow any member of the public to examine their records, unless the agency can shield the records under one of nine narrow exemptions set forth in the Act. In contrast to most statutes, Congress has directed the courts to give federal agencies no deference in almost all cases involving the interpretation and application of this Act.

Since its enactment in 1966, the FOIA has been a valuable resource for many groups and individuals, and the D.C. Circuit hears more FOIA cases than all of the remaining judicial circuits combined. Journalists have used the Act to unearth facts for hundreds of news stories. Businesses and trade associations have regularly obtained data that help them monitor the actions of agencies and competitors with which they deal. And numerous citizens have been able to learn what records are maintained about themselves in government files.

In addition to the FOIA, there are two other significant "open government" statutes that have been the subject of cases in which Judge Bork participated: the Privacy Act, which regulates the use and accuracy of records that government agencies maintain about individuals, and the Government-in-the-Sunshine Act or

"Sunshine Act," which requires certain agencies to conduct their meetings in public, unless one or more statutory exemptions applies.

Judge Bork participated in 25 published cases involving the FOIA, Privacy Act and Sunshine Act, seven of which involved split decisions.[15] In each of the split decisions, Judge Bork voted for the government, and he wrote opinions in four of these cases. Some of Judge Bork's opinions come down quite emphatically in favor of the executive branch's authority to withhold information from the public. In one of those cases, Sims v. Central Intelligence Agency, 709 F.2d 95 (1983), he was ultimately upheld by the Supreme Court. 471 U.S. 159 (1985).

Wolfe v. Department of Health and Human Services, 815 F.2d 1527 (1987), is illustrative of his approach. In that case, the requesters sought access to a "regulations log" which would disclose when proposed and final rules had been sent by the Food and Drug Administration ("FDA") to the Secretary of Health and Human Services ("HHS") and from there to the Office of Management and Budget ("OMB"), a unit of the Executive Office of the

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[15] Five of the splits were FOIA cases, and the remaining 2 were brought under the Privacy and Sunshine Acts, respectively. In Weisberg v. Department of Justice, 763 F.2d 1436 (1986), the court split over a non-FOIA issue, namely, whether an FOIA plaintiff who seeks to pursue both a monetary and FOIA claim in the same case must pursue an appeal in the U.S. Court of Appeals for the Federal Circuit. Because the court did not split on an issue pertaining to the FOIA, this case was not counted in the chart that appears at the beginning of this chapter. Nor does the chart include McGehee v. CIA, 697 F.2d 1095, on rehearing, 711 F.2d 1077 (1983), because the panel was unanimous after its second opinion in the case.

President which scrutinizes all rules for consistency with presidential policies and cost efficiency. The requesters sought access to this log for two reasons: to learn how long FDA rules were being delayed by HHS and OMB, and to find out where the rules were being considered in order to offer their views to the appropriate agency. Their request did not ask for the disclosure of the content of the rules being considered, but only the dates on which they had been sent from one office to another.

The district court rejected HHS's claim that it had lawfully withheld the documents showing these dates under the exemption that applies to documents whose disclosures might interfere with the agency's predecisional, deliberative process, and the D.C. Circuit affirmed over Judge Bork's dissent. In Judge Bork's view, the FOIA allowed HHS to withhold this Log because disclosure "will tend to produce precipitous decision-making and to discourage subordinates from providing their superiors with frank opinions about difficulties." Id. at 1538.

Judge Bork then offered his "tentative views" on the government's claim, made for the first time on appeal, that apart from the FOIA exemption, an "executive privilege" rooted in the Constitution allows HHS and other agencies to withhold communications to and from OMB. Id. He explained that the privilege was "an attribute of the duties delegated to each of the branches by the Constitution. Neither Congress nor the courts, any more than the executive, could be constitutionally forced by a coordinate branch to reveal deliberations for which confidentiality is required." Id. The case, which is discussed in more detail in Chapter V dealing with separation of powers, has recently been set for rehearing *en banc*.

In addition to Judge Bork's expansive view of the exemptions to the FOIA, he also wrote a dissenting opinion in *Greenberg v. Food and Drug Administration*, 803 F.2d 1213 (1986). In that case, a consumer group sought access to a list of facilities that used a potentially dangerous CAT scanner in order to determine if the manufacturer had provided a filter for the machine to guard against excessive radiation. One of the principal problems encountered by requesters in FOIA cases is that they have not seen the documents at issue, and therefore are at a serious disadvantage when an agency argues that the documents contain trade-secret information, as happened in the *Greenberg* case. Judge Bork's view, which the majority rejected, would have denied requesters the opportunity to test the validity of the government's factual claims by cross examination at trial. Judge Bork's approach in *Greenberg* is tantamount to eliminating judicial review in many FOIA cases since it would deny requesters the critical litigation tools they need to test the factual allegations made by the government on a motion for summary judgment. He was willing to impose these burdens on FOIA requesters, even though the government has the burden of proof under the statute.

II. CONSTITUTIONAL LAW[16]

JUDGE BORK'S VOTES IN SPLIT
DECISIONS IN CONSTITUTIONAL LAW CASES
IN WHICH THE EXECUTIVE IS A PARTY

	Individuals	Executive
Substantive Constitutional Protections	0	2
First Amendment	0	4
TOTAL	0	6

Constitutional law cases involve the distribution of power among the various parts of government and the limitations imposed on government control of the conduct of individuals and corporations. Because many constitutional law cases involve issues of great public interest, and because such cases go to the heart of our system of government, it is appropriate that prospective Supreme Court Justices be evaluated in large part on their views on constitutional law issues.

Judge Bork is an advocate of "judicial restraint," i.e., he is said to recognize only those constitutional rights that can be found in the text of the Constitution or the intent of the Framers and not to derive rights from broad phrases in the

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[16] Judge Bork participated in the following split decisions: Case Nos. 52, 54 (substantive constitutional protections); 15, 20, 32, 33, 47, 52, 53, and 54 (First Amendment). Case Nos. 32 and 33 are not included in the tables for the reasons discussed in footnotes 9 and 13, respectively, of this Chapter. Judge Bork also wrote the following opinions: Opinion Nos. 10, 35, 57, 94, 102, 105, 114, 123, 126, 130, 141, 144 (substantive constitutional protections); 16, 24, 28, 44, 49, 77, 78, 79, 115, 124, 128, and 142 (First Amendment).

Constitution based on his own personal values. However, Judge Bork wrote as recently as 1985 that, "intent" has a rather specialized meaning, because judges must apply not just the actual intent of the Framers, but the "principles" underlying the words of the Constitution and even the "objects those principles are . . . intended to achieve." Foreword to G. McDowell, THE CONSTITUTION AND CONTEMPORARY CONSTITUTIONAL THEORY, at x (1985). Judge Bork went on to note that the "level of generality the judge chooses when he states the idea or object of the Framers" is "susceptible to manipulation." Id. at x - xi. In our review of Judge Bork's record on the D.C. Circuit, we have found that his derivation of constitutional principles has indeed been susceptible to such manipulation.[17]

From the limited number of constitutional cases in which Judge Bork participated, the record shows that his judicial approach to constitutional decision-making is no less based on his own personal values than is the approach of the "liberal" judges he criticizes. Thus, his opinions show that, although Judge Bork has consistently exercised judicial restraint when individuals have asked the court to prohibit governmental interference with their activities, he has been much more willing to find new constitutional guarantees when it is business that is complaining about governmental intrusion.

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[17] For a more detailed analysis of this "manipulation," see Dworkin, The Bork Nomination, 34 NEW YORK REVIEW, at 3-10 (Aug. 13, 1987), which also demonstrates that Judge Bork's principal exposition of this constitutional theory, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1 (1971), makes his constitutional decision-making dependent on his own values.

Aside from his votes in these cases, Judge Bork has used his judicial opinions, as he previously used law review articles and writings in the popular press, to state his disagreement with many Supreme Court decisions. Judge Bork's criticisms of Supreme Court doctrine are especially important because he believes that, far more than in other areas of law, Supreme Court Justices are not obligated to uphold precedent on constitutional questions and that "the court ought to be always open to rethink constitutional problems." A Talk with Judge Robert H. Bork, 9 DISTRICT LAWYER 29, 32 (May/June 1985). Indeed, in that interview, he stated that a judge's "basic duty is to the Constitution, not simply to precedent" and that he has in mind Supreme Court doctrines that are worthy of reconsideration. Id. Although in the interview he declined to name the particular Supreme Court cases that he would reconsider, he has openly stated his disagreement with many Supreme Court doctrines both in his judicial opinions and his academic writings. Because Judge Bork's attacks on settled constitutional law may be a fair indicator of how he might try to move the Court as a Supreme Court Justice, we have compiled a list of the Supreme Court's constitutional decisions that Judge Bork has criticized, which is reproduced in the Appendix.

A. Substantive Constitutional Protections

A major area of constitutional debate is the extent to which courts should overturn state or federal legislation based on the substantive protections of the Constitution that limit the government's power to restrict the liberty of individuals and corporations. Earlier in this century, courts used a doctrine called "substantive due process" to invalidate a variety of economic and social legislation. The most infamous of these cases, Lochner v. New York, 198 U.S. 45 (1905), held unconstitutional a statute that limited the number of hours a day that bakers could work. As explained by Chief Justice Stone in United States v. Carolene Products Co., 304 U.S. 144, 152-153 n.4 (1938), the Supreme Court retreated from substantive due process as a constitutional theory that would protect property interests from government regulation, and thereafter began to recognize greater constitutional rights of individuals instead. As Judge Bork himself has recognized, the Lochner-style due process theory is now a thoroughly discredited doctrine. See, e.g., Judicial Review & Democracy, 24 SOCIETY, at 5, 6 (Nov./Dec. 1986).

Under modern constitutional theory, a person seeking protection from the Constitution must overcome a number of hurdles. First, the court must find that the claimed right is one for which the Constitution affords some level of protection. Second, the court must decide whether the statute or other governmental action being challenged is subject to "strict scrutiny" or whether it will only require that the governmental interest bear a minimal relation to the objectives sought (the so-called "rational basis" test). And third, the court must weigh the justification offered, the alleged governmental goals, and the infringement on the rights of the plaintiff to determine whether the applicable test has been satisfied. As an appeals court judge, Judge Bork has exercised considerable restraint in finding constitutional violations when the dispute is between an individual and the government, but has been far more willing to find such violations when the plaintiff is a business organization.

1. Individual Rights

As the table at the beginning of the chapter demonstrates, Judge Bork voted for the government on all 6 split decisions involving individual rights where the government was a party. One of the most controversial individual rights that have been afforded constitutional protection is the right to privacy, which was first articulated in Griswold v. Connecticut, 381 U.S. 479 (1965), a case that struck down a law prohibiting the use of contraceptives. As a law professor, Judge Bork severely criticized the Griswold decision:

> It follows, of course, that broad areas of constitutional law ought to be reformulated. Most obviously, it follows that substantive due process, revived by the Griswold case, is and always has been an improper doctrine. Substantive due process requires the Court to say, without guidance from the Constitution, which liberties or gratifications may be infringed by majorities and which may not.

Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 11 (Fall 1971)("Neutral Principles"). Judge Bork has reiterated his academic theories on the lack of a constitutional underpinning for the right to privacy in his judicial opinions, although he has not gone so far as to declare, as he did as a professor, that "I am convinced, as I think most legal scholars are, that Roe v. Wade [the decision striking down certain state abortion laws] is, itself, an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of State legislative authority." Statement of Prof. Robert Bork, Hearings Before the Subcomm. on Separation of Powers of the Senate Judiciary Comm. on S. 158: A Bill to Provide that Human Life Shall be Deemed to Exist From Conception, 97th Cong., 1st Sess. 310, 315 (April-June, 1981).

Among his judicial opinions, the foremost example of his restrictive view of the right to privacy is Dronenburg v. Zech, 741 F.2d 1388, rehearing en banc denied, 746 F.2d 1579 (1984). In a unanimous opinion written by Judge Bork, the court upheld the Navy's administrative discharge of James Dronenburg, a linguist and cryptographer, for engaging in homosexual conduct. In rejecting the claim that private consensual homosexual activity falls within the zone of constitutionally protected privacy, Judge Bork went out of his way to criticize the Supreme Court's right to privacy cases, finding them so devoid of principle that they provided the lower court judge with no "articulate Supreme Court principle." 741 F.2d at 1392-95. After concluding that Dronenburg's claim required the court to determine whether a new constitutional right existed, Judge Bork adapted his admonition from his previous academic life "that no court should create new constitutional rights," id. at 1396 n.5, to his role as a circuit judge:

> If it is in any degree doubtful that the Supreme Court should freely create new constitutional rights, we think it certain that lower courts should not do so.

Id. at 1396 (footnote omitted). Finally, he articulated a rule of deference to executive and legislative actions:

> When the Constitution does not speak to the contrary, the choices of those put in authority by the electoral process, or those who are accountable to such persons, come before us not as suspect because majoritarian but as conclusively valid for that very reason.

Id. at 1397.

The full Court denied Dronenburg's petition for rehearing with Judges Robinson, Wald, Mikva, and Edwards dissenting, in part because of "the use of the panel's decision to air a revisionist view of constitutional jurisprudence" and "to wipe away selected Supreme Court decisions." 746 F.2d at 1580. In addition, the dissent criticized the Bork opinion for failing to engage in any serious equal protection analysis of the disparate treatment of heterosexual and homosexual conduct. Id. at 1581.

Judge Bork again applied a restrictive approach to the constitutional right to privacy in Franz v. United States, 707 F.2d 582 (1983), which arose when the Justice Department relocated a federal witness, his new wife, and her children by a former marriage, and then concealed the children's whereabouts from their father who retained visitation rights. The father sued over this severance of his parental rights, and the majority, in an opinion written by Judge Edwards and joined by Judge Edward Tamm, held that the total and permanent severance of the relationship between a non-custodial parent and his minor children, without their participation or consent, violated both their rights to privacy and procedural due process.

After the court filed its opinion, Judge Bork filed a separate statement concurring in part and dissenting in part, in which he accused the majority of "creat[ing] a new constitutional right and invent[ing] a new procedure to protect it." 712 F.2d 1428, 1434 (1983). Although he acknowledged that "substantive due process is part of our constitutional law" and that "the Court has fashioned both a substantive and procedural constitutional law of family relations," he stated that lower courts should not go further than the Supreme Court decisions and create any new rights. Id. at 1438. Moreover, Judge Bork found the case an inappropriate one in which to find new rights because he saw no basis to protect the rights of divorced, non-custodial parents comparable to that of protecting "intact marriages" on which he considered the constitutional rights of privacy to be based. Id. In an addendum to the opinion for the Court, the majority noted that even Judge Bork admitted that his "dissatisfaction with the majority's interpretation of the [right to privacy] doctrine derives more from distaste for substantive due process theory in general than from disagreement regarding whether the principles established by the Supreme Court are fairly applicable to the instant case." Id. at 1431.

Judge Bork also applied his philosophy of judicial restraint in Williams v. Barry, 708 F.2d 789 (1983), where the court determined the extent to which the Constitution requires that due process must be accorded homeless men before the District of Columbia could close their shelters. The district court held that the proposed closings implicated a property interest protected by the Constitution -- a ruling that was not appealed. It also held that the Fifth Amendment required the District to provide notice of the planned closing and an opportunity to present written evidence, but that any decision to close the shelters would be immune from judicial review. The majority agreed with most of the district court's rulings, but it vacated the part which insulated any final decision to close shelters from judicial review on the ground that the question would not be ready for judicial review until the District had made a final decision. 708 F.2d at 791-92.

Judge Bork wrote a separate concurring opinion, which reads more like a dissent, in which he expressed his opinion on an issue that the parties did not brief, and the majority did not address: whether the homeless men had any constitutional protection from arbitrary government action in the form of due process rights. As he stated, "[h]ad there been a cross appeal, I think it is highly likely that no process would have been found due." Id. at 793. Judge Bork then took the opportunity to expound his view that it is "revolutionary" to subject what he called "political decisions," to procedural due process requirements and to judicial review:

> The Mayor is an elected official and his decision on the shelters is a political one. From the beginning of judicial review it has been understood that such decisions need not be surrounded and hemmed in with

> judicially imposed processes. Indeed, the reasons for judges not interfering with the methods by which political decisions are arrived at are closely akin, if not identical, to the considerations underlying the political question doctrine, a doctrine which denies the courts jurisdiction even to enter into certain areas.

Id.[18]

Finally, he sided with the government in Cosgrove v. Smith, 697 F.2d 1125 (1983), which involved a claim by male prisoners, who had been convicted of violating the laws of the District of Columbia, that they were denied equal protection because their right to parole depended on the happenstance of whether they had been assigned to serve their sentences in federal or D.C. jails. The majority agreed that the inmates should be given the opportunity to prove the extent of the differing standards and the absence of legitimate reasons for this discriminatory treatment. Judge Bork, by contrast, voted to dismiss this claim entirely on the ground that there "might" be legitimate reasons for the discrimination, even though the court had heard no evidence from either side on any such reasons. Id. at 1144, 1145.[19]

Cosgrove is the only equal protection case that Judge Bork decided other than Dronenburg, discussed above, in which he summarily rejected the claim as being contrary to "common sense and common experience" without demanding proof of any rationale for the discrimination. 741 F.2d at 1398. If the equal protection clause has so little bite that claims may be dismissed with offhand "mights" and "maybes," as in these two cases, then its role as a bulwark of protection for minorities will be severely curtailed. Indeed, as an academic, Judge Bork believed that the equal protection clause applies only to racial discrimination, Neutral Principles, 47 IND. L.J. at 11 -- a view that would eliminate the only constitutional basis for outlawing sex discrimination. See We Suddenly Feel That Law is Vulnerable, FORTUNE, at 115, 143 (Dec. 1971), where he included the "rights of women" in a list of constitutional claims that should be resolved in the political process rather than in the courts.

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[18] These views are reminiscent of those made by Judge Bork in a law review article that he wrote on this theme. See Commentary: The Impossibility of Finding Welfare Rights in the Constitution, 1979 WASH. U.L.Q. 695.

[19] In Cosgrove, Judge Bork agreed with the majority that the inmates should be permitted to develop both the legal and factual basis for their claim that male prisoners had been subject to sex discrimination because female prisoners had the benefit of uniform District parole standards no matter where they were imprisoned. He did not, however, indicate whether a sex discrimination claim could prevail under the Constitution. Id. at 1145-46.

2. Business Rights

Judge Bork's most significant opinions protecting the constitutional rights of businesses are in Jersey Central Power & Light v. Federal Energy Regulatory Commission, which is discussed from an administrative law perspective in Chapter I.[20] An electric utility asserted that the Federal Energy Regulatory Commission's ("FERC's") denial of a rate increase amounted to an unconstitutional "taking" of its property without just compensation and a violation of its due process right to a hearing. Judge Bork first wrote an opinion on behalf of a unanimous panel rejecting the utility's claims on the grounds that the denial of the rate increase did not constitute a "taking" and that the utility had no due process right to a hearing under the circumstances. 730 F.2d 816 (1984). However, on rehearing and rehearing _en banc_, Judge Bork, writing for the majority in both cases, adopted the opposite position, holding that as long as the higher rates sought by Jersey Central did not exceed those charged by neighboring utilities, it would be a violation of both the due process and taking clauses for FERC to reject them. 768 F.2d 1500, 1505 & n.7 (1985), _vacated_, 810 F.2d 1168, 1175-76, 1180-81 & n.3 (1987)(_en banc_).[21]

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[20] Although discussed in both sections, Jersey Central is counted only in the administrative law table. Since the other opinions discussed in this section did not have a split on a constitutional issue, no business cases appear in the constitutional law table.

Judge Mikva dissented from both the second panel and the _en banc_ decisions, and was joined in the latter dissent by Judges Wald, Robinson and Edwards. In addressing the constitutional implications of the majority's decision, Judge Mikva charged that Judge Bork had "revive[d] a thoroughly discredited theory of judicial review" in order to create a new entitlement based on his own "sense of economic fairness." 768 F.2d at 1506, 1513. Thus, according to Judge Mikva, "today's decision in reality signifies a renaissance of Lochner-style substantive due process in ratemaking law," and "revives the spectre of a line of cases the Supreme Court wisely laid to rest half a century ago." Id. at 1513, 1514. Judge Mikva characterized Judge Bork's opinion as "the quiet announcement of a major new federal entitlement" for regulated corporations "to earn net revenues if they can earn them at rates lower than those charged by one or more corporations in the same line of business located nearby." Id. at 1512. According to the dissent, Judge Bork violated his own arguments against creating new constitutional rights:

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[21] This ruling comports with Judge Bork's arguments, made as a professor, that the Constitution protects economic rights, and thus government regulation of such matters as prices and entry into markets impinges on economic freedoms. _The Supreme Court Needs a New Philosophy_, FORTUNE 138, 170 (Dec. 1968); _On Constitutional Economics_, AEI J. GOV'T & SOC'Y 14, 15 (Sept./Oct. 1983).

> What is most startling is that the court's opinion produces this new substantive right virtually out of thin air; the majority just makes it up. It is apparently of no concern to the majority that the Supreme Court has never suggested such a limit on the Commission's authority; indeed, the majority sees no need to refer to any decision by any court, or even a concurring or dissenting opinion, granting to investors in regulated industries anything like the conditional right to dividends recognized by the court today.

Id. at 1512; see also 810 F.2d at 1209, 1211. It is difficult to escape the conclusion that Judge Bork either created a new constitutional right or took a very expansive view of that contained in the takings clause, either of which is a long way from judicial restraint.

In two other cases, Judge Bork sided with property owners who relied on the takings clause. In Silverman v. Barry, 727 F.2d 1121 (1984), Judge Bork ruled in favor of landlords challenging the District of Columbia's refusal to permit them to convert a residential apartment complex into a condominium. Although he recognized that "takings clause challenges in this context have not fared well," id. at 1126, he wrote the opinion for himself and two other judges, which allowed claims based on the takings and due process clauses to go forward. Id. at 1125-26. He also reinstated the landlords' claim that the District's enactments exceeded its police power, even though "[t]he Supreme Court has not struck down a zoning ordinance on police power grounds since 1928," id. at 1126, and their claim that the District's condominium law impermissibly delegated legislative power to bar conversions to tenants -- a claim based on concededly "pre-Lochner cases" which Judge Bork nonetheless found to be still valid precedent. Id. And in Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1551 (1984)(en banc), although differing with the majority on the nature of the relief to which the plaintiffs were entitled, Judge Bork joined a dissent, agreeing that an owner of a cattle ranch in Honduras could sue the United States for the taking of his property, allegedly resulting from its occupation by a United States sponsored military base.[22]

Although Judge Bork has not participated in a large number of cases in which a business plaintiff has raised a constitutional claim, he has shown a considerable willingness to support an expansive view of these rights when compared to the general approach that the courts have taken in similar situations. Even more strikingly, when Judge Bork's protection of business rights is contrasted with his decided unwillingness to protect individual rights, it raises serious questions about the sincerity of his philosophy of judicial restraint in the constitutional area.

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[22] Because the split in Ramirez was not on a constitutional issue, it is included in the table on Access in Chapter IV.

3. First Amendment

Some of Judge Bork's proponents point to the First Amendment as representing an exception to his general opposition to the constitutional doctrines developed by the Warren Court. Judge Bork, it is said, is a strong supporter of free speech who can be expected to defend much established doctrine against attack and even, perhaps, extend First Amendment rights.

However, in the Indiana Law Journal article in which then-Professor Bork outlined his judicial philosophy, he indicated that First Amendment law should be rolled back to where it stood in the 1920's, or perhaps even further. According to the article, the First Amendment protects only "explicitly and predominantly political" speech, that is, speech intended to influence government policy or activity. Neutral Principles, 47 IND. L.J. at 26. Even political speech, he argued, should be unprotected if it advocates overthrow of the government or any other violation of law, a contention that might extend to civil disobedience. Id. at 29-31. He also objected to Supreme Court decisions requiring a "clear and present danger" before such speech may be forbidden. Id. Although Judge Bork wrote to the ABA Journal in 1984 to disclaim the article as stating only his "tentative views," Judge Bork Replies, 70 ABA JOURNAL 132 (February 1984), the following year he referred to it in an interview with Conservative Digest as a statement of his judicial philosophy: "I finally worked out a philosophy which is expressed pretty much in that 1971 Indiana Law Journal piece which you have probably seen." McGuigan, Judge Bork Is A Friend of the Constitution, CONSERVATIVE DIGEST, at 101 (Oct. 1985).[23] Judge Bork's judicial opinions suggest that, by and large, he not only adheres to this limited view of the First Amendment, but in many cases would restrict the extent to which even political speech is protected when it interferes with other interests that he holds more dear.

Judge Bork has not had occasion to rule on any cases that involved exclusively artistic or literary expression, and so it is impossible to be certain how he would rule in such a case. In his opinions, however, he is always careful to note that, to the extent that the First Amendment extends any protection to the particular expression at stake, the expression was "political." E.g., Ollman v. Evans, 750 F.2d 970, 1002 (1984) (libel plaintiff had "placed himself in the political arena and became the subject of heated political debate.. . . [T]he core function of the first amendment is the preservation of that freedom to think and speak which is the means indispensible to the discovery and spread of political truth.")

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[23] Judge Bork has reiterated his disapproval of Supreme Court decisions protecting the right to advocate overthrow of the government. American Enterprise Institute, Symposium on Foreign Intelligence: Legal and Democratic Controls, at 15 (Dec. 11, 1979). He also advocated amending the espionage laws to forbid newspapers from disclosing national security information deemed "of no public interest," id. at 13, a notion that even former CIA Director William Colby saw as inconsistent with the First Amendment. Id. at 21.

Similarly, in other cases in which the expression could have been classified as artistic or scientific and given protection as such, Judge Bork has emphasized its political aspects in bringing it within the coverage of the First Amendment. See Lebron v. Washington Metropolitan Area Transit Authority, 749 F.2d 893, 896 (1984), and McBride v. Merrell Dow & Pharmaceuticals, 717 F.2d 1460, 1466 (1983). And in Reuber v. United States, 750 F.2d 1039, 1065 (1984), Judge Bork said in a concurring opinion that if a scientist was fired for criticizing the government, "that is precisely the kind of speech the First Amendment was designed to protect," but if he was simply criticizing a research company, then First Amendment protection is less or non-existent.[24] The only case in which he has gone beyond "political" speech was FTC v. Brown & Williamson, 778 F.2d 35 (1985), where he invoked Supreme Court decisions granting First Amendment protection to a corporation's commercial speech, and so narrowed an FTC injunction which forbade the use of certain misleading claims in cigarette commercials.

Even when Judge Bork found that speech was "political," his opinions have not provided great protection to the speakers. Indeed, we found no case in which he voted to uphold the right to engage in political demonstrations. Thus, for example, in White House Vigil for ERA v. Watt, 717 F.2d 568 (1983), the majority, while reversing part of a preliminary injunction protecting the right to demonstrate in front of the White House, expressly authorized the district court to allow individuals to keep parcels of leaflets with them in order to be able to hand them out without having to leave for a storage area after each handful is disseminated. In dissent, Judge Bork would have forbidden individuals to keep parcels of leaflets with them. Id. at 573. Similarly, the majority opinion in Community for Creative Non-Violence v. Watt, 703 F.2d 586 (1983), which was overturned by the Supreme Court, 468 U.S. 288 (1984), struck down Park Service rules that barred persons protesting homelessness from sleeping on the Mall; Judge Bork joined the dissenters in finding no infringement of the First Amendment. And Judge Bork joined the opinion in Juluke v. Hodel, 811 F.2d 1553 (1987), rejecting a claimed right to demonstrate by sitting in folding chairs outside the White House gate.

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[24] In Reuber, unlike the dissenter, Judge Bork voted to find state action, and thus to permit an employee to proceed with a suit in which he charged that he was fired by a private company for exercising First Amendment rights. But, unlike Judge Wald's opinion for the court, Judge Bork's opinion strongly suggests that the employee would be unable to obtain any relief. Id. at 1065-69. This case has not been counted in our tables, as a vote either for or against the First Amendment, because the only defendants about whose liability the judges disagreed were the private companies.

Judge Bork displayed a similar lack of sensitivity to the First Amendment in Finzer v. Barry, 798 F.2d 1450 (1986), which challenged the constitutionality of a law forbidding the display of signs opposing the policies of a foreign government within 500 feet of its embassy, but permitting the display of signs supporting that government's policies. The statute was attacked by persons who believed that carrying signs in front of the Nicaraguan and Soviet embassies would give their cause greater visibility, and would thus better enable them to communicate their views to the American public. The purpose of the law was to protect the "dignity" of the foreign government and its diplomats, which the government claimed was required by international law, notwithstanding any First Amendment concerns.

Writing for the majority, Judge Bork ruled that the court owed the greatest deference to the government's judgment that allowing such signs would somehow injure the foreign policy of the United States, and that no narrower restrictions on free speech would protect its policy as well. Id. at 1458-60. Judge Bork conceded that signs are permitted at embassies and consulates outside the District of Columbia without unduly offending the Law of Nations, but speculated that there "may well" be a basis for this distinction. Id. at 1463 n.9. He upheld that distinction, even though the government offered no evidence to support that claim or the assertion that the dignity of foreign governments was at stake.

As the dissent pointed out, however, the rule of deference in the foreign policy area has never applied to limit citizens' rights of free speech:

> The notion that the Law of Nations permits or requires silencing of Americans in their views on foreign governments' policies to avoid assault on the dignity of the embassy is too radical a departure from recognized first amendment principles to be accepted on the D.C. government's or the majority's say-so.. . . We cannot uphold the statute merely because the government has sent its

> lawyers into court to defend it. It is our job to demand facts and evidence to show that the asserted justification really exists.

Id. at 1487, 1489.[25]

The would-be protesters also complained about another part of the statute that forbade anyone to "congregate" within 500 feet of an embassy without the permission of the police. Despite the fact that black-letter Supreme Court law forbids such open-ended prohibitions unless there are strict standards to govern the police in deciding when to give permission and when to withhold it, Judge Bork deferred to government restrictions of free speech by refusing to address the lack of standards. Instead, because he found that the statute had specific purposes (although not spelled out in the statute), he assumed that the police would recognize those purposes and grant or withhold permission in accordance with them. Id. at 1471-72. But as the dissent pointed out, mere assumptions about police good faith cannot avoid a First Amendment challenge; a state court or legislature must provide the requisite narrowing interpretation. Id. at 1497.

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[25] The dissent pointed out that the statute was also defective under traditional First Amendment analysis because it forbids speech depending on the viewpoint expressed: expression is barred only in opposition to the policies of the relevant foreign government. Id. at 1493. Judge Bork sought to avoid this point by arguing that those who opposed West German policies remain free to express that opposition by demonstrating in front of the East German embassy. Id. at 1475. As the dissent stated, however, "this argument is silly. Issues and controversies do not divide themselves neatly along national lines like paired legislative votes." Id. at 1494.

Finzer also illustrates that Judge Bork looks beyond the text of the Constitution and the intent of the Framers to find essentially personal values to apply in resolving constitutional claims. Judge Bork justified his invocation of international law because it is not "just another code of rules, like the common law of negligence or statutory law governing commercial transactions [that] would of course offer little that need be weighed against another constitutional provision." Id. at 1464. Instead, he found legitimacy for applying the particular international law rules at issue in such "constitutional" values as "the place of the United States among nations," "the raising or lowering of tensions between our country and others," "the conduct of our foreign policy, primarily by the President but also in some measure by Congress in ways specified by the Constitution," and "war and peace." Id. at 1464.

On the surface, Judge Bork's rationale may seem consistent with his rule that only those values that emanate from the Constitution can be employed by judges in constitutional decisionmaking. But if the values that he relied on in Finzer have constitutional status, it is hard to imagine what values could not similarly be found to be given weight in the Constitution. At bottom, the distinction between the executive power and prerogatives articulated by Judge Bork in Finzer and the values associated with privacy interests, the rights of criminal defendants, or personal liberties, which he has rejected in other decisions, appears to be based more on Judge Bork's personal values than on any constitutional authority.[26]

Finzer was a case in which the plaintiffs sought to overturn a congressional decision to limit the exercise of free speech rights. But Judge Bork's position in Finzer cannot be justified by the claim that he simply defers to the political process in deciding when speech should be limited, because when Congress has acted to promote the right to exchange political views, Judge Bork has abandoned his deferential attitude. For example, Congress became disturbed by the executive's repeated exclusion from the United States of foreigners who belong to certain proscribed organizations, despite the fact that their visits were solely for purposes of delivering academic lectures or otherwise communicating about political subjects with Americans. Therefore, it passed the McGovern Amendment, which provides that visas may not be denied based on an individual's membership in an organization unless the Secretary of State certifies to Congress that admission of that individual would be contrary to our national security interests.

The executive branch responded to this congressional determination by simply deciding that admission of any person who belongs to one of the proscribed organizations automatically injures American foreign policy, thus warranting denial of a visa. In Abourezk v. Reagan, 785 F.2d 1043 (1986), the majority decided that the executive was evading the plain congressional intent in limiting executive power, and remanded the case to the district court to reconsider the visa denials. In dissent, Judge Bork gave no deference to Congress's purpose to prevent the executive from unduly interfering with political debate and voted to uphold the Administration. As the majority noted, Judge Bork's approach would give the State Department "precisely the power that the McGovern Amendment was intended to revoke." Id. at 1058 n.20. By deferring to the executive in such a case, "we would shirk our obligation to enforce the congressional direction . . . to pay genuine heed to the McGovern Amendment." Id. at 1060.

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[26] Similarly, Judge Bork has not only argued that the Constitution permits government spying on persons because they exercise their First Amendment rights, but has also found in the Constitution a prohibition on legislation that would forbid such surveillance on the ground that Congress may not impose detailed limits on the executive's conduct of intelligence activities. ABA Standing Committee on Law and National Security, Law, Intelligence and National Security Workshop, at 61-62 (Dec. 11-12, 1979).

The one First Amendment area in which Judge Bork has voted on the "free speech side" -- libel cases -- is also the area in which the party advocating a broad view of the First Amendment is most likely to be a business.[27] Judge Bork has received plaudits from civil libertarians and angry denunciations from conservative activists for opinions in which he expressed concern about the rising tide of libel cases which threaten to discourage the press from effectively reporting on matters of public interest. Nevertheless, his opinions contain certain disquieting notes.

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[27] In his essay, The First Amendment Does Not Give Greater Protection to the Press Than to Speech, CENTER MAGAZINE, at 30 (March-April 1979), Judge Bork identified overregulation of corporations as a danger to press freedom. Judge Bork also relied on the First Amendment to protect a cigarette advertiser in FTC v. Brown & Williamson, which is discussed above, and to question the fairness doctrine, which was designed by Congress to promote the First Amendment rights of those who do not own a television station, see Chapter I, Section A.

In each of his three libel opinions, Judge Bork protected a statement denouncing a person who opposed business interests. This fact is most obvious in Ollman v. Evans, 750 F.2d 970 (1984), where the majority upheld dismissal of a suit by a Marxist professor against the conservative columnists Evans and Novak.[28] Similarly, in McBride v. Merrell Dow & Pharmaceuticals, 717 F.2d 1460 (1983), a scientist, who had testified against Merrell Dow in product liability litigation, sued over Merrell Dow's attacks on his credibility. Judge Bork allowed the action to proceed on one limited claim, but instructed the district judge to limit discovery to issues on which the company might well be able to obtain summary judgment. And in Moncrief v. Lexington Herald-Leader, 807 F.2d 217 (1986), where the plaintiff, a lawyer for the Labor Department, sued over an article in a Kentucky newspaper that accused him of improper conduct in prosecuting a mine safety case, Judge Bork voted to dismiss the libel complaint for lack of personal jurisdiction. In the one libel case brought by businessmen against a newspaper based on a story that criticized their business practices, Judge Bork chose to disqualify himself and, as is the practice, did not provide an explanation. Tavoulareas v. Washington Post, 817 F.2d 762

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[28] This case has not been counted in our tables of split decisions because the parties were both private and the tables count only those cases in which Judge Bork voted for or against the government.

(1987).

Moreover, although Judge Bork's opinion in Ollman waxed eloquent about First Amendment protection of news commentators, and about the need to expand constitutional rights to ensure that they adequately serve the purposes of the Framers, it also contained a flat refusal to promulgate a specific standard by which future cases must be judged. Instead, Judge Bork opined that hard cases require an opinion written in terms of "first principles" that permit the case to be discussed "with sophistication and feeling for the underlying values at stake." 750 F.2d at 994. Judge Bork conceded that this approach "risks admitting into the law an element of judicial subjectivity," id. at 997, but concluded that there is no satisfactory alternative but to consider "the totality of the circumstances" in a balancing test. Id. at 1002.

Of course, this kind of "judicial subjectivity" would also permit judges to decide in favor of libel plaintiffs with whom they share political sympathies, and against those of different political persuasions. The possibility hardly seems remote and, in fact, underlies the language used in the Ollman opinion, which repeatedly emphasized that it was by becoming an active Marxist, by promoting "revolution," by seeking to "make more revolutionaries," by condoning "youth rebellion," and by using his position to "indoctrinate the young with his political beliefs," id. at 1003, 1004, that Ollman left himself open to being accused of such things as having "no status in his profession."

III. CRIMINAL LAW [29]

JUDGE BORK'S VOTES IN SPLIT DECISIONS IN CRIMINAL LAW CASES	
Defendant	Executive
0	2

Judge Bork's deference to the executive branch is also evident in the area of criminal law. Of the 24 criminal cases in which he participated, Judge Bork voted for the prosecution 23 times (96% of the time), including in the only 2 cases that were split decisions.[30] Based on both his votes and his opinions, Judge Bork's record indicates that he is willing to cut back on basic safeguards for persons facing criminal charges. His opinions also demonstrate that, as in the civil context, Judge Bork is willing to deviate from rules of judicial restraint in order to mold criminal jurisprudence to conform to his own preferences.

United States v. Mount, 757 F.2d 1315 (1985), involved the Fourth Amendment's exclusionary rule, which generally bars prosecutors from using evidence obtained by police during an unlawful search or seizure in this country. The defendant in Mount argued that this rule should apply to evidence seized by

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[29] Judge Bork participated in split decisions in the following cases: Case Nos. 28, 38. He wrote opinions in the following cases: Opinion Nos. 34, 45, 62, 64, 70, 72, 109, 119, 129, 138.

[30] A list of the 24 criminal cases in which Judge Bork participated appears in the appendix. This list does not include habeas corpus actions. The only case in which Judge Bork voted to reverse a conviction was United States v. Foster, 783 F.2d 1087 (1986).

British police during a warrantless search of his home in Britain and turned over to the American authorities for use in a case against him here. The majority rejected this argument, relying on the established doctrine that United States courts will not ordinarily apply the exclusionary rule to evidence seized by foreign law enforcement authorities, because the basic purpose of the exclusionary rule is to deter police misconduct, and application of the rule would not deter foreign police officers.

The majority also declined to exclude the evidence in the exercise of its supervisory power over the trial courts, as some United States courts have stated they would do in cases when evidence has been seized by foreign police in a manner that "shocks the judicial conscience." Finding nothing "shocking" about the search in this case (which may have been lawful under British law, _see_ _id_. at 1322 n.3), the majority left for another day the question of whether evidence may ever be excluded on this theory.

Judge Bork wrote a separate concurring opinion which appears to ignore his admonition that courts should resolve only "concrete controversies" and not "abstract" issues. _Barnes v. Kline_, 759 F.2d 21, 52 (1985). His opinion criticized other courts which stated that they would use their supervisory powers to exclude evidence obtained overseas using methods which "shocked the judicial conscience." He argued that courts did not possess any such power to exclude evidence on this basis, adding that if they did, he would vote against such a rule. 757 F.2d at 1323-

24.

Judge Bork noted that there may be constitutional prohibitions against using evidence obtained overseas from beatings, torture, or other forms of physical abuse. 757 F.2d at 1324 n.7. Short of those situations, however, he would leave federal appeals courts with no supervisory authority to exclude evidence obtained abroad under circumstances which may "shock the judicial conscience." And in language which may bode ill for the exclusionary rule in general, Judge Bork wrote that in situations where "no deterrence of unconstitutional police behavior is possible, a decision to exclude probative evidence with the result that a criminal goes free to prey upon the public should shock the judicial conscience even more than admitting the evidence." Id. at 1323.

In another case, Judge Bork found that even evidence which the trial judge had found to be unreliable could be admitted and used to convict a defendant. In United States v. Singleton, 759 F.2d 176 (1985), an armed robbery case, a major issue was the validity of eyewitness identifications of the defendant. After hearing all the evidence, District Judge William B. Bryant, a 22-year veteran of the federal district court in Washington, D.C., concluded that the identification evidence was unreliable and that the overall evidence was thus insufficient to convict the defendant, whom he ordered acquitted. The court of appeals reversed that decision. On remand, Judge Bryant granted the defendant a new trial, but this time ordered the government not to use the identification evidence on the ground that it was not legally admissible.

The government appealed this order, and the court of appeals' majority, in an opinion by Judge Bork, reversed. Judge Bork wrote that the earlier appellate decision reversing the acquittal prevented the trial judge from holding that the identification testimony could not be legally admitted into evidence against the defendant. This decision drew a sharp dissent from Judge Luther Swygert, a visiting judge from the United States Court of Appeals for the Seventh Circuit, who accused Judge Bork of "blurring the distinction between the admissibility and sufficiency of evidence," and thereby "ignor[-ing] the most fundamental premises and policies of evidence law," as well as the due process concerns underlying the Supreme Court decisions excluding unreliable, suggestive identifications. 759 F.2d at 184. Judge Swygert also noted that, contrary to the representations that Judge Bork made in his opinion, the prior court of appeals decision on the sufficiency of the evidence (which was decided by a wholly different panel) did not resolve the due process issue and in fact "_expressly_ _declined_ to reach" the issue so that Judge Bryant could resolve it "in the first instance." _Id_. at 185 (emphasis added). In Judge Swygert's view, Judge Bork disregarded basic rules of evidence and due process, and also went to extreme lengths to prevent the district court from making the initial evidentiary determinations that are ordinarily deemed to be its province.

The defendant sought rehearing by the full court. Three judges voted to rehear the case. Another three judges found Judge Bork's opinion "difficult to subscribe to," although they did not believe that the legal issue in the case was so exceptional as to warrant the unusual step of having the case reargued before all ten judges, and so rehearing was denied. 763 F.2d 1432 (1985).

A further example of Judge Bork's willingness to come to the aid of the prosecution is United States v. Garrett, 720 F.2d 705 (1983). The defendant argued that his rights under the Speedy Trial Act, which was enacted to ensure that criminal proceedings would be expeditiously resolved, had been violated because the government had not filed an indictment against him within 30 days after his arrest. The government argued that certain exceptions to the 30 day rule applied, and the trial judge agreed. On appeal, Judge Bork, joined by the other two judges on the panel, determined that the exceptions cited by the district judge were not applicable, but nonetheless voted to uphold the defendant's conviction, relying on an exception that had never been raised in the district court or even argued by the government on appeal.

IV. ACCESS TO THE COURTS [31]

JUDGE BORK'S VOTES IN SPLIT DECISIONS IN CASES INVOLVING ACCESS TO THE COURTS

Granted Access	0
Denied Access	14

Introduction

Federal courts are courts of limited jurisdiction. This means that federal courts may decide only cases in which jurisdiction has been conferred by the Constitution or by statute. The Constitution gives the Supreme Court the power to decide lawsuits that raise issues pertaining to the interpretation of the Constitution or federal statutes, and Congress has extended that jurisdiction to the lower courts.

Even if a court has jurisdiction, it will not necessarily reach the merits of a claim because there are a variety of other technical hurdles that a plaintiff must overcome. For example, the case may be dismissed because the particular plaintiff does not have standing (a sufficient interest in the case); the claim is barred by the applicable statute of limitations (the requirement that claims be filed within a specified period of time); or the case is barred by the doctrine of sovereign immunity (a limitation on lawsuits against the government). Because the ability of many litigants to gain access to the courts realistically depends on statutory provisions that allow judges to grant attorneys' fees to the prevailing party, these cases are also included in this section.

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[31] Judge Bork participated in split decisions in the following cases: Case Nos. 4, 6, 17, 22, 23, 29, 35, 36, 37, 42, 43, 46, 56, 57. He also wrote the following access opinions: Opinion Nos. 13, 17, 30, 41, 91, 95, 139, 107, 112, 134 (standing); Opinion Nos. 7, 47, 103, 108 (sovereign immunity); Opinion No. 50 (preclusion); Opinion Nos. 28, 35, 90, 92, 132 (statute of limitations); Opinion Nos. 2, 33, 66, 127 (attorneys' fees); Opinion Nos. 61, 117 (miscellaneous).

Judge Bork has used these and a variety of other doctrines to argue that courts should dismiss lawsuits without reaching the merits. He has voted to dismiss cases brought by the United States Senate, the State of Massachusetts, veterans, an Iranian hostage, social security claimants, prison inmates, citizens of Japanese descent who were interned during World War II, Haitian refugees, handicapped citizens, an airline, the United Presbyterian Church, homeless citizens in the District of Columbia, and consumer groups. Each of these individuals or organizations filed their claim in federal court, but in each case Judge Bork voted in favor of closing the courthouse door. Indeed, in every one of the 14 cases where the court split on access issues, Judge Bork voted to deny access.

A. Standing

Article III of the Constitution gives the federal courts jurisdiction only over "cases" and "controversies." This means that there must be a real, rather than theoretical, dispute between the parties. This principle does not usually bar business lawsuits because most cases brought by businesses involve identifiable property claims or monetary interests that will be directly affected by the outcome of the case. However, the issue of standing is more frequently raised in cases brought by environmental, consumer, and civil rights groups, because it is sometimes more difficult for them to demonstrate that the judicial relief they seek will produce tangible benefits for them or their members. Where they can document that such a benefit is likely to result, the Supreme Court has determined that they have standing to sue, even if they seek a nonmonetary benefit like safer foods or a cleaner environment. See, e.g., Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978). Judge Bork, however, has taken an extremely restrictive view of standing, which would exclude from the federal courts many plaintiffs who currently are permitted to pursue their claims.

Judge Bork provided the most thorough discussion of his views on standing in his dissent in Barnes v. Kline, 759 F.2d 21 (1985). The case was brought by the United States Senate, the Speaker of the House and its Bipartisan Leadership Group, and 33 individual members of the House of Representatives (collectively referred to as "Congress"). The issue in Barnes concerned the meaning of the pocket veto clause of the Constitution, which provides that the President may veto a bill only by returning it to Congress with his objections noted "unless the Congress by their adjournment prevent its Return." U.S. Constitution, Article I, Section 7, Clause 2. If there is such an adjournment, the President can veto a bill simply by not signing it.

The power to use the pocket veto is significant because it permits the President to nullify an Act of Congress without the possibility of an override and without explaining the reasons for his action to Congress. The particular bill involved in Barnes placed certain conditions on continued military assistance to El Salvador, but the broader issue was whether, after adjourning for a recess during a term of Congress, the President could still exercise a pocket veto even though both Houses of Congress had appointed a clerk to receive bills from the President, and thus "their adjournment [did not] prevent its return." In this instance, the President believed that he had properly exercised the pocket veto, and Congress believed that the statute had been validly enacted. In order to resolve the impasse, Congress sued the President, and the court of appeals ruled in Congress's favor, holding that the bill had become law.

In what the majority described as a "wide-ranging dissent" (id. at 26), Judge Bork concluded that the constitutional doctrine of separation of powers prohibited the courts from deciding this or other similar important constitutional questions. Even though the Senate and House wanted the issue decided, and even though the President conceded at oral argument that the Senate had standing (id. at 42 n.1), Judge Bork found that the court could not decide the merits of the case, but should dismiss for lack of standing. Judge Bork argued that the congressional parties were "suing not because of any personal injury done them but solely to have the courts define and protect their governmental powers." Id. at 42. Because his decision is based on Article III of the Constitution (id. at 43), under Judge Bork's theory, a constitutional amendment would be required for Congress to challenge the legality of the pocket veto.

According to Judge Bork, Members of Congress and other citizens who have an "intensely felt interest in the proper constitutional performance of the United States government" have no right to seek vindication of their constitutional rights in federal court. Id. at 44. However, Judge Bork was careful to protect private and business interests; at least three times in his opinion, he stated that they are permitted to litigate constitutional questions. Id. at 54, 61, 63-65.

The impact of Judge Bork's dissent was not lost on the majority. According to Judge Carl McGowan, Judge Bork "reads Article III to bar any governmental official or body from pursuing in federal court any claim" asserting that another governmental official has violated the law. Id. at 26 (emphasis in the original). Relying on six Supreme Court cases, including cases brought by former President Richard Nixon and former Senator Barry Goldwater, the majority found that "Supreme Court precedent contradicts the dissent's sweeping view [of] Article III." Id. at 27. Quoting Justice Powell's opinion in Goldwater v. Carter, 444 U.S. 996, 997 (1979), the majority found that "a dispute between Congress and the President is ready for judicial review when 'each branch has taken action asserting its constitutional authority' -- when, in short, 'the political branches reach a constitutional impasse.'" 759 F.2d at 28.[32]

In Haitian Refugee Center v. Gracey, 809 F.2d at 794 (1987), Judge Bork again elaborated on his theory that the doctrine of separation of powers bars certain litigants from the courthouse. In that case, which drew an opinion from all three judges on the panel, the Haitian Refugee Center challenged President Reagan's program of interdicting ships to prevent illegal aliens from entering the United States. The plaintiffs claimed that the program violated the Refugee Act of 1980, the Immigration and Nationality Act, the Constitution, and a United Nations protocol. Id. at 797-98.

In his opinion, Judge Bork concluded that under the doctrine of separation of powers the Haitian Refugee Center had no standing to bring the case. As in Barnes, he argued that the executive branch may be immune from suit even if it is claimed that there is a violation of the Constitution, a statute, or international law. Instead, the issue must be fought in the political arena between the President and Congress. Judge Edwards, in dissent, noted that "[t]he majority seeks to abandon the Supreme Court's consistently articulated test [for standing i]n the absence of any precedent to support its new test." Id.

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[32] Even Judge Bork had held on 3 prior occasions that, in certain circumstances, Members of Congress have standing to litigate federal constitutional and statutory issues. American Federation of Government Employees v. Pierce, 697 F.2d 303, 305 (1982); Vander Jagt v. O'Neil, 699 F.2d 1166, 1177 (1983); Crockett v. Reagan, 720 F.2d 1355, 1357 (1983). While the status of Judge Bork's prior rulings in Vander Jagt and Crockett is unclear, he recognized that Barnes is inconsistent with Pierce. 759 F.2d at 44-45 n.2.

at 826.

Judge Bork argued in Barnes that "judicial restraint" is necessary in cases that pit the President against Congress because otherwise the judiciary "will quickly become the single, dominant power in our governmental arrangements." 759 F.2d at 54. However, one unresolved question is how far his argument would extend. For example, many lawsuits brought by environmental, consumer, civil rights, and other public interest organizations are essentially disputes between the executive and legislative branches of government.

Consider the example of a statute directing the Environmental Protection Agency ("EPA") to issue automobile emission standards within a specified period of time. An environmental organization that sues EPA on behalf of its members over EPA's failure to meet the deadline is, in a sense, representing the interests of Congress (and not unimportantly all citizens concerned about automobile emissions) against the executive branch. Under the analysis adopted by Judge Bork in Barnes and Haitian Refugee Center, such a lawsuit might be barred by the doctrine of separation of powers. This concern led the majority in Barnes to declare that Judge Bork's "political cure seems to us considerably worse than the disease, entailing, as it would, far graver consequences for our constitutional system than does a properly limited judicial power to decide what the Constitution means in a given case." 759 F.2d at 29.

A hint of how Judge Bork might vote in the wide range of public interest cases which would today be decided on the merits if they reached the Supreme Court is given in his concurrence in Center for Auto Safety v. Thomas, 806 F.2d 1071 (1986). The Center challenged an EPA rule that made it easier for automobile manufacturers to comply with the fuel economy requirements in the Energy Policy Conservation Act of 1975. Under that statute, automobile manufacturers must gradually increase the fuel efficiency of their cars or pay penalties for noncompliance. In addition, Congress gave "any person who may be aggrieved" by an EPA rule the right to challenge the rule in court.

The panel unanimously concluded that the Center had standing and that some aspects of the EPA rule were unlawful, which will require automobile manufacturers to substantially improve their fuel performance or pay about $300 million in fines. However, Judge Bork wrote a one-paragraph opinion stating that he had voted to uphold standing only because he believed that the court was bound by an earlier case in which he did not participate, Center for Auto Safety v. National Highway Traffic Safety Administration, 793 F.2d 1322 (1986), and with which he indicated that he did not agree. 806 F.2d at 1080.

One of the most troubling aspects of Judge Bork's standing analysis is that it is one-sided. It is clear from his opinion that car manufacturers would have standing to challenge a EPA rule that they believed was too strict. Yet, according to Judge Bork, automobile users, the intended beneficiaries of the statute, had no standing to challenge an EPA decision that even he concluded had unlawfully benefited manufacturers. The D.C. Circuit has withdrawn the panel decision in Center for Auto Safety v. Thomas, and the standing issue was argued before the full court on the same day as Haitian Refugee Center.

Judge Bork reached a similar result in Bellotti v. Nuclear Regulatory Commission, 725 F.2d·1380 (1983), where the Attorney General of Massachusetts petitioned to intervene in an Nuclear Regulatory Commission ("NRC") proceeding to modify the license for the Pilgrim Nuclear Power Station which is located in his State. According to the NRC staff, this was "one of the most significant enforcement actions ever taken," involving the greatest penalties ever levied by the Commission. See id. at 1384. Although the statute gives "any person whose interest may be affected by the proceeding" the right to intervene, and although the Attorney General intended to argue that the power plant was so unsafe that its license should be revoked, Judge Bork held that Massachusetts had no right to participate in the proceeding. Id. at 1381. The net result of this split decision was that the utility that owned the power plant was permitted to argue that the penalties should be less than those proposed by the NRC, but neither states nor the public were allowed to argue for greater penalties.

In cases involving business, Judge Bork has also supported a more restrictive standing doctrine where the business has relied on non-economic interests as a basis for standing. While he has stressed that businesses have standing where they allege direct *economic* injury as a result of governmental action, *see* discussion of *Barnes v. Kline* above, he has rejected standing in the rare cases in which businesses sought to vindicate non-economic, public interests. Thus, in *Citizens Coordinating Committee v. Washington Metropolitan Area Transit Authority*, 765 F.2d 1169 (1985), the Mazza Gallerie shopping mall sought relief under the Clean Water Act for damages caused by the defendant's unlawful pollutant discharges. In its complaint, Mazza Gallerie alleged that the pollution had made the area in which it was situated "less pleasant and attractive," but Judge Bork found that was not sufficient to confer standing. *Id*. at 1172. While the Supreme Court has held that individuals have standing if they allege that damage to the environment harms their aesthetic interests, *see* *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973), Judge Bork concluded for a unanimous panel that a corporation cannot be similarly "affronted by deteriorations in its environment." *Id*. at 1173. Accordingly, Mazza Gallerie's "theory of noneconomic injury" did not confer standing. *Id*.

Similarly, in *Northwest Airlines, Inc. v. Federal Aviation Administration*, 795 F.2d 195 (1986), an airline sought to challenge the Federal Aviation Administration's decision to recertify a pilot who had previously been fired from the airline for flying an airplane while intoxicated. Northwest wanted to have the pilot's license permanently revoked so that he could not fly for it or for any other airline. Northwest did not claim it had standing in the matter because of any direct economic interest in whether the pilot was permitted to fly. Rather, it argued that, as an air carrier, it had an overriding interest in the safety of its flights, and that this interest would be jeopardized by allowing unfit pilots in the sky. Judge Bork, writing for the court, rejected that interest as a basis for standing because the possibility that the pilot "will fly in areas in which Northwest maintains routes and actually cause injury to Northwest's passengers and crew is too remote and speculative to constitute injury." Id. at 201. In addition, Judge Bork noted that Northwest's theory of standing "could not be limited to airline companies; any individual who flies, or who intends to, could claim that he has the interest necessary to oppose" the licensing of pilots with records of alcoholism. Id. Thus, because Northwest relied on the public interest in safer skyways, and not on its own economic interest, Judge Bork concluded that it did not have standing. Id.

B. Sovereign Immunity

The doctrine of sovereign immunity is derived from the English rule that the "King can do no wrong" and therefore cannot be sued for injuries he may have inflicted. As the doctrine has been applied in this country, governmental entities may not be sued unless sovereign immunity has been waived by statute. Over the years, Congress has passed laws waiving immunity for both the federal and foreign governments. The courts must occasionally construe these enactments to assess the scope of Congress's waiver of immunity. Because the doctrine of sovereign immunity stems from an antiquated, imperial view of governmental power, the Supreme Court has, over the past fifty years, regarded it with disfavor and liberally interpreted congressional waivers of immunity.

Judge Bork, however, has sided with governmental entities, ranging from the Islamic Republic of Iran to the Washington Metropolitan Area Transit Authority, that have sought to use the doctrine of sovereign immunity to block lawsuits by injured persons. Three of these cases were split decisions. In _Persinger v. Islamic Republic of Iran_, 729 F.2d 835 (1984), Judge Bork ruled that neither an American hostage nor his parents could sue the Iranian government for physical and emotional injuries sustained as a result of his seizure and detention. Judge Edwards, in dissent, complained that Judge Bork reached that result by disregarding the "clear terms" of the law that establishes boundaries for suits against foreign governments, and by instead relying on "policy grounds" for his decision. _Id_. at 844. In _Morris v. Washington Metropolitan Area Transit Authority_, 781 F.2d 218 (1986), Judge Bork dismissed an employee's claim of racial discrimination against Washington Metropolitan Area Transit Authority ("WMATA"), an entity created pursuant to a compact signed by the governments of Maryland, Virginia, and the District of Columbia. Judge Bork reasoned that WMATA had sovereign immunity because the signatories "conferred their respective sovereign immunities upon it" and because it was being sued for actions taken in the course of "a governmental function." *Id*. at 219. And, in *Lombard v. United States*, 690 F.2d 215 (1982), he voted to dismiss claims brought under the Constitution and the Federal Tort Claims Act by a serviceman who alleged that the government had deliberately exposed him, during the Manhattan project, to dangerous radioactive substances and that, as a result, his four children had suffered birth defects. In dissenting, Judge Ruth Ginsburg argued that this "expansive interpretation" of the doctrine of sovereign immunity was inconsistent with prior precedent and ran counter to "remedial legislation ordered by Congress." *Id*. at 227, 233.

Judge Bork's most far-reaching defense of the doctrine of sovereign immunity can be found in his dissenting opinion in *Bartlett v. Bowen*, 816 F.2d 695 (1987). The plaintiff, a Christian Scientist, challenged a provision of the Medicare Act on the grounds that it barred her from $286 in benefits in contravention of the free exercise of religion clause of the First Amendment to the Constitution. The government argued for dismissal of this claim on the grounds that the Medicare Act denies judicial review to any administrative "determination" under the Act if the amount in controversy is less than $1000. The majority of the court of appeals rejected this contention, concluding that Congress did not intend to preclude the courts from considering *constitutional* challenges, regardless of the amount in controversy. In support of its conclusion, the court cited a long line of prior cases, including several recent Supreme Court decisions, for the proposition that Congress "would not wish to court the constitutional dangers inherent in denying a forum in which to argue that government action has injured interests that are protected by the Constitution." Id. at 699, quoting Ungar v. Smith, 667 F.2d 188, 193 (D.C. Cir. 1981). Thus, in order to avoid a serious constitutional question -- an established rule of restraint which federal courts have imposed on themselves -- the majority construed the Medicare Act as not precluding judicial review of constitutional challenges.

In a dissenting opinion, Judge Bork found that Congress did intend to preclude judicial review of constitutional claims and that this result was itself constitutionally required. After Judge Bork construed the Medicare Act so that he could not avoid a difficult constitutional question, he embarked on a lengthy discussion of why the doctrine of sovereign immunity gives Congress broad power to preclude constitutional challenges to statutes authorizing the distribution of governmental benefits. In the course of his analysis, according to the majority, Judge Bork took "great pains to disparage" a leading Supreme Court decision, Johnson v. Robison, 415 U.S. 361 (1974), which suggested that Congress could not preclude review of constitutional claims; he totally "ignore[ed] clear precedent" from his own circuit which followed the Robison decision; and he made "no mention of the Supreme Court's very recent reaffirmation of Robison - using exactly the same language." 816 F.2d at 702-03 (emphasis in original).

With respect to the substance of Judge Bork's analysis, the majority contended that he "relie[d] on an extraordinary and wholly unprecedented application of the notion of sovereign immunity to uphold the Act's preclusion of judicial review." *Id.* at 703. The majority also concluded that Judge Bork's view that Congress may not only legislate, but also may "judge the constitutionality of its own actions," would destroy the "balance implicit in the doctrine of separation of powers." *Id.* at 707. Thus, according to the majority, the

> dissent's sovereign immunity theory in effect concludes that the doctrine of sovereign immunity trumps every other aspect of the Constitution. According to the dissent, neither the delicate balance of power struck by the framers among the three branches of government nor the constitutional guarantee of due process limits the Government's assertion of immunity. Such an extreme position simply cannot be maintained.

Id. at 711. The majority further explained that, under Judge Bork's view, sovereign immunity could defeat not only a claim based on freedom of religion grounds, such as the one before the court, but it could also prevent review of a blatantly racist legislative scheme. Thus, as the majority described Judge Bork's view,

> Congress would have the power to enact, for example, a welfare law authorizing benefits to be available to white claimants only and to immunize that enactment from judicial scrutiny by including a provision precluding judicial review of benefits claims.. . . Any theory that would allow such a statute to stand untouched by the judicial branch flagrantly ignores the concept of separation

> of powers and the guarantee of due process. We see no evidence that any court, including the Supreme Court, would subscribe to the dissent's theory in such a case.

Id. (emphasis added).

C. Preclusion

In addition to arguing for an unprecedented expansion of the doctrine of sovereign immunity, Judge Bork also has attempted to make it far more difficult for persons to challenge government action under the Administrative Procedure Act ("APA"). The APA provides, with certain limited exceptions, that federal courts are authorized to review the actions of administrative agencies to determine whether they are arbitrary, capricious, or not in accordance with law. 5 U.S.C. §§ 701-706 (1982). One of the exceptions to this provision involves actions that are "committed to agency discretion by law." Id. at § 701(a)(2). While courts have generally read this exception narrowly, Judge Bork has attempted to construe it broadly to preclude judicial review. In Gott v. Walters, 756 F.2d 902 (1985), for example, he joined an opinion which held that the statute governing the distribution of veterans benefits, 38 U.S.C. § 211(a), "precludes judicial review of virtually all VA decisonmaking pertaining to veterans' benefits, even a rulemaking conducted in a manner admittedly violative of APA procedures." Id. at 917 (emphasis in original). The court reached this result despite statements from both Congress and the VA that this reading of the statute was wrong. Thus, as explained in Judge Wald's dissenting opinion, the court's "decision not only ignores the relevant indicators of congressional intent but also constitutes rank judicial interference with a reasonable statutory interpretation agreed upon by both political branches of government." Id. at 929.

In Robbins v. Reagan, 780 F.2d 37 (1985), Judge Bork took a similar approach in considering a decision by the Department of Health and Human Services to close a federally owned building which had been operated as a shelter for the homeless. The plaintiffs challenged this decision as arbitrary and capricious, and thus violative of the APA. The government argued, however, that the APA precluded judicial review, relying on Heckler v. Chaney, 470 U.S. 821 (1985), a recent Supreme Court decision which held that agency refusals to take enforcement actions are generally not subject to judicial review. The majority decided that Chaney did not apply outside the context of agency enforcement decisions, and that to apply it to the case at hand "would be to frustrate Congress's clear intention, and the long traditions of allowing judicial review when it can carry out an effective function." Id. at 46.

Judge Bork disagreed, maintaining that the court should not even attempt to review the government's reasons for closing the shelter. Contrary to the narrow reading which most courts have given to Chaney, Judge Bork argued that it should be construed broadly to preclude judicial review of agency decisions that are far afield from the enforcement context. Under his approach, unless there are explicit statutory standards "relating to the specific allegation at stake in a given challenge," judicial review cannot take place under the APA. Id. at 57. In other words, if a plaintiff argued that a particular agency action was contrary to Congress's overall objectives in enacting a legislative scheme, that is an inadequate basis for judicial review. If that approach to APA review were to become the law of the land, it would substantially cut back on the traditional role that federal courts have played in requiring federal agencies to act in a manner that is reasonable and consistent with Congress's intent.

D. Statute of Limitations

Judge Bork has also argued vigorously for the rigid application of statutes of limitations and similar provisions, even to bar constitutional claims. For example, Brown v. United States, 742 F.2d 1498 (1984), involved an inmate's claim that he had been unconstitutionally deprived of adequate food, clothing, and sanitary conditions, and had not been protected from physical assaults by guards and other inmates. The issue before the court was whether this federal constitutional suit should be dismissed because the plaintiff had not complied with a local provision, which provides that actions for damages may not be brought against the District of Columbia government unless it is given notice of the claim within six months after the injury. The majority of the full court of appeals, including then Judge Antonin Scalia, held that this provision did not bar the plaintiff's federal civil rights claim because the interests reflected in such notice provisions are not "universally understood to be [] essential to fair litigation." Id. at 1506.

Judge Bork dissented, relying principally on an argument that he acknowledged had been abandoned by the government's lawyer at oral argument -- that Congress had drafted the notice provision broadly enough to include federal constitutional claims. Id. at 1510 n.1. Although he refused to apply a broad remedial provision to a workplace hazard in another case because it was not the kind of "hazard[] Congress had in mind," Oil, Chemical and Atomic Workers International Union v. American Cyanamid Co., 741 F.2d 444, 449 (1983), Judge Bork took the opposite approach in Brown, arguing that the notice provision could be used to bar constitutional claims even though that sort of application "never occurred to the legislature." 742 F.2d at 1510 (quoting Eastern Airlines, Inc. v. Civil Aeronautics Board, 354 F.2d 507, 511 (1965)). In doing so, he emphasized the District of Columbia's interest in being notified of claims to be brought against it within six months, but minimized the adverse impact that such a short notice period would have on the ability of injured persons to pursue constitutional claims against the city. Id. at 1515-16.

Judge Bork also argued that constitutional claims should be barred by a statute of limitations in Hohri v. United States, 793 F.2d 304 (1986)(denying rehearing en banc). In that case, Japanese-Americans who were interned during World War II sought money damages for violations of their constitutional rights, including the taking of their property without just compensation. In its infamous decision in Korematsu v. United States, 323 U.S. 214 (1944), the Supreme Court refused to halt the internment of Japanese-Americans on the basis of the government's claim that the internment was justified by military necessity. According to the plaintiffs in the Hohri case, however, the government had concealed from the Supreme Court documents in the government's own files which undermined the national security justification for the incarceration. They argued that the government's intentional concealment of this evidence tolled the statute of limitations for their damages claims until the documents became available. A majority of the panel ruled that, because of the Supreme Court's reliance on the government's national security justification in Korematsu, the plaintiffs were justified in waiting to pursue their claims for damages until they had obtained evidence that the government had in fact misled the Court about the true reasons for its actions and until either Congress or the executive stated that the presumption of deference to the war-making branches may not have been warranted, as Congress did in creating a Commission in 1980. Hohri v. United States, 782 F.2d 227, 251-53 (1986).

Judge Bork, who had not sat on the panel, argued that the case should be reheard en banc, stating that the statute of limitations "plainly bars this action." 793 F.2d at 305. In his view, the plaintiffs did not need to wait as long as they did to bring their claims because they could have successfully challenged the internment and the taking without the documents that the government had concealed and without waiting for one of the political branches to retract its claim of military necessity. In advancing this argument, Judge Bork relied on a rationale which appears to be inconsistent with other opinions he has written. In the course of rejecting other constitutional challenges, Judge Bork has invoked the "classical deference [owed by courts] to the political branches in matters of foreign policy" and national security. Finzer v. Barry, 798 F.2d 1450, 1459 (1986). But in Hohri, he criticized the majority opinion on the grounds that it reflected too much deference to the executive branch's claims of military necessity.

The two judges in the panel majority responded that Judge Bork's analysis was off the mark because the court was not erecting any general rules for constitutional cases brought during either wartime or peacetime, but was merely construing the plain language of Korematsu. They pointed out that they had focused "particularly and precisely [on] the special facts of an extraordinary episode of injustice," as well as on the Supreme Court's "clear, pin-pointed and definite" holding that "sufficient military necessity existed to justify the World War II internment policy." Id. at 313 (emphasis in original). For the court to hold, as Judge Bork desired, that the plaintiffs could have brought their claims earlier would have subjected them to a "vicious whipsaw" and effectively precluded them "from ever obtaining judicial redress . . . ." Id. at 314. It is ironic that the only national security case of which we are aware where Judge Bork argued for less deference to the government than the other members of the court was where such an argument was essential to dismiss an individual's claim.

E. Attorneys' Fees

The final category of cases bearing on the public's access to the courts concerns the award of attorneys' fees to prevailing parties. In most litigation, where the lawyers are paid a fee from their clients regardless of whether they win or lose, the question of court-awarded attorneys' fees does not arise or does not determine whether the case can be brought. However, Congress has recognized that there are many classes of cases in which those who seek to vindicate their legal rights through the courts would be unable to do so because they lack the financial resources to pay the considerable attorneys' fees that inevitably accompany litigation. To encourage lawyers to take on these cases, and to ensure that these valuable rights are not lost because of the unavailability of counsel, Congress has enacted attorneys' fees provisions in a number of areas -- civil rights, environmental, and suits against the government by individuals and small businesses -- which allow a prevailing plaintiff to recover his or her attorneys' fees.

During Judge Bork's tenure on the D.C. Circuit, he has participated in 12 cases resulting in published opinions involving a claim of entitlement to attorneys' fees. In 8 of these cases, including the only 1 that involved a split decision, Judge

Bork voted to deny fees. In 2 others, he voted to grant fees to a business petitioner -- once in a case involving the government, Kennecott Corp. v. EPA, 804 F.2d 763 (1986) (per curiam), and once in a case involving private parties, Eureka Investment Corp. v. Chicago Title Insurance Co., 743 F.2d 932 (1984). In 1 of the remaining 2 cases, Judge Bork joined an opinion vacating a fee award to a successful plaintiff under the Freedom of Information Act, but leaving open the possibility -- albeit remote -- that the plaintiff would eventually recover fees. Weisberg v. Department of Justice, 745 F.2d 1476 (1986). In the final case, Judge Bork joined a unanimous opinion rejecting the Federal Mine Safety and Health Administration's categorical denial of fees to a claimant who had been furnished an attorney by his union. Munsey v. FMSHA, 701 F.2d 976 (1983).

- In all five attorneys' fees cases in which he wrote opinions, Judge Bork ruled against the party seeking fees. In addition, although he did not write for the panel in Shultz v. Crowley, which construed the Equal Access to Justice Act narrowly over the strong dissent of Judge MacKinnon, he did write a statement accompanying the full court's denial of rehearing en banc, which expressed support for the panel majority's opinion, 802 F.2d 498 (1986).

V. SEPARATION OF POWERS[33]

Judge Bork based many of his decisions on his claimed strict adherence to the constitutional principle of separation of powers -- the principle that the Constitution assigns specific powers to each of the three branches of government and that no branch may encroach upon the powers of the other branches. Article I of the Constitution created the Congress of the United States as the legislative branch -- and defined its powers, including the powers to tax, to appropriate money, to provide for the common defense, to define and punish criminal offenses, to declare war, and to "make all Laws which shall be necessary and proper" for the execution of its powers. Article II established the President as the head of the executive branch, made him the Commander-in-Chief of the military, and gave him the responsibility to "take care that the Laws are faithfully executed." Article III established the courts as the judicial branch and gave them the power to decide "cases and controversies" arising under the Constitution and the laws of the United States.

Although the doctrine of "separation of powers" is not explicitly found in the language of the Constitution, it is now well-settled constitutional doctrine that the Framers intended the three branches to operate largely separate from one another. However, it is also clear that "the Constitution by no means contemplates total separation of each of these three essential branches of Government" and that "[t]he Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." Buckley v. Valeo, 414 U.S. 1, 121-22 (1976).

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[33] Judge Bork wrote opinions in the following cases: Opinion Nos. 13, 91, 98, 106, 107, 134. His only vote in a split decision that not counted in another section is in Case No. 20.

Despite Judge Bork's purported allegiance to these principles, an examination of his opinions in a wide variety of cases -- from administrative law to constitutional law -- leads to the conclusion that Judge Bork has not been faithful to the doctrine of separate but equal branches. Instead, Judge Bork has advocated the supremacy of the executive branch over the legislative and judicial branches, and he has disdained many of the checks that safeguard against the aggrandizement of the executive branch's power.

As demonstrated in the administrative law chapter, Judge Bork consistently supported virtually unfettered deference to the executive's interpretation of statutory language, except in those cases which a business challenged an agency's regulatory decision. He did so even where the statutory language was plain and the legislative history reflected a congressional purpose that was clearly at odds with the agency's interpretation. As Judge Wright wrote in his dissent in the panel opinion in Natural Resources Defense Council v. Environmental Protection Agency, 804 F.2d 710, 733 (1986), Judge Bork's approach to statutory construction "comes perilously close to establishing an absolute rule of judicial deference to agency interpretations." Judge

Wright further expressed his concern that "[i]n our caution not to rob the Executive Branch of its proper role in the constitutional system, we must be extremely careful not to deprive Congress of effective legislative control over agency action." Id.

Although Judge Bork has acknowledged that the Constitution commits the conduct of our nation's foreign relations to both the executive and legislative branches, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 801 (1984), nowhere is his belief in the supremacy of the executive branch more entrenched than in the context of foreign affairs. Thus, in his dissent in a case involving the scope of the Secretary of State's authority to deny visas to foreigners invited to present their political views to citizens of this country, Judge Bork explained that the "principle of deference [to an agency's statutory interpretation] applies with special force where the subject of [the statutory] analysis is a delegation to the Executive of authority to make and implement decisions relating to the conduct of foreign affairs." Abourezk v. Reagan, 785 F.2d 1043, 1063 (1986).

In that case, in order to conclude that the Secretary had the authority to deny visas to individuals simply on the basis of their political affiliations, Judge Bork essentially had to nullify an amendment to the Immigration and Nationality Act that requires the Secretary to recommend granting visas to any alien who is a member of the Communist Party, but who is otherwise admissible to the United States, unless the Secretary certifies to Congress that "the admission of such alien would be contrary to the security interests of the United States." Id. at 1048 (quoting 22 U.S.C. § 2691(a) (1982)). In addition, Judge Bork found "dubious" the proposition that the plaintiffs could even challenge the executive's assertion that visa applicants are affiliated with certain Communist governments, since resolution of such factual disputes would not only fall outside the "power and competence" of a reviewing court, but could also "require information that might well be too sensitive for the Executive to submit [to the court], even in camera." Id. at 1070 n.4.

Judge Ruth Ginsburg wrote for the majority that, under Judge Bork's interpretation of the statute, the State Department "may exclude someone simply by pointing to her membership in a [specified] organization" and its decision is then "walled off from any effective challenge." Id. at 1058 n.20. While Judge Bork viewed the majority's opinion as "begin[ning], albeit cautiously, a process of judicial incursion into the United States' conduct of its foreign affairs," id. at 1076, Judge Ginsburg expressed a different view of the relative roles of the three branches of government:

> The Executive has broad discretion over the admission and exclusion of aliens, but that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie.

Id. at 1061.

Another case in the foreign affairs area demonstrates Judge

Bork's extreme deference to the executive branch at the expense of Congress. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (1984), raised the issue of whether relatives of persons murdered in an armed attack on a civilian bus in Israel by members of the Palestinian Liberation Organization had a right to seek compensatory and punitive damages in federal court in the United States. While all three of the judges who sat on the panel agreed that the suit should be dismissed for lack of subject matter jurisdiction, each wrote an opinion expressing different rationales for this result. Judge Roger Robb readily dismissed the case as one that raised a "political question" that should not be resolved by the courts; Judges Bork and Edwards wrote lengthy opinions expressing their own views.

Judge Bork was "guided chiefly by separation of powers principles, which caution courts to avoid potential interference with the political branches' conduct of foreign relations." Id. at 799. He concluded that since there was no express grant of the specific cause of action in question in the "law of nations" or in any of the treaties relied on by the plaintiffs, and because "[a] judicial pronouncement on the PLO's responsibility for the 1978 bus attack would likely interfere with American diplomacy," id. at 805, plaintiffs' claims were barred to avoid "substantial problems of judicial interference with nonjudicial functions." Id. at 804.

Judge Edwards vehemently disagreed with this analysis. Relying on a Second Circuit opinion, he found that the phrase "law of nations" in the jurisdictional grant was by no means a stagnant concept, but instead encompassed not only expressed causes of action in existence when the provision was written, but also the "customs and usages of civilized nations, as articulated by jurists and commentators," which, in his view, amply prohibited the kind of attack that was involved there. Id. at 777. Judge Edwards concluded that the plaintiffs were barred from pursuing their specific claims, however, because, by failing to make specific allegations that the perpetrators of the crimes acted in an official governmental capacity, they did not make out a "law of nations" claim.

In response to Judge Bork's separation of powers analysis, Judge Edwards wrote that:

> To the extent that Judge Bork rejects the [Second Circuit's] construction of [the grant of jurisdiction] because it is contrary to his perception of the appropriate role of courts, I believe he is making a determination better left to Congress. It simply is not the role of a judge to construe a statutory clause out of existence merely on the belief that Congress was ill-advised in passing the statute.

Id. at 789. He further expressed his concern that to construe the grant of jurisdiction out of existence because it is difficult to implement, as Judge Bork had done, "is to usurp Congress' role and contravene its will." Id. at 790. Noting that Judge Bork went so far as to state that, even if there were a specific grant of jurisdiction in the "law of nations" for the case at hand, "considerations of justiciability" would nevertheless come into play, Judge Edwards concluded that "[w]ith this remark, Judge Bork virtually concedes that he would keep these cases out of court under any circumstances." Id. Judge Edwards found this proposition to be completely inconsistent with Judge Bork's purported allegiance to the principles of separation of powers:

> Vigorously waving in one hand a separation of powers banner, ironically, with the other [Judge Bork] rewrites Congress' words and renounces the task that Congress has placed before him.

Id.

Judge Bork has aired his views about the unconstitutionality of congressional limitations on the executive's conduct of foreign affairs in other forums. In a 1971 law review article, he wrote that "there is no reason to doubt that President Nixon had ample Constitutional authority" to order the secret bombing of Cambodia, and that "[t]he real question . . . is whether Congress has the Constitutional authority to limit the President's discretion with respect to this attack," since "[a]ny detailed intervention by Congress in the conduct of the Vietnamese conflict constitutes a trespass upon powers the Constitution reposes exclusively in the President." Comments on the Legality of the United States Action in Cambodia, 65 American Journal of International Law 79 (Jan. 1971). According to then Professor Bork, Congress's power in this area is limited to the decisions to initiate and end wars; once the nation is involved in a military conflict, "Congress cannot, with Constitutional propriety, undertake to control the details of that incursion." Id. at 81. He repeated these views during the 1973 hearings on his confirmation to become Nixon's Solicitor General. Nominations of Joseph T. Sneed to be Deputy Attorney General and Robert H. Bork to be Solicitor General: Hearings Before the Senate Committee on the Judiciary, 93rd Cong., 1st Sess. 9-10 (1973).

Along the same lines, Judge Bork has expressed his view that the War Powers Resolution, passed by Congress in the wake of the Vietnam War as an effort to limit the President's unilateral ability to deploy United States troops, is "probably unconstitutional and certainly unworkable." Wall Street Journal, Mar. 9, 1978. In the same article, Judge Bork wrote that the then-proposed Foreign Services Intelligence Act, which was subsequently enacted as a judicial check on the executive's electronic surveillance of American citizens, "may run afoul of . . . the Constitution," because it would "give the Supreme Court an essentially administrative role in intelligence gathering." Id. In response to the argument that the judiciary would merely act as a "check" on the abuse of the executive's wiretap power, he complained that "[t]o suppose that [judges] would defer to the superior expertise of the agencies is either to confess the safeguards will not work or to underestimate the strength of the tendency displayed by the judiciary in recent years to take over both legislative and executive functions." Id.

Judge Bork has also expounded on his view that the judicial branch is attempting to usurp the powers of the legislative and executive branches in his opinions that would deny "standing" to individuals seeking to have the federal courts adjudicate their claims against the executive branch. See Chapter IV, Section A.

Thus, for example, in denying the Haitian Refugee Center the opportunity to challenge the legality of the President's program of interdicting ships carrying undocumented aliens from Haiti to the United States, Judge Bork held that the injury alleged by the group, i.e., that it was being deprived of its opportunity to counsel and associate with the refugees, was far too speculative to satisfy the "causation" requirement of the standing doctrine which "implements separation of powers because it is necessary to prevent the virtually limitless spread of judicial authority." Haitian Refugee Center v. Gracey, 809 F.2d 794, 805 (1987). In the name of "separation of powers," Judge Bork, who prides himself on being a "strict constructionist" of the Constitution, read into Article III's limitation of federal court jurisdiction to "cases and controversies" insurmountable barriers to plaintiffs wishing to challenge executive action, including the requirement that they show that the governmental action at issue was purposefully aimed at interfering with their relationships with third parties. Id. at 808.

As his opinion in Barnes v. Kline demonstrates, Judge Bork is also a vigorous opponent of "congressional standing," arguing that to allow one branch of government to bring a constitutional challenge to the exercise of power by the other branch constitutes a "major aggrandizement of judicial power." 759 F.2d 21, 60 (1984). Thus, he stated that a dispute between the branches over the allocation of powers, such as the issue raised in Barnes -- the constitutionality of the President's pocket veto power -- "is best left to political struggle and compromise." Id. at 55. In Judge Bork's view, "[i]f the federal courts can routinely be brought in to pronounce constitutional principle every time the branches of the federal government disagree[,] then we will indeed become a . . . judge-ridden society." Id.

In cases barring litigants from the courts based on separation of powers doctrine, Judge Bork has based his deference to the executive on his views that "[i]t was to allow room for the evolution of the powers of various offices and branches that the Constitution's specification of those powers was made somewhat vague," and that "[t]he Framers contemplated organic development [of the respective powers of the branches], not a structure made rigid at the outset by rapid judicial definition of the entire subject as if from a blueprint." Id. In contrast, Judge Bork has adopted an entirely different basis for deferring to the executive in individual rights cases, finding absolutely no room for the "evolution" or "organic development" of individual protections guaranteed by the Bill of Rights. See Chapter II. Judge Bork made his views on standing clear long before he became a federal judge. Indeed, in 1973, as the defendant to the suit challenging his "Saturday Night Massacre" firing of Special Prosecutor Archibald Cox, then Solicitor General Bork argued that neither the citizen plaintiff nor the three congressional plaintiffs had standing even to bring such a suit. See Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973). The district court disagreed and also held that the firing was illegal. Id.

Judge Bork restated his view that the judicial branch is expanding to the detriment of our democratic foundations in an opinion concerning the doctrine of sovereign immunity -- which holds the executive immune from lawsuits, even where the plaintiff has clearly suffered injury as a result of executive actions. See Chapter IV, Section B. Thus, in his dissent in Bartlett v. Brown, 816 F.2d 695 (1987), relying on the doctrine of sovereign immunity, Judge Bork found it acceptable for Congress to prohibit a federal court from reviewing a constitutional challenge to actions of the executive branch. The majority disagreed, holding that "a statutory provision precluding all judicial review of constitutional issues removes from the courts an essential judicial function under our implied constitutional mandate of separation of powers, and deprives an individual of an independent forum for the adjudication of a claim of constitutional right." Id. at 703 (emphasis in the original).

Judge Bork has also taken an extremely broad view of the scope of executive privilege -- the constitutionally based privilege that protects communications to and from the President concerning the exercise of his powers. In Wolfe v. Department of Health & Human Services, 815 F.2d 1527 (1987), the majority held that a "regulations log" kept by the Department of Health and Human Services ("HHS"), which indicated when a proposed regulation was received and transmitted by various agencies in the course of the regulatory process, could not be withheld from the public under the Freedom of Information Act ("FOIA") on the

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The majority rejected this argument, on the ground that disclosure of the information at issue -- the date on which a proposed regulation was transmitted from one agency to another -- did not implicate any of the privilege's concerns for protecting the substantive communications with the President. In addition, the majority concluded that "even if such a threat were found to exist, extension of the presidential privilege to the OMB [would be] unprecedented and unwarranted." Id. at 1533. Moreover, it observed that "[t]he President himself and communications with him are not implicated in any way by the OMB review process," id., and that "to extend the privilege to OMB invites extension to the entire Executive Branch, which would create an unnecessary sequestering of massive quantities of information from the public eye." Id. at 12.

Judge Bork dissented, arguing first that the claimed statutory exemption applied with full force to the log at issue. Id. at 1534-37. Then, although stating that, since the exemption applied, he did not have to address the government's constitutional claim, Judge Bork nevertheless launched into an expression of his "tentative views" that the executive privilege would apply to the information at issue. He found the majority's "apparent[] belie[f] that the constitutional privilege is restricted to the President himself" to be a "troubling position," because, in his view, it "ignores the President's need, both long-established and all the more imperative in the modern administrative state, to delegate his duties." Id. at 1539. Thus, Judge Bork argued that OMB could not effectively exercise its delegated power to review the advisability of regulatory actions unless this delegation carried with it "the delegation of the President's constitutional privilege." Id. Under this sweeping analysis of the scope of executive privilege, any governmental official acting in the performance of duties delegated to him by the President (including officials such as Lt. Colonel Oliver North) would be constitutionally protected from divulging to the public, the courts, and Congress all communications generated in the course of such activities.

VI. ANTITRUST[34]

Antitrust laws play an important role in the American economy. Beginning with the Sherman Act in 1890, Congress has enacted a series of laws designed to prevent certain mergers and other collusive practices, such as price-fixing and agreements to divide up markets, that stifle competition and injure consumers.

The Supreme Court is particularly influential in defining the scope of these laws because the antitrust statutes are written in general terms, outlawing such practices as a "restraint of trade," an "attempt to monopolize," or a merger whose effect "may be substantially to lessen competition." It is the Supreme Court which has given more precise meaning to these and similar statutory phrases, defining which types of business conduct are permissible and which are not.

Antitrust law was Judge Bork's specialty both when he was in private practice and as a law professor. His views on antitrust issues were expressed in a number of articles over the years, culminating in his 1978 book, The Antitrust Paradox: A Policy at War with Itself. His work criticized many of the Supreme Court's antitrust decisions, particularly those which are based in part on social and political as well as economic factors that affect the allocation of economic power in America. Judge Bork has argued that the only goal of the antitrust laws should be consumer welfare and that much greater attention should be paid to economic efficiency in assessing whether that goal is being achieved. In his view, the Supreme Court correctly interpreted the scope of the antitrust laws in a series of cases decided around the turn of the century which dealt with horizontal mergers and collusive behavior such as price-fixing. In later years, by contrast, "in one antitrust context after another -- mergers, exclusive dealerships, patent-license restrictions, price discrimination, and so on and on -- the Supreme Court has steadily and drastically reshaped the law to protect the inefficient producer at the expense of consumers." "The Supreme Court Versus Corporate Efficiency," FORTUNE, at 92 (Aug. 1967).

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[34] Judge Bork wrote opinions in the following cases: Opinion Nos. 27, 36, 37, 43 and 51. There were no split decisions in which he participated.

In his book, which relies heavily on economic analysis, Judge Bork concluded that only certain types of conduct should be regulated by the antitrust laws:

(1) The suppression of competition by horizontal agreement, such as agreements with rivals or potential rivals to fix prices or divide markets;

(2) Horizontal mergers creating very large market shares (those that leave fewer than three significant rivals in any market); and

(3) Predatory practices engaged in to drive rivals from a market, to prevent or delay the entry of rivals, or to discipline existing rivals, with the caveat that antitrust enforcers should take care not to confuse hard competition with predation.

He also identified many types of business conduct which he believed should no longer be subject to the antitrust laws.

Judge Bork has further argued for abandoning any concern with practices that he regards as beneficial, such as small horizontal mergers, all vertical and conglomerate mergers, vertical price maintenance and market division, tying arrangements, exclusive dealing and requirements contracts, "predatory" price cutting, price "discrimination," and the like. Finally, he has argued that the antitrust laws should not apply to any firm size or industry structure created by internal growth or by a merger more than 10 years old.

Robert Pitofsky, an antitrust authority and a former Federal Trade Commissioner, who is currently Dean of Georgetown University Law Center, has offerdd the following observation on Judge Bork's antitrust theories: "One way to examine his views is to ask how many Supreme Court cases, currently thought to state valid law, would he vote to overrule. If his writings are a fair guide, the answer would be about 90%." Memorandum to J. Blattner from R. Pitofsky, at 2 (July 27, 1987).

In his five years on the bench, Judge Bork has not had much opportunity to decide antitrust cases, primarily because the District of Columbia is not a center of commerce, and thus few antitrust suits are filed in that circuit. In fact, only five of his decisions involved antitrust issues, and he wrote the opinion for the court in each one, with none of his colleagues registering a dissent. In one of those, Federal Trade Commission v. PPR Industries, Inc., 798 F.2d 1500 (1986), the court granted a request by the Federal Trade Commission to enjoin a proposed merger pending judicial resolution of the case. His opinion in another case, however, Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (1986), indicates a willingness to write his own views of antitrust into law if given an opportunity to do so.

Prior to economic deregulation of the household goods moving industry, many local moving companies operated as the agent for a national van line, transporting goods for that agent in a particular region. In addition, these local companies often had licenses which allowed them to transport goods in a region independently of the van line. Following passage of a deregulation law in 1980, these agents found it easier to obtain their own operating authority and began to handle more moves on their own, rather than as agents for a van line.

Responding to this "free rider" situation, Atlas Van Lines adopted a policy stating that it would not deal with any agent unless that agent surrendered its own operating authority and agreed to operate solely as an Atlas agent, or unless it created a new corporation that would handle interstate moves separately from its operations as an Atlas agent. Several agents sued the van line, claiming that the company was engaging in a group boycott in violation of the Sherman Act.

On the merits, the case was not a difficult one, and the trial judge and all three appeals court judges agreed that the Atlas policy was reasonable and should be upheld. What is noteworthy, however, is the fact that Judge Bork, writing for the court, used the case as an opportunity to outline his views on the primacy of economic efficiency in determining the analysis and outcome of such suits. Under traditional antitrust analysis, a reviewing court would first ask if the consolidation is so anti-competitive as to be unlawful on its face (the "per se" rule); if not, the court must weigh the pro-competitive aspects against the anti-competitive ones and determine if the proposal is reasonable, as the district court did in Rothery.

Judge Bork's opinion indicated that such analysis was largely unnecessary and that the case could instead be decided by looking at the market share of the companies involved. In a discussion reminiscent of his book, he stated that the decision favoring Atlas could be based on the fact that Atlas and its agents had only 6% of the market; therefore, Atlas could not possibly have enough market power to eliminate competition, and the new policy must instead be designed to achieve efficiencies. "No third possibility suggests itself," he added. 792 F.2d at 221.

Judge Wald agreed with the outcome of the case, but wrote a separate concurring opinion stating that reliance on market power alone might be appropriate if "the only legitimate purpose of the antitrust laws is this concern with the potential for decrease in output and rise in prices.. . ." Id. at 230 (emphasis in original). She added that until the Supreme Court "provides more definitive instruction in this regard," it would be "premature" to be constructing a test which "ignores all other potential concerns of the antitrust laws except for restriction of output and price raising." Id. at 231 (footnotes omitted). As a Supreme Court Justice, Judge Bork would be well situated to provide such a "more definitive instruction" to lower courts on how to decide antitrust cases, and his writings set forth what he believes those instructions should contain.

CONCLUSION

In our view, Judge Bork's record on the D.C. Circuit raises serious issues that should be addressed before any Senator votes to confirm his nomination to the Supreme Court.

PUBLIC CITIZEN LITIGATION GROUP
August 1987

APPENDIX [35]

OPINIONS WRITTEN BY JUDGE BORK

1. National Latino Media Coalition v. Federal Communications Commission, 816 F.2d 785 (1987)

2. Montgomery & Associates v. Commodity Futures Trading Commission, 816 F.2d 783 (1987)

3. United Transportation Union v. Brock, 815 F.2d 1562 (1987)

4. Maxcell Telecom Plus v. Federal Communications Commission, 815 F.2d 1551 (1987)

* 5. Wolfe v. Department of Health and Human Services, 815 F.2d 1527, *vacated and rehearing en banc granted*, 821 F.2d 809 (1987)

6. Western Union Telegraph Co. v. Federal Communications Commission, 815 F.2d 1495 (1987)

7. Bartlett v. Bowen, 816 F.2d 695 (1987), *rehearing en banc denied*, ___ F.2d ___ (July 31, 1987)

8. National Fuel Gas Supply Corp. v. Federal Energy Regulatory Commission, 811 F.2d 1563 (1987), *pet. for cert. filed* (May 21, 1987)

9. National Treasury Employees Union v. Federal Labor Relations Authority, 810 F.2d 1224 (1987)

10. Jersey Central Power & Light Co. v. Federal Energy Regulatory Commission, 810 F.2d 1168 (1987)(*en banc*)

11. Amalgamated Transit Union v. Brock, 809 F.2d 909 (1987)

12. Independent U.S. Tanker Owners Committee v. Dole, 809 F.2d 847 (1987), *pet. for cert. filed* (May 16, 1987)

* 13. Haitian Refugee Center v. Gracey, 809 F.2d 794 (1987)

14. Mississippi Industries v. Federal Energy Regulatory Commission, 808 F.2d 1525 (1987); *portions of opinion vacated by unpublished order* (June 24, 1987)(dissenting opinion adopted as opinion of the Court and case remanded to agency).

15. Securities Industry Association v. Board of Governors of Federal Reserve System, 807 F.2d 1052 (1986),

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[35] Asterisks in the margin indicate cases of particular significance.

cert. denied, 107 S. Ct. 3228 (1987)

16. Moncrief v. Lexington Herald-Leader Co., 807 F.2d 217 (1986)

17. Telecommunications Research and Action Center v. Allnet Communication Services, 806 F.2d 1093 (1986)

18. Center for Auto Safety v. Thomas, 806 F.2d 1071 (1986), vacated and rehearing en banc granted, 810 F.2d 302 (1987)

19. Natural Resources Defense Council v. Environmental Protection Agency, 804 F.2d 710 (1986), vacated and rehearing en banc granted, 810 F.2d 270 (1987), on rehearing en banc, ____ F.2d ____ (July 28, 1987)

20. Greenberg v. Food & Drug Administration, 803 F.2d 1213 (1986)

21. McLaughlin v. Bradlee, 803 F.2d 1197 (1986)

22. Panhandle Eastern Pipe Line Co. v. Federal Energy Regulatory Commission, 803 F.2d 726 (1986)

23. Restaurant Corp. of America v. National Labor Relations Board, 801 F.2d 1390 (1986)

* 24. Telecommunications Research & Action Center v. Federal Communications Commission, 801 F.2d 501, rehearing en banc denied, 806 F.2d 1115 (1986), cert. denied, 107 S. Ct. 3196 (1987)

25. Red Lake Band of Chippewa Indians v. United States, 800 F.2d 1187 (1986)

26. National Treasury Employees Union v. Federal Labor Relations Authority, 800 F.2d 1165 (1986)

27. Federal Trade Commission v. PPG Industries, 798 F.2d 1500 (1986)

28. Finzer v. Barry, 798 F.2d 1450 (1986), cert. granted sub nom. Boos v. Barry, 107 S. Ct. 1282 (1987)

29. Pittsburgh & Lake Erie Railroad Co. v. Interstate Commerce Commission, 796 F.2d 1534 (1986)

30. Northwest Airlines v. Federal Aviation Administration, 795 F.2d 195 (1986)

31. Coalition for the Environment v. Nuclear Regulatory Commission, 795 F.2d 168 (1986)

32. International Brotherhood of Electrical Workers Local 1466 v. National Labor Relations Board, 795 F.2d 150 (1986)

33. Business and Professional People for the Public Interest v. Nuclear Regulatory Commission, 793 F.2d 1366 (1986)

34. Monk v. Secretary of the Navy, 793 F.2d 364 (1986)

35. Hohri v. United States, 793 F.2d 304 (1986), vacated, 107 S. Ct. 2246 (1987)

* 36. Rothery Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210 (1986), cert. denied, 107 S. Ct. 880 (1987)

37. Three Way Corp. v. Interstate Commerce Commission, 792 F.2d 232, cert. denied, 107 S. Ct. 573 (1986)

38. Meeropol v. Meese, 790 F.2d 942 (1986)

39. San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission, 789 F.2d 26 (en banc), cert. denied, 107 S. Ct. 330 (1986)

40. Beaufort County Broadcasting Co. v. Federal Communications Commission, 787 F.2d 645 (1986)

41. Community for Creative Non-Violence v. Pierce, 786 F.2d 1199 (1986)

42. American Maritime Association v. United States, 786 F.2d 1186 (1986)

43. Neumann v. Reinforced Earth Co., 786 F.2d 424, cert. denied, 107 S. Ct. 181 (1986)

* 44. Abourezk v. Reagan, 785 F.2d 1043, cert. granted, 107 S. Ct. 666 (1986)

45. Demjanjuk v. Meese, 784 F.2d 1114 (1986)

46. King v. Palmer, 40 Fair Empl. Prac. Case (BNA) 198 (1986)(denial of rehearing en banc)

47. Morris v. Washington Metropolitan Area Transit Authority, 781 F.2d 218 (1986)

48. National Classification Committee v. United States, 779 F.2d 687 (1985)

49. Federal Trade Commission v. Brown & Williamson Tobacco Corp., 778 F.2d 35 (1985)

50. Robbins v. Reagan, 780 F.2d 37 (1985)

51. United States v. Western Electric Co., 777 F.2d 23 (1985)

52. Meadows v. Palmer, 775 F.2d 1193 (1985)

53. Greenberg v. Food & Drug Administration, 775 F.2d 1169 (1985), *vacated*, 803 F.2d 1213 (1986)

54. Mid-Tex Electric Cooperative v. Federal Energy Regulatory Commission, 773 F.2d 327 (1985)

55. Alabama Power Co. v. Federal Communications Commission, 773 F.2d 362 (1985)

56. Delmarva Power & Light Co. v. Federal Energy Regulatory Commission, 770 F.2d 1131 (1985)

* 57. Jersey Central Power & Light Co. v. Federal Energy Regulatory Commission, 768 F.2d 1500 (1985)(rehearing panel opinion reported at 730 F.2d 816 (1984)), *on rehearing en banc*, 810 F.2d 1168 (1987)

58. Norfolk & Western Railway Co. v. United States, 768 F.2d 373 (1985), *cert. denied sub nom.* *Aluminum Association v. Norfolk & Western Railway Co.*, 107 S. Ct. 270 (1986)

59. Securities Industry Association v. Comptroller of the Currency, 765 F.2d 1196 (1985), *cert. denied*, 106 S. Ct. 790 (1986)

60. National Classification Committee v. United States, 765 F.2d 1146 (1985)

61. Citizens Coordinating Committee on Friendship Heights v. Washington Metropolitan Area Transit Authority, 765 F.2d 1169 (1985)

62. United States v. Singleton, 763 F.2d 1432 (1985) (denial of rehearing *en banc*)

63. Edison Electric Institute v. Interstate Commerce Commission, 765 F.2d 210 (1985)

64. United States v. James, 764 F.2d 885 (1985)

65. Maryland Department of Human Resources v. Department of Health and Human Services, 763 F.2d 1441 (1985)

66. Weisberg v. Department of Justice, 763 F.2d 1436 (1985)(on rehearing)

67. Vinson v. Taylor, 760 F.2d 1330 (1985)(denial of rehearing *en banc*), *aff'd sub nom. Meritor Savings Bank v. Vinson*, 106 S. Ct. 2399 (1986)

68. Telocater Network of America v. Federal Communications Commission, 761 F.2d 763 (1985)

69. Paralyzed Veterans of America v. Civil Aeronautics Board, 752 F.2d 694 (1985)(denial of rehearing *en banc*), *rev'd sub nom. Department of Transportation v. Paralyzed Veterans of America*, 106 S. Ct. 2705 (1986)

* 70. United States v. Singleton, 759 F.2d 176, *rehearing en banc denied*, 763 F.2d 1432 (1985)

71. Farmers Export Company v. United States, 758 F.2d 733 (1985)

72. United States v. Mount, 757 F.2d 1315 (1985)

73. Wilson v. Good Humor Corporation, 757 F.2d 1293 (1985)

74. Catrett v. Johns-Manville Sales Corp., 756 F.2d 181 (1985), *rev'd sub nom. Celotex Corp. v. Catrett*, 106 S. Ct. 2548 (1986)

* 75. Prill v. National Labor Relations Board, 755 F.2d 941, *cert. denied sub nom. Meyers Industries v. Prill*, 106 S. Ct. 313, 352 (1985)

76. Sierra Club v. Department of Transportation, 753 F.2d 120 (1985)

77. Lebron v. Washington Metropolitan Area Transit Authority, 749 F.2d 893 (1984)

78. Reuber v. United States, 750 F.2d 1039 (1984)

* 79. Ollman v. Evans, 750 F.2d 970 (1984)(*en banc*), *cert. denied*, 471 U.S. 1127 (1985)

* 80. Middle South Energy v. Federal Energy Regulatory Commission, 747 F.2d 763 (1984), *cert. dismissed sub nom. City of New Orleans v. Middle South Energy*, 473 U.S. 930 (1985)

81. American Employers Insurance Co. v. American Security Bank, 747 F.2d 1493 (1984)

82. Boston Carrier v. Interstate Commerce Commission, 746 F.2d 1555 (1984)

83. National Classification Committee v. United States,

746 F.2d 886 (1984)

84. National Association of Regulatory Utility Commissioners v. Federal Communications Commission, 746 F.2d 1492 (1984)

85. Washington Hospital Center v. Service Employees International Union, Local 722, 746 F.2d 1503 (1984)

86. New York State Energy Research and Development Authority v. Federal Energy Regulatory Commission, 746 F.2d 64 (1984)

87. City of New York Municipal Broadcasting System v. Federal Communications Commission, 744 F.2d 827 (1984), cert. denied, 470 U.S. 1084 (1985)

88. Donovan v. Williams Enterprises, 744 F.2d 170 (1984)

89. P & R Temmer v. Federal Communications Commission, 743 F.2d 918 (1984)

90. Brown v. United States, 742 F.2d 1498 (1984), cert. denied sub nom. District of Columbia v. Brown, 471 U.S. 1073 (1985)

* 91. Barnes v. Kline, 759 F.2d 21 (1985), vacated sub nom. Burke v. Barnes, 107 S. Ct. 734 (1987)

92. Athens Community Hospital v. Schweiker, 743 F.2d 1 (1984)(rehearing panel opinion reported at 686 F.2d 989 (1982))

* 93. Oil, Chemical and Atomic Workers International Union v. American Cyanamid Co., 741 F.2d 444 (1984)

* 94. Dronenburg v. Zech, 741 F.2d 1388, rehearing en banc denied, 746 F.2d 1579 (1984)

95. Cowin v. Bresler, 741 F.2d 410 (1984)

96. Amalgamated Clothing and Textile Workers Union v. National Labor Relations Board, 736 F.2d 1559 (1984)

97. International Paper Co. v. Federal Energy Regulatory Commission, 737 F.2d 1159 (1985)

98. Nathan v. Smith, 737 F.2d 1069 (1984)

99. Donovan v. Carolina Stalite Co., 734 F.2d 1547 (1984)

100. Midwestern Gas Transmission Co. v. Federal Energy Regulatory Commission, 734 F.2d 828 (1984)

101. Grano v. Barry, 733 F.2d 164 (1984)

102. Jersey Central Power & Light Co. v. Federal Energy Regulatory Commission, 730 F.2d 816 (1984), *on rehearing*, 768 F.2d 1500 (1985), *on rehearing en banc*, 810 F.2d 1168 (1987)

103. Persinger v. Islamic Republic of Iran, 729 F.2d 835, *cert. denied*, 469 U.S. 881 (1984)

104. Ganadera Industrial v. Block, 727 F.2d 1156 (1984)

105. Silverman v. Barry, 727 F.2d 1121 (1984)

106. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (1984), *cert. denied*, 470 U.S. 1003 (1985)

107. Crockett v. Reagan, 720 F.2d 1355 (1983), *cert. denied*, 467 U.S. 1251 (1984)

108. Jayvee Brand v. United States, 721 F.2d 385 (1983)

109. United States v. Garrett, 720 F.2d 705 (1983), *cert. denied*, 465 U.S. 1037 (1984)

110. Yellow Taxi Co. of Minneapolis v. National Labor Relations Board, 721 F.2d 366 (1983)

111. Kansas State Network v. Federal Communications Commission, 720 F.2d 185 (1983)

112. Von Aulock v. Smith, 720 F.2d 176 (1983)

113. Black Citizens for a Fair Media v. Federal Communications Commission, 719 F.2d 407 (1983), *cert. denied*, 467 U.S. 1255 (1984)

114. Mosrie v. Barry, 718 F.2d 1151 (1983)

115. McBride v. Merrell Dow and Pharmaceuticals Inc., 717 F.2d 1460 (1983)

* 116. Bellotti v. Nuclear Regulatory Commission, 725 F.2d 1380 (1983)

117. Friends for All Children, Inc. v. Lockheed Aircraft Corp., 717 F.2d 602 (1983)

118. ICBC Corp. v. Federal Communications Commission, 716 F.2d 926 (1983)

119. Lewis v. Exxon Corp., 716 F.2d 1398 (1983)

120. York v. Merit Systems Protection Board, 711 F.2d 401

(1983)

* 121. Planned Parenthood Federation of America v. Heckler, 712 F.2d 650 (1983)

122. Sims v. Central Intelligence Agency, 709 F.2d 95 (1983), *aff'd in part, rev'd in part*, 471 U.S. 159 (1985)

123. Williams v. Barry, 708 F.2d 789 (1983)

124. Loveday v. Federal Communications Commission, 707 F.2d 1443, *cert. denied*, 464 U.S. 1008 (1983)

125. Office of Communication of United Church of Christ v. Federal Communications Commission, 707 F.2d 1413 (1983)

* 126. Franz v. United States, 712 F.2d 1428 (1983)(separate statement accompanying panel opinion reported at 707 F.2d 582)

127. Crowley v. Shultz, 704 F.2d 1269 (1983)

128. Community for Creative Non-Violence v. Watt, 703 F.2d 586 (1983), *rev'd*, 468 U.S. 288 (1984)

129. United States v. Lewis, 701 F.2d 972 (1983)

130. Cosgrove v. Smith, 697 F.2d 1125 (1983)

131. Devine v. White, 697 F.2d 421 (1983)

132. McClam v. Barry, 697 F.2d 366 (1983)

133. McGehee v. Central Intelligence Agency, 697 F.2d 1095 (1983), *on rehearing*, 711 F.2d 1076 (1983)

134. Vander Jagt v. O'Neill, 699 F.2d 1166, *cert. denied*, 464 U.S. 823 (1983)

* 135. McIlwain v. Hayes, 690 F.2d 1041 (1982)

136. Athens Community Hospital v. Schweiker, 686 F.2d 989 (1982), *on rehearing*, 743 F.2d 1 (1984)

137. Richey Manor v. Schweiker, 684 F.2d 130 (1982)

138. United States v. Harley, 682 F.2d 1018 (1982)

139. National Treasury Employees Union v. Merit Systems Protection Board, 743 F.2d 895 (1984)

140. Telecommunications Research and Action Center v.

Federal Communications Commission, 806 F.2d 1115 (1986)(concurring in denial of rehearing en banc reported at 801 F.2d 501), cert. denied, 107 S. Ct. 3196 (1987)

141. Carter v. District of Columbia, 795 F.2d 116 (1986)

142. White House Vigil for ERA Committee v. Watt, 717 F.2d 568 (1983)

143. Shultz v. Crowley, 806 F.2d 281 (1986)(denying rehearing en banc in case reported at 802 F.2d 498), pet. for cert. filed (Mar. 12, 1987)

144. Dronenburg v. Zech, 746 F.2d 1579 (1984)(denying rehearing en banc in case reported at 741 F.2d 1388)

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1. Associated Gas Distributors v. Federal Energy Regulatory Commission, No. 85-1811 (June 23, 1987)
2. Doe v. United States, 821 F.2d 694 (1987)(*en banc*)
3. Wolfe v. Department of Health and Human Services, 815 F.2d 1527, *vacated and rehearing granted*, 821 F.2d 809 (1987)
4. Bartlett v. Bowen, 816 F.2d 695 (1987), *rehearing en banc denied*, ___ F.2d ___ (July 31, 1987)
5. Jersey Central Power & Light Co. v. Federal Energy Regulatory Commission, 810 F.2d 1168 (1987)(*en banc*)
6. Haitian Refugee Center v. Gracey, 809 F.2d 794 (1987)
7. [Omitted because subsequent order eliminated split; see Opinion No. 14.]
8. Natural Resources Defense Council v. Environmental Protection Agency, 804 F.2d 710 (1986), *vacated and rehearing en banc granted*, 810 F.2d 270, *on rehearing en banc*, ___ F.2d ___ (July 28, 1987)
9. Greenberg v. Food and Drug Administration, 803 F.2d 1213 (1986)
10. Dettmann v. Department of Justice, 802 F.2d 1472 (1986)
11. Restaurant Corp. of America v. National Labor Relations Board, 801 F.2d 1390 (1986)
12. Telecommunications Research v. Federal Communications Commission, 801 F.2d 501, *rehearing denied*, 806 F.2d 1115 (1986), *cert. denied*, 107 S. Ct. 3196 (1987)
13. Shultz v. Crowley, 802 F.2d 498 (1986), *rehearing denied*, 806 F.2d 281 (1986), *pet. for cert. filed* (Mar. 12, 1987)
14. National Treasury Employees Union v. Federal Labor Relations Authority, 800 F.2d 1165 (1986)
15. Finzer v. Barry, 798 F.2d 1450 (1986), *cert granted sub nom. Boos v. Barry*, 107 S. Ct. 1282 (1987)
16. Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Commission, 798 F.2d 499 (1986)(*en banc*)
17. Hohri v. United States, 793 F.2d 304 (1986)(denial of rehearing *en banc*), *vacated*, 107 S. Ct. 2246 (1987)

18. Church of Scientology of California v. Internal Revenue Service, 792 F.2d 146 (1986)(*en banc*), *cert. granted*, 107 S. Ct. 947 (1987)

19. San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission, 789 F.2d 26 (*en banc*), *cert. denied*, 107 S. Ct. 330 (1986)

20. Abourezk v. Reagan, 785 F.2d 1043, *cert. granted*, 107 S. Ct. 666 (1986)

21. American Federation of Government Employees v. Federal Labor Relations Authority, 778 F.2d 850 (1985)

22. California Association of the Physically Handicapped v. Federal Communications Commission, 778 F.2d 823 (1985)

23. Robbins v. Reagan, 780 F.2d 37 (1985)

24. Meadows v. Palmer, 775 F.2d 1193 (1985)

25. Norfolk & Western Railway Co. v. United States, 768 F.2d 373 (1985), *cert. denied sub nom*. *Aluminum Association v. Norfolk & Western Railway Co.*, 107 S. Ct. 270 (1986)

26. Simplex Time Recorder Co. v. Secretary of Labor, 766 F.2d 575 (1985)

27. Weisberg v. Department of Justice, 763 F.2d 1436 (1985)(on rehearing)

28. United States v. Singleton, 759 F.2d 176 (1985), *rehearing en banc denied*, 763 F.2d 1432 (1985)

29. Gott v. Walters, 756 F.2d 902, *on rehearing en banc*, 791 F.2d 172 (1985)

30. Catrett v. Johns-Manville Sales Corp., 756 F.2d 181 (1985), *reversed sub nom.* *Celotex Corp. v. Catrett*, 106 S. Ct. 2548 (1986)

31. Prill v. National Labor Relations Board, 755 F.2d 941 (1985), *cert. denied sub nom.* *Meyers Industries v. Prill*, 106 S. Ct. 313, 352 (1985)

32. Reuber v. United States, 750 F.2d 1039 (1984)

33. Ollman v. Evans, 750 F.2d 970 (1984), *cert. denied*, 471 U.S. 1127 (1985)

34. Middle South Energy v. Federal Energy Regulatory Commission, 747 F.2d 763 (1984), *cert. dismissed sub nom.* *City of New Orleans v. Middle South Energy*, 473 U.S. 930 (1985)

35. Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (1984)(*en banc*), *remanded*, 471 U.S. 1113 (1985)

36. Brown v. United States, 742 F.2d 1498 (1984), *cert. denied sub nom. District of Columbia v. Brown*, 471 U.S. 1073 (1985)

37. Barnes v. Kline, 759 F.2d 21 (1985), *vacated sub nom. Burke v. Barnes*, 107 S. Ct. 734 (1987)

38. United States v. Byers, 740 F.2d 1104 (1984)(*en banc*)

39. Northland Capital Corp. v. Silver, 735 F.2d 1421 (1984)

40. Kennedy for President Committee v. Federal Election Commission, 734 F.2d 1558 (1984)

41. Reagan for President Committee v. Federal Election Commission, 734 F.2d 1569 (1984)

42. Persinger v. Islamic Republic of Iran, 729 F.2d 835, *cert. denied*, 469 U.S. 881 (1984)

43. Investment Company Institute v. Federal Deposit Insurance Corp., 728 F.2d 518 (1984)

44. National Soft Drink Association v. Block, 721 F.2d 1348 (1983)

45. Black Citizens for a Fair Media v. Federal Communications Commission, 719 F.2d 407 (1983), *cert. denied* 467 U.S. 1255 (1984)

46. Bellotti v. Nuclear Regulatory Commission, 725 F.2d 1380 (1983)

47. White House Vigil for ERA Committee v. Watt, 717 F.2d 568 (1983)

48. York v. Merit Systems Protection Board, 711 F.2d 401 (1983)

49. Planned Parenthood Federation of America v. Heckler, 712 F.2d 650 (1983)

50. Council of and for the Blind of Delaware County Valley v. Regan, 709 F.2d 1521 (1983)

51. Sims v. Central Intelligence Agency, 709 F.2d 95 (1983), *aff'd in part, rev'd in part*, 471 U.S. 159 (1985)

52. Franz v. United States, 707 F.2d 582, *supplemental opinion*, 712 F.2d 1428 (1983)

53. Community for Creative Non-Violence v. Watt, 703 F.2d 586

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54. Cosgrove v. Smith, 697 F.2d 1125 (1983).

55. McIlwain v. Hayes, 690 F.2d 1041 (1982)

56. Lombard v. United States, 690 F.2d 215 (1982)

57. Bennett v. Bennett, 682 F.2d 1039 (1982)[36]

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[36] There are a total of 56 split decisions. *See* Case No. 7 above.

CRIMINAL CASES IN WHICH JUDGE BORK PARTICIPATED

1. United States v. Johnson, 802 F.2d 1459 (1986)
2. United States v. Fitzhugh, 801 F.2d 1432 (1986)
3. United States v. Vortis, 785 F.2d 327, *cert. denied*, 107 S. Ct. 148 (1986)
4. United States v. Foster, 783 F.2d 1082 (1986)(*en banc*)
5. United States v. Foster, 783 F.2d 1087 (1986)
6. United States v. Lucas, 778 F.2d 885 (1985)
7. United States v. James, 764 F.2d 885 (1985)
8. United States v. Treadwell, 760 F.2d 327 (1985), *cert. denied*, 106 S. Ct. 814 (1986)
9. United States v. Singleton, 759 F.2d 176 (1985), *rehearing en banc denied*, 763 F.2d 1432 (1985)
10. United States v. Mount, 757 F.2d 1315 (1985)
11. United States v. Blakeney, 753 F.2d 152 (1985)
12. United States v. Kelly, 748 F.2d 691 (1984)
13. United States v. Byers, 740 F.2d 1104 (1984)(*en banc*)
14. United States v. Cohen, 733 F.2d 128 (1984)(*en banc*)
15. United States v. Coyer, 732 F.2d 196 (1984)
16. United States v. Glover, 725 F.2d 120 (1984), *cert. denied*, 466 U.S. 905 (1984)
17. United States v. Cooper, 725 F.2d 756 (1984)
18. United States v. Bullock, 725 F.2d 118 (1984)
19. United States v. Garrett, 720 F.2d 705 (1983), *cert. denied*, 465 U.S. 1037 (1984)
20. United States v. Weisz, 718 F.2d 413 (1983), *cert. denied*, 465 U.S. 1027, 1035 (1984)
21. United States v. Lipscomb, 702 F.2d 1049 (1983)(*en banc*)
22. United States v. Lewis, 701 F.2d 972 (1983)
23. United States v. Bittle, 699 F.2d 1201 (1983)
24. United States v. Belfield, 692 F.2d 141 (1982)

25. United States v. Harley, 682 F.2d 1018 (1982)

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"Resale Price Maintenance and Consumer Welfare," 77 Yale L.J. 950 (1968).

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"The Selling of Bork," *Legal Times* (July 20, 1987).

"Reagan's Outspoken Nominee to the Court," *Newsweek* (July 13, 1987).

"In Search of the Constitution, #107 Strictly Speaking," Public Affairs Television (Air date May 28, 1987).

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"A Talk With Robert H. Bork," 9 *District Lawyer* (No. 5, May/June 1985).

"Justice Robert H. Bork: Judicial Restraint Personified," *California Lawyer* (May 1985).

This Week with David Brinkley, ABC News (June 5, 1983) (transcript).

Face The Nation, CBS (November 11, 1973)(transcript).

CASES IN WHICH JUDGE BORK PARTICIPATED IN WHICH PUBLIC CITIZEN LITIGATION GROUP HAS REPRESENTED PARTIES OR *AMICI CURIAE* [37]

1. Wolfe v. Department of Health and Human Services, 815 F.2d 1527, *vacated and rehearing en banc granted*, 821 F.2d 809 (1987)

2. Center for Auto Safety v. Thomas, 806 F.2d 1071 (1986), *vacated and rehearing en banc granted*, 810 F.2d 302 (1987)

3. City of New Haven v. United States, 809 F.2d 900 (1987)

4. Greenberg v. Food and Drug Administration, 803 F.2d 1213 (1986)

5. Coalition for the Environment v. Nuclear Regulatory Commission, 795 F.2d 168 (1986)

6. Church of Scientology v. Internal Revenue Service, 792 F.2d 153 (1986)(*en banc*), *cert. granted*, 107 S. Ct. 947 (1987)

7. Committee of 100 on the Federal City v. Hodel, 777 F.2d 711 (1985)

8. Oil, Chemical and Atomic Workers International Union v. Zegeer, 768 F.2d 1480 (1985)

9. Abbotts v. Nuclear Regulatory Commission, 766 F.2d 604 (1985)

10. Community Nutrition Institute v. Block, 749 F.2d 50 (1984)

11. National Soft Drink Association v. Block, 721 F.2d 1348 (1983)

12. McGehee v. Central Intelligence Agency, 697 F.2d 1095, *on rehearing*, 711 F.2d 1076 (1983)

13. Sims v. Central Intelligence Agency, 709 F.2d 95 (1983), *aff'd in part, rev'd in part*, 471 U.S. 159 (1985)

14. Consumers Union of United States v. Federal Trade Commission, 691 F.2d 575 (1982)(*en banc*), *aff'd sub nom.* United States

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[37] In the cases listed in the text, Judge Bork ruled in favor of parties represented by Public Citizen Litigation Group in four cases: Center for Auto Safety v. Thomas, City of New Haven v. United States, McGehee v. Central Intelligence Agency, and Consumers Union of United States v. Federal Trade Commission. In the first of these cases, however, he wrote a concurring opinion expressing doubt that the parties bringing the action had standing to sue. That issue has been reargued before the full court.

Senate v. Federal Trade Commission, 463 U.S. 935 (1983)

15. McIlwain v. Hayes, 690 F.2d 1041 (1982)

SUPREME COURT CONSTITUTIONAL LAW CASES AND DOCTRINES THAT JUDGE BORK HAS CRITICIZED

As indicated at the outset of Chapter II, both Judge Bork's constitutional decisions while on the D.C. Circuit and his academic writings indicate that his personal values may play a large role in the results that he reaches. Moreover, he has indicated that he would be willing to overturn established constitutional precedents. Accordingly, it is of more than passing interest to review the list of Supreme Court decisions and doctrines that he has openly criticized.

Although it is usually difficult to predict how a nominee for the Supreme Court will rule on constitutional issues that may arise after confirmation, Judge Bork has already expressed his views on many important constitutional issues. Although some of these criticisms were advanced as early as 1971, Judge Bork said in 1985 that "my views [about improper "usurpation of political functions by courts"] have remained about what they were." 9 DISTRICT LAWYER 29, 31 (June 1985). Because Judge Bork's views in this area may be critical to many of those who must evaluate his nomination, we have prepared the following list of Supreme Court constitutional decisions and doctrines, noting the places where Judge Bork criticized them.

CASES INVOLVING THE RIGHT TO PRIVACY

Griswold v. Connecticut, 381 U.S. 479 (1965) (struck down statute making it a crime for anyone, including married couples, to use contraceptives). Criticized in Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 11 (1971), which stated that Griswold and its antecedents were "wrongly decided"; Dronenburg v. Zech, 741 F.2d 1388, 1392 (1984), repeats this criticism. Among the Griswold antecedents criticized in IND.

L.J. were the following:

> *Meyer v. Nebraska*, 262 U.S. 390 (1922) (struck down law forbidding teaching in language other than English).
>
> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (struck down law requiring all children to attend public rather than private schools).

Roe v. Wade, 410 U.S. 113 (1973) (struck down state abortion laws). Criticized in Statement of Prof. Robert Bork, *Hearings Before the Subcomm. on Separation of Powers of the Comm. of the Senate Judiciary Comm. on S. 158: A Bill to Provide that Human Life Shall be Deemed to Exist From Conception*, 97th Cong., 1st Sess. 310, 315 (April-June, 1981) ("*The Human Life Bill*"), as "a serious and wholly unjustifiable judicial usurpation of state legislative authority"; also criticized in *Dronenburg v. Zech*, *supra*, 741 F.2d at 1394-95.

Dronenburg states that the following cases "create new rights", are unprincipled, and "contain little guidance for lower courts," *id.* at 1392. Judge Bork also noted that as an academic he had objected to the creation of "new rights," but that this view was irrelevant to his function "as a circuit judge." *Id.* at 1396 n.5. On rehearing *en banc*, Judge Bork agreed that he was criticizing the following decisions, but denied that he was proposing to overrule them. 746 F.2d at 1582.

> *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (struck down state law limiting contraceptives for married couples, forbidding them for others). Criticized in *Dronenburg*, 741 F.2d at 1393-94 *et seq.*
>
> *Carey v. Population Services Int'l*, 431 U.S. 678 (1977) (struck down state law restricting adults' access to contraceptives). Criticized in *Dronenburg*, 741 F.2d at 1395 *et seq.*
>
> *Loving v. Virginia*, 388 U.S. 1 (1967) (struck down law forbidding interracial marriage). Criticized in *Dronenburg*, 741 F.2d at 1393 *et seq.*

CASES INVOLVING EQUAL PROTECTION

Skinner v. Oklahoma, 316 U.S. 535 (1942) (struck down law requiring sterilization of "habitual criminals"). Criticized in 47 IND. L.J. at 12.

Shelley v. Kraemer, 334 U.S. 1 (1948) (forbade courts to enforce restrictions in deeds forbidding sale of homes to blacks). Criticized in 47 IND. L.J. at 15-17.

Baker v. Carr, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S.

533 (1964); and Lucas v. Forty-Fourth Gen. Ass'y, 377 U.S. 713 (1964) (required that legislative districting be based on one-man, one-vote). Criticized in 47 IND. L.J. at 18-19. The article notes that some challenges might be based on clause of the Constitution that guarantees a republican form of government, but under that clause much of what the Supreme Court has held is forbidden would be allowed. Criticism repeated in Nominations of Joseph T. Sneed to be Deputy Attorney General and Robert H. Bork to be Solicitor General: Hearings Before the Senate Committee on the Judiciary, 93rd Cong., 1st Sess. 13-14 (1973).

Katzenbach v. Morgan, 384 U.S. 641 (1966) (upheld constitutionality of Voting Rights Act provision guaranteeing right to vote to persons educated in Puerto Rico, despite inability to read or write in English). Criticized in 1973 Confirmation Hearing, at 16, and The Human Rights Bill, at 314-315, on ground that it is the Supreme Court, not Congress, that is entitled to decide whether state literacy tests violate the Equal Protection Clause.

Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966) (struck down state poll tax). Criticized in 1973 Confirmation Hearing, at 17.

Levy v. Louisiana, 391 U.S. 68 (1968) (struck down state law barring illegitimate, but not legitimate children, from suing for tort causing their parents' death). Criticized in 47 IND. L.J. at 12.

Shapiro v. Thompson, 394 U.S 618 (1969) (struck down one-year residence requirement for welfare payments). Criticized in 47 IND. L.J. at 12.

Oregon v. Mitchell, 400 U.S. 112 (1970) (upheld provision of Voting Rights Act eliminating all literacy tests). Criticized in The Human Rights Bill, at 314.

University of California Board of Regents v. Bakke, 438 U.S. 265 (1978) (upheld constitutionality of affirmative action). Criticized in Wall Street Journal, July 21, 1978.

The Indiana Law Journal article argues, at page 11, that only racial discrimination is forbidden by the Equal Protection Clause, and indicates that his list of wrongly decided cases in that area "could be extended." Id. at page 12.

CASES INVOLVING THE FIRST AMENDMENT

Dennis v. United States, 341 U.S. 494 (1951); Yates v. United States, 354 U.S. 298 (1957); Brandenburg v. Ohio, 395 U.S. 444 (1969); and all cases embodying the position taken by Justices Holmes and Brandeis (holding that speech which advocates the overthrow of the government, or any violation of the law, may be forbidden only if "clear and present danger," or "imminent and likely harm," is established). Criticized in 47 IND. L.J. at 23. Criticism reiterated in American Enterprise Institute, SYMPOSIUM ON FOREIGN INTELLIGENCE: LEGAL AND DEMOCRATIC CONTROLS, at 15 (December 11, 1979).

Roth v. United States, 354 U.S. 476 (1957) (holding that First Amendment protects artistic, literary and scientific works, except where obscene). Criticized in 47 IND. L.J. at 23. Judge Bork claims to have changed his views. However, Professor Dworkin indicates that the recantation may be based on the relation of literary or scientific works to politics, although most have no such relation. The Bork Nomination, 34 NEW YORK REVIEW No. 13, at 8 n.7 (August 13, 1987).

Engel v. Vitale, 370 U.S. 421 (1962) (struck down state law allowing public schools to have state-sponsored prayer read in class). Criticized in speeches at NYU Law School (1982) and Brookings Institution (1985), reported in Washington Post, July 28, 1987, at A8. Article reports that Judge Bork denied having referred to "specific cases" in his speech.

Aguilar v. Felton, 473 U.S. 402 (1985) (struck down use of government funds to pay public employees to teach in religious schools). Criticized in speech at Brookings Institution, reported in Washington Post, cited above.

Wallace v. Jaffree, 472 U.S. 38 (1985) (struck down moment of silence statute adopted to encourage school prayer). Criticized in speech at Brookings Institution, reported in Washington Post, cited above.

Cohen v. California, 403 U.S. 15 (1971) (struck down conviction of protestor for wearing jacket saying "Fuck the Draft"). Criticized in interview with McGuigan, Judge Robert Bork Is a Friend of the Constitution, CONSERVATIVE DIGEST, at 95-97 (October 1985).

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upheld FCC's fairness doctrine, which requires broadcast media to provide opportunities for broadcast of dissenting views). Criticized in TRAC v. FCC, 801 F.2d 501, 509 (1986) and Branch v. FCC, ___ F.2d ___ (No. 86-1256, July 21, 1987)(Slip op. at 24-26).

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AUG 21 1987

Statement by the AFL-CIO Executive Council

on

OPPOSITION TO THE NOMINATION OF ROBERT H. BORK TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

August 17, 1987
Washington, D.C.

The AFL-CIO opposes the nomination of Judge Robert H. Bork to be an Associate Justice of the Supreme Court of the United States. We call on the Senate to use its independent "advice and consent" powers to reject that nomination.

It is an open secret that the President is intent on perpetuating the "Reagan revolution's" social and political program beyond his term of office by putting the courts, including the Supreme Court, in the hands of judges whose first fealty is to that program. It is the Senate's right and responsibility to stand up to this ideological court packing and to insist on a Supreme Court nominee steeped in the richer, more complex , more diverse and more humane body of rules, practices and understandings that have historically been recognized to constitute the law.

Our review of Judge Bork's academic work and his public career make it plain that he is a man moved not by deference to the democratic process, nor by an allegiance to any recognized theory of jurisprudence, but by an overriding commitment to the interests of the wealthy and powerful in our society. His agenda is the agenda of the right wing and he has given a lifetime of zeal to publicizing that agenda; that is the stuff from which his nomination was made and that is what requires the Senate to refuse its advice and consent.

Over the past three decades Judge Bork has opposed a variety of initiatives, whether legislative or judicial, to extend social, economic, political, and legal rights more broadly and equitably. So far as we have been able to ascertain, he has never shown the least concern for working people, minorities, the poor, or for individuals seeking the protection of the law to vindicate their political and civil rights. The causes that have engaged him are those of businessmen, of property owners and of the executive branch of government.

Judge Bork's academic work on the Constitution purports to be in praise of "judicial restraint" and "neutral principles," but his work as a whole makes it clear that these phrases are used merely as literary counterpoint to the invective in which he condemns "liberal judges" who allegedly decide cases out of "partisanship," "activism" and reliance on "their personal political values."

The decisions he derides include many of the landmarks guaranteeing civil liberties, racial justice and equal treatment under law: decisions providing for "one man one vote"; outlawing the poll tax; upholding Congress' broad powers to enforce the Fourteenth Amendment; enunciating the "clear and present danger" test to safeguard free speech; and outlawing exclusionary racial covenants. These are not the excesses of judicial imperialists but rather conscientious efforts to plumb the deepest values of the Constitution and to move, in a measured way, toward the realization of its grand plan.

In contrast, we have not found in Judge Bork's writings even a whisper of disapproval of any Supreme Court decision in the last fifty years taking a limited view of individual rights or a broad view of government power, or any suggestion that right-wing judges have ever improperly relied on their personal values in construing statutes or in fashioning constitutional principles. Nothing in logic or experience supports the notion that judges who share Judge Bork's political and social views have been so consistent in their devotion to disinterested reason; and, not surprisingly, the arguments Judge Bork makes do not support his contention that the modern decisions upholding individual rights he attacks are wholly without legal support.

The Constitution is a complex and subtle document phrased in the general terms required in a charter of government meant to endure. The Supreme Court's interpretative efforts are necessarily imperfect and reasoned criticism of those efforts is a the evolution of constitutional law. But Judge Bork's polemics, his nts that the decisions with which he disagrees are the product of willful have precisely the opposite effect.

seeking to drain the Bill of Rights of most of its force, Judge Bork has energies on attempting to liberate big business from most of the limits er stated in the antitrust laws. In pursuit of this goal, and in order to al belief in the virtues of Chicago-school economic theory, he is an ctivist, ready and willing to jump all the hurdles put in his way by nents and dozens of long standing judicial precedents.

s "dedication" to judicial restraint also disappears where the issue is With only vague "separation of powers" concepts to rely on he has been both legislative and judicial checks on the Executive Branch. That e squared with his approach to individual rights cases, where he argues rest constitutional mandate can ever justify invalidating a legislative

five year record on the federal bench has been characterized by the subordinate principle to partisan preference. As the Columbia Law record in non-unanimous decisions in which he participated -- in those ch there almost surely was no binding precedent to foreclose the ndent judgment -- is far to the right of other Reagan-appointed judges. e cases, said that Review, display a "one-sided approach to...the aint] he espouses," since he voted "consistently in favor of business inst federal agencies yet opposed most claims by public interest n-unanimous constitutional cases the pattern is the same: claims that operty rights rarely won Judge Bork's support while claims of executive r challenged by Congress or individuals --rarely lost his vote.

President Reagan has justified his choice by arguing that Judge Bork's accomplishments make him a logical successor to Justice Frankfurter. That is a comparison with special meaning to the trade union movement. Felix Frankfurter was a strong and early friend of labor who had worked to expose the evils of the labor injunction, to frame the New Deal and to forward the cause of civil liberties before going on the bench. Yet, once on the Supreme Court, Justice Frankfurter, out of respect for the democratic branches of government, took a relatively narrow view of the Court's authority to invalidate legislation on constitutional grounds and showed a scrupulous regard for following congressional intent in cases involving federal statutes.

Justice Frankfurter's career makes it plain that restraint in the exercise of judicial authority is no vice. Organized labor is committed to making its way by mobilizing the energies of its members and by making their presence felt in the economic, political and legislative processes. We are well aware of the dangers of personal political and social bias in judicial decision-making; we recognize that judges who strive to transcend their parochial limits are the judges who meet the obligation of their office.

Judge Bork is not in the Frankfurter tradition. Justice Frankfurter referred to constitutional adjudication as a process calling for "statecraft," calling, in other words, for a justice able to look beyond his personal predilections and to comprehend the wide range of legitimate interests reflected in the law.

Judge Bork has demonstrated no capacity for statecraft. His skill is the pamphleteer's skill of reducing complex questions to caricatures and of belittling the honor and integrity of his intellectual opponents. His place is on the lawyers' side of the bar openly arguing for the privileged who have been the beneficiaries of his endeavors all along.

For these reasons the AFL-CIO opposes his nomination to the Supreme Court and urges the Senate to refuse its "advice and consent."

[Fact Sheet Attached]

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August 17, 1987

Memorandum on Judge Robert H. Bork's Academic Writings and Judicial Opinions

I. Introduction

This memorandum evaluates Judge Bork's record based on an examination of (1) virtually all of his published writings on constitutional and jurisprudential issues over the past 25 years; (2) a sample of his writings in antitrust law; (3) an extensive cross-section of his testimony at congressional hearings, both with respect to his own earlier nominations to the Solicitor General's office (1973) and to the D.C. Circuit (1982) and with respect to a variety of bills upon which he was called to testify, either as a Justice Department official or as a professor of law; and (4) all of Judge Bork's published judicial opinions in his five years on the U.S. Court of Appeals for the D.C. Circuit.[1]

These sources confirm that Judge Bork has, in his academic and popular writings, almost without exception taken the position favored by the right wing, and, in his judicial capacity, he has consistently adhered to that same ideological agenda whenever the law has been insufficiently clear to stay his hand. In spite of his rhetoric of "judicial restraint" and "neutral principles," his judicial record has displayed a pattern of reaching for results contrary to the interests of labor, minorities, environmentalists, consumer groups, and those seeking vindication in the courts for violations of their civil rights and liberties, while at the same time, consistently protecting business interests from regulation and the Executive Branch of the federal government from congressional checks.

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[1] We have not examined the positions that Judge Bork took in briefs and arguments as Solicitor General. As Judge Bork made clear during his confirmation hearings for that position, the Solicitor General is an advocate for the Executive Branch, and his public positions in that office would reflect the policies and legal interests of the Ford Administration, rather than his own legal and policy preferences. Nomination of Robert H. Bork to be Solicitor General: Hearings Before the Senate Committee on the Judiciary, 93rd Cong. 1st Sess. at 24 (1973) (hereinafter "1973 Confirmation Hearings").

II. An Overview of Judge Bork's Non-Judicial Writings

In his 25 years of writing for law reviews and other periodicals, Judge Bork has produced very few (if any) serious scholarly works outside of the field of antitrust law. Instead, he has produced a large number of short, popularly styled, polemical attacks on legal decisions that have taken a broad view of individual constitutional rights. In opposing these decisions he has virtually never admitted that any of the cases he examined presented "close questions," or that there were any strong -- or even legitimate -- arguments on the other side.

Much of Judge Bork's writing takes the form of ad hominem attacks, asserting that the decisions he dislikes were caused by "liberal judges" who failed to properly divorce their judicial decisionmaking from their own political values, and who had thus imposed their own social and political agendas on the law by judicial fiat at the expense of democratic processes. According to Judge Bork, these judges should have applied "neutral principles," which would ineluctably lead to a narrow scope for civil rights and civil liberties guarantees, wholesale limitations on access to the federal courts, and a broad reach for Executive Branch powers at the expense of Congress. But other than asserting these conclusions, Bork provides no serious analysis to explain why "neutral principles" lead to his preferred results.

Judge Bork's non-judicial writings have also focused on the degree to which, in his view, public policy has followed a course that has disproportionately and unwisely favored such groups as minorities, the poor, environmentalists, and organized labor at the expense of business. It is thus hardly surprising that his writings on legal doctrine just happen to argue for results consistent with these political beliefs.

III. An Overview of Judge Bork's Judicial Voting Record

In spite of his continuing assertions that judges must be guided by neutral principles, Judge Bork's record of decisions on the D.C. Circuit clearly reflects his own right wing, pro-business biases. Thus, a survey of all cases during his tenure in which he took a position in disagreement with any colleague shows that Judge Bork:

(a) voted against civil rights and/or civil liberties claimants in eighteen (18) out of the twenty (20) non-unanimous cases in which these claims were in dispute;

(b) voted for limiting access to the federal courts in all sixteen (16) of the non-unanimous cases involving disputes over such access;

(c) voted in favor of the executive agencies in every one of the nine non-unanimous Freedom of Information Act, Sunshine Act and Privacy Act cases; and

(d) voted against criminal defendants in all three of the non-unanimous criminal procedure cases.

And, reflecting his pro-business orientation, Judge Bork:

(a) voted in favor of the employer in five (5) out of seven (7) non-unanimous labor cases, including all of the cases in which the interests of a private business were at stake;

(b) voted in favor of business in all ten (10) of the non-unanimous consumer and/or rate regulation cases; and also

(c) voted for business in both of the non-unanimous environmental cases. (A copy of this survey of cases is attached).

A similar study conducted by the Columbia Law Review reached the same conclusion. Finding that in regulation cases Bork "voted consistently in favor of business groups' claims against federal agencies, . . . yet opposed most claims by public interest groups," the study concluded that Judge Bork's "voting behavior . . . reflects an apparently inconsistent application of judicial restraint." Even more significantly, the study compared Judge Bork's voting record with those of Reagan-appointed judges in general and concluded that Judge Bork's record "ma[de] him far more conservative than the average Reagan appointee to the U.S. Courts of Appeals."[2]

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[2] Columbia Law Review, Press Release: Bork's Voting Record Far More Conservative than that of the Average Reagan Judge, New Study Reveals, July 27, 1987 (analyzing Columbia Law Review's study, All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Court of Appeals, 87 Colum. L. Rev. (forthcoming)).

IV. Judge Bork's Record in Specific Subject Areas

A. Civil Rights and Civil Liberties

The principal focus of Judge Bork's writing on the Constitution has been to attack as illegitimate various constitutional doctrines enunciated over the last four decades. He has generally argued that for courts to give expansive constructions to constitutional provisions protecting individual rights is anti-democratic, in that any expansion of individual rights is a contraction of the area in which majorities are free to govern through the normal political process. The areas where Bork has found modern constitutional doctrine most objectionable include: equal protection, substantive due process, and free speech.

Among the equal protection cases that Bork has explicitly found objectionable are many of the landmark cases in the struggle for civil rights -- for example, Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (prohibiting use of poll taxes); Katzenbach v. Morgan, 384 U.S. 641 (1966) and Oregon v. Mitchell, 400 U.S. 112 (1970) (upholding Congress's power under the Fourteenth and Fifteenth Amendments to pass the Voting Rights Acts' prohibitions of literacy tests for voting); Shelley v. Kraemer, 334 U.S. 1 (1948) (declaring racially discriminatory restrictive covenants unconstitutional).3/ Bork fervently objects to the substantive due process doctrine

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3/ Bork attacks Harper in his Forward to G. McDowell, The Constitution and Contemporary Constitutional Theory (1985), at

(Continued)

in all its manifestations, but most especially to Roe v. Wade, 410 U.S. 113 (1973) (legalizing abortion).4/

3/ (Continued)

vii; he also criticized the case in the hearings on his confirmation to the Solicitor General's office. See 1973 Confirmation Hearings, at 17. Bork attacks Katzenbach v. Morgan in his 1973 Confirmation Hearings at 16 and in the Hearing Before the Subcommittee on Separation of Powers of the Senate Judiciary Committee on S.158: A Bill to Provide that Human Life Shall Be Deemed to Exist From Conception, 97th Cong., 1st Sess. (1981) 314-315 (hereinafter "Human Life Bill Hearings). And he attacks Oregon v. Mitchell in, Human Life Bill Hearings at 314. Bork characterized Katzenbach and Mitchell as "very bad, indeed pernicious, constitutional law." Id. Bork attacks Shelley v. Kraemer at Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 15-17 (1971) (hereinafter "Neutral Principles").

Other prominent equal protection cases that Bork has strongly criticized as illegitimate include Skinner v. Oklahoma, 316 U.S. 535 (1942) (prohibiting state compelled sterilization of criminals) (see Bork, Neutral Principles, at 12); Reynolds v. Sims, 377 U.S. 533 (1964) (establishing the "one-man, one-vote" principle for legislative reapportion) (see Bork, Neutral Principles, at 18-19, and 1973 Confirmation Hearings, at 13-14); Levy v. Louisiana, 391 U.S. 68 (1968) (prohibiting state discrimination against illegitimate children) (see Bork, Neutral Principles, at 12); University of California v. Bakke, 438 U.S. 265 (1978) (upholding constitutionality of affirmative action under certain circumstances) (see Wall Street J., July 21, 1978).

4/ Bork generally attacks all substantive due process doctrine in Neutral Principles, at 11, and his views have been reflected in his judicial opinions. See Dronenburg v. Zech, 746 F.2d 1579 (1984), (criticizing Supreme Court substantive due process cases in decision holding that homosexuals had no constitutional protection under either the equal protection clause or the due process clause); Franz v. U.S., 707 F.2d 582 (1983) (severely limiting prior constitutional holdings recognizing a parent's right to participate in the raising of children, and arguing that those holdings should have no application to divorced non-custodial parents).

For one example of Bork's attack on Roe v. Wade, see Human Life Bill Hearings, at 310 (calling decision "an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of state legislative authority").

Although the substantive due process line of cases is highly controversial -- and Judge Bork's views on them are within the spectrum of mainstream legal thought -- his views on the equal protection cases, which are much more universally accepted precedents, reflect a general hostility to individual rights and equal protection claims. Certainly his attempts to articulate the neutral principle that justifies his criticism cannot withstand scrutiny.

Judge Bork argues that it is wholly legitimate to derive a general value from the text and history of a constitutional provision and then to apply that value to a situation never specifically contemplated by the framers.[5] This method, however, does not lead to mechanical judgments, since outcomes may be very different depending upon the generality with which the judge defines the value that he finds in the constitutional text and history. Constitutional provisions such as the equal protection clause are written in the broadest possible language, and judges and scholars may legitimately disagree how broadly to define the values embodied in such provisions and thus how broadly to apply the provisions' protections.

Judge Bork advocates a quite narrow understanding of the equal protection clause, but at no point does he explain why the methodology he accepts mandates the results he insists upon, or why the cases he attacks are, as he argues, wholly unprincipled. Some of these decisions were, of course, controversial, but Judge Bork does little more than assert their invalidity as a given.

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[5] See Ollman v. Evans & Novak, 750 F.2d 970, 993 (1984).

Professor Ronald Dworkin has recently noted this aspect of Judge Bork's equal protection writings, and condemned it:

> Bork defends [his] truncated view . . . only by appealing to the platitude that judges must choose 'no level of generality higher than that which interpretation of the words, structure, and history of the Constitution fairly supports.' That is certainly true, but unhelpful, unless Bork can produce an argument that his own truncated conception meets that test; and he has not, so far as I am aware, produced even the beginning of such an argument. . . . Unless he can produce some genuine argument for his curtailed view . . . beyond the fact that it produces decisions he and his supporters approve, his constitutional philosophy is empty: not just impoverished and unattractive, but no philosophy at all. [Dworkin, Bork the Radical, N.Y. Rev. of Books, Aug. 13, 1987, p. 4-5.]

Given that much of Bork's writings on modern constitutional doctrine includes expressions of extreme disdain for those judges who he feels have read notions of "egalitarianism" or "moral philosophy" into constitutional law, and that Bork has himself repeatedly taken positions antithetical to the interests of minorities,[6] it is not surprising that all of the decisions Bork criticizes are decisions expanding individual constitutional rights. Bork seems never to have criticized a modern Supreme Court decision that narrowed those rights or that expanded the rights of property or business. The intensity of his views makes it all but certain that he will continue to take a very dim view of most individual constitutional rights claims.

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[6] In 1963 Judge Bork wrote an article attacking the federal law prohibiting racial discrimination in public accommodations, asserting that the law constituted a morally improper interference with the rights of racists to refrain from associating with Blacks. Bork, Civil Rights -- A Challenge, New Republic, 8/3/63, p. 21. He later declared that he had reconsidered these views and had abandoned them. 1973 Confirmation Hearings at 14. Bork was also one of the few legal scholars to testify in favor of the Nixon Administration's efforts to pass legislation limiting federal courts' authority to order busing in school desegregation cases. Bork, The Constitutionality of the Presidents Busing Proposals (1972).

B. Free Speech

Judge Bork began his consideration of First Amendment issues by suggesting that only explicitly political speech enjoys constitutional protection and by denigrating as "unprincipled" the proposition that the First Amendment in any way protects speech of a literary, scientific, or artistic nature. See Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1 (1971). Even within the political speech category he asserted that it would be similarly unprincipled to protect any advocacy of unlawful acts, no matter how abstract the advocacy may be. His free speech writings thus began with a broad attack on vast numbers of unquestioned precedents, including an attack on the early free speech opinions of Holmes and Brandeis, which had become the foundations of modern free speech jurisprudence.

In Gitlow v. New York, 268 U.S. 652 (1925) and Whitney v. California, 274 U.S. 357 (1927), Justices Holmes and Brandeis wrote stirring attacks on majority opinions that upheld the imprisonment of political radicals for their political speech. These separate writings are considered among the most eloquent statements of our society's free speech ideals ever produced. And their approaches have long since been accepted -- while the Gitlow and Whitney majorities have been "thoroughly discredited" -- by the Supreme Court. Brandenburg v. Ohio, 395 U.S. 444 (1969). The theory of the Gitlow and Whitney cases was that the first amendment offered no protection to any advocacy of violating the law, regardless of whether any violation was actually intended or likely. Had this doctrine survived, the wholesale imprisonment or silencing of radicals would have been permitted, as would have been the imprisonment of those who defended or advocated the civil rights demonstrators' civil disobedience. But beyond that, as the Supreme Court has repeatedly noted, allowing the state to criminally punish any political utterance that might be construed as endorsing a violation of law would chill the free speech of many and would seriously limit the scope of debate that the society enjoys. Judge Bork, however, viewed this now repudiated doctrine as correct and has called the contrary view "unprincipled." For Bork, the theories of Gitlow and Whitney, rather than of Holmes and Brandeis, should have been made the basis of modern law.

Since he first enunciated these extreme and controversial views in 1971, he has been very unclear as to whether he still views them as valid. Compare Hearings Before Senate Judiciary Committee on Nomination of Robert Bork to the D.C. Circuit, February 26, 1982, at p. 4-5 (where Bork stated that "application of . . . neutral principles to the first amendment reaches the results" he described in 1971, but said that as lower court judge, he would follow contrary Supreme Court precedent) with Bork, Judge Bork Replies, A.B.A. Journal (February 1984) (attacking a critic for implying that Bork still believed in his 1971 views; stating that he "has long since concluded that [such] forms of discourse . . . as moral and scientific debate, . . . deserve potection"). It is thus unclear what his general approach to free speech cases will be if he is confirmed to the Supreme Court, although it is clear that he has continued to criticize leading Supreme Court decisions that are at the center of modern first amendment doctrine.[7]

Judge Bork's free speech record on the Court of Appeals is mixed. In Ollman v. Evans & Novak, 750 F.2d 970, 993 (1984) (en banc), Bork, in a separate concurrence, argued for a substantial expansion of the First Amendment's protection to defendants in libel cases. The opinion could have been written by Justice Brennan and stands in stark contrast to Bork's other constitutional rights opinions. It must be recognized however that free speech libel law, based on the *New York Times v. Sullivan* rule, fits with Judge Bork's overall views more closely than other free speech doctrines, since it is a pro-defendant rule that primarily redounds to the benefit of large institutions, *i.e.*, the institutional press.[8] Moreover, the speech in question in that case was explicitly political speech of a non-radical nature, and thus within what Bork regards as the First Amendment's core.[9]

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[7] See e.g., McGuigan, Judge Robert Bork is a Friend of the Constitution, CONSERVATIVE DIGEST, October 1985, pp. 95-97 (interview) (criticizing Cohen v. California, 403 U.S. 15 (1971), where the Court held it unconstitutional to criminally punish the use of vulgarity in the context of political speech); American Enterprise Institute, Symposium on Foreign Intelligence: Legal and Democractic Controls, December 11, 1979, at 15 (panel discussion) (criticizing those first amendment cases protecting the abstract advocacy of overthrow of government or abstract advocacy of breaking law).

Not surprisingly where First Amendment rights are intermixed with property rights or with business freedoms, Judge Bork has expressed clear solicitude for the First Amendment claim. For example, Bork has expressed the view that federal election campaign funding regulation is unconstitutional,[10] and he strongly implies that many of the limits placed on broadcasters should be declared unconstitutional or otherwise abandoned.[11] Although in clear conflict with his stated first amendement jurisprudence, Judge Bork has never criticized the Supreme Court's expansions of the protection of commercial speech. See FTC v. Brown & Williamson Tobacco Co., 778 F.2d 35 (1986) (Bork majority opinion applying commercial speech doctrine to protect cigarette advertising).

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[8] In other cases Bork has expressed hostility towards libel plaintiffs and sympathy for institutions sued in libel cases. *See e.g.*, *Moncrief v. Lexington-Herald*, 807 F.2d 271 (1986) (dismissing libel action on jurisdictional grounds); *McBride v. Merrell Dow*, 717 F.2d 1460 (1983) (limiting plaintiff's discovery rights in libel case).

[9] Some have also speculated that it may not have escaped Judge Bork's attention that his decision in *Evans & Novak* served to protect conservative writers against a Marxist professor's libel suit.

[10] *See* Bork, *'Reforming' Foreign Intelligence*, Wall Street J., July 21, 1978 (arguing that Federal Election Campaign Act "limits political expression and deforms the political process" and criticizing the Supreme Court for failing to declare it unconstitutional in its entirety); *see also* Bork, *The First Amendment Does Not Give Greater Freedom to the Press Than to Speech*, The Center Magazine, March/April 1979, p. 28, 34 (calling on press to realize danger of Federal Election Campaign Act).

Where business and property interests are not at issue, however, Judge Bork's respect for free speech rights goes only so far. In particular, he has been exceptionally deferential to government interests where the rights of demonstrators and leafleters have been at issue, or where the government has argued that "national security" interests are involved, no matter how flimsy that interest may be. In Finzer v. Parry, 798 F.2d 1450 (1986), for example, Bork gave very short shrift to the claims of demonstrators who challenged a statute that prohibited all demonstrations critical of a foreign government held within 500 feet of that government's embassy. Bork analyzed the statute in terms that were almost totally deferential to the government's asserted interests in not allowing foreign governments to be offended. The opinion prompted a forceful dissent, and the Supreme Court has subsequently granted review of Bork's decision. 107 S.Ct. 1282 (1987). Similarly, in White House Vigil for ERA v. Watt, 717 F.2d 568 (1983), Bork dissented from a decision that placed very minimal limits on the government's ability to regulate demonstrators, picketers and leafleters on the sidewalks near the White House. Whatever Judge Bork's theoretical approach to First Amendment questions, Finzer and White House Vigil show that his purported respect for protecting political speech does not necessarily extend to protecting the right to demonstrate or leaflet on streets and sidewalks and does not lead him to subject any asserted interests of the government to very close scrutiny.12/

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[11] See Bork, Freedom of the Press, supra, at 31 (arguing for private ownership of broadcast spectrum and abandonment of federal licensing and regulation); Telecommunications Research v. FCC, 801 F.2d 501 (1986) (affirming FCC decision not to apply fairness doctrine and reasonable access rules to new broadcast technology and questioning of Supreme Court's rationale for sustaining the constitutionality of these rules).

In Reuber v. U.S., 750 F.2d 1039 (1984), Judge Bork made clear that his view of remedies for free speech violations is also quite narrow. The case involved a private sector employee who was allegedly discharged at the urging of the government in retaliation for his free speech activity, and Judge Bork wrote extensively, in a concurring opinion, to urge that remedies for such employees should be severely limited. Indeed, he even

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12/ Bork's extremely deferential approach to government assertions of the need to restrict expression can also be seen in his dissent in Abourezk v. Reagan, 785 F.2d 1043 (1986). In that case, Judge Bork dissented, wanting to dismiss a claim by groups who had invited foreign speakers to attend their conferences only to find that the State Department refused to allow the speakers to enter the country. Bork interpreted the statute authorizing the State Department to exclude invited foreign visitors from the country much more broadly than the majority -- in spite of recent amendments to the statute specifically limiting such exclusions -- arguing that the executive is entitled to the broadest deference where the entrance of foreigners was concerned.

questioned the rationale of a leading Supreme Court case on the basic issue of whether reinstatement should be an available remedy when an employee is unconstitutionally discharged. See 750 F.2d at 1063-1069 (questioning the reasoning of Mt. Healthy v. Doyle, 429 U.S. 24 (1977)).

As the labor movement understands particularly well, it is cases like Finzer, White House Vigil and Reuber that implicate the First Amendment rights of average persons, who must often rely on marches, picket lines and leaflets to express their views since they do not own their own presses or broadcast stations, and who will often be effectively silenced by threats from employers that speech will lead to discharge and the loss of livelihood. Judge Bork's record on these practical first amendment questions is disturbing.

As we have noted above, in non-unanimous civil liberties and civil rights cases, Bork has voted against the rights asserted in eighteen (18) out of twenty (20) cases.[13]

B. Access to the Federal Courts

While Bork argues forcefully that judges should not rely on their own values to expand individual constitutional rights, he simultaneously argues for judges to interpret very expansively those doctrines that limit access to the courts for those seeking to vindicate their rights, even though those doctrines often have no specific basis in the Constitution's text. [14] Judge Bork thus proves to be very much the activist in seeking to deny individual rights claimants access to the courts. Indeed, he has voted to deny access to the courts in every one of the sixteen (16) non-unanimous cases in which the access issue was in dispute.

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[13] Because he did not argue for the dismissal of the claim in Reuber, but only to severely limit the remedies, Reuber is counted as one of the two surveyed cases in which Bork voted in favor of a civil liberties claim. Evans & Novak is the other.

Some of Judge Bork's positions with respect to the various doctrines restricting access to the courts are quite extreme. Thus, in Bartlett v. Bowen, 816 F.2d 695 (1987), Bork wrote in dissent that a statutory limit on judicial review of medicaid benefit decisions should be construed as fully precluding any judicial review of the statute's constitutionality. Bork argued the extreme position that Congress, in the name of sovereign immunity, is free to deny all judicial review of constitutional challenges to a benefit program, even though this would, in effect, allow it to design such a program in violation of constitutional rights.[15]

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[14] See Bork, The Impossiblity of Finding Welfare Rights In the Constitution, 1979 Wash. U.L.Q. 695, 699 (the principle of "the limited political authority of the courts" should be enforced "even though it was not explicitly stated" in the document); see also Vander Jagt v. O'Neil, 699 F.2d 1166, 1178-79 (1983) (Bork, concurring) (limitations on access to the courts derive from "more than an intuition but less than a rigorous and explicit [constitutional] theory").

[15] During the 1973 confirmation hearings on Bork's nomination as Solicitor General, he was asked whether, in light of his earlier support of Nixon's efforts to limit busing

(Continued)

Bork has similarly taken extreme positions on standing doctrine. For example, in Haitian Refugee Center v. Gracey, 809 F.2d 794 (1987), Bork asserted that the Constitution established a per se rule against granting standing to a party who is indirectly injured by a law or regulation unless he can show that the law or regulation was specifically intended to cause his indirect injury. This extraordinarily limiting theory of what Congress can do in creating standing had not only never been stated as a rule by the Supreme Court, it was also totally unnecessary to the decision of the case before the Court.16/

15/ (Continued)

remedies in school desegregation cases, he believed Congress could deny all remedial power to the courts when a violation of constitutional rights was alleged. He assured the Senate that in his view "Congress could not deny the court[s] the availability of [all] remed[ies]" because, as he correctly stated, "in such a case Congress would be denying the right and . . . that is not within the power of Congress." 1973 Confirmation Hearings 22-23. The majority in Bartlett raised precisely that argument in defense of its position, and Judge Bork's vehement dissent is all but impossible to square with his prior testimony.

16/ Bork's practice of anticipating situations not specifically before the court and writing separately to craft per se rules that would limit standing doctrine can also be seen in Telecommunications Research v. Allnet, 806 F.2d 1093, 1097-98 (1986) (Bork, concurring), where he argued that associational standing should never be permitted where monetary relief is at issue. The majority had held that although this was generally true, the case did not present the need to reject arguments for various exceptions. Judge Bork's haste to articulate per se rules of standing runs counter to the standing doctrine's essential rationale: that a court should not decide a hypothetical case, but only a case that is concretely presented by parties with an actual interest in that case's resolution.

Bork's consistent denial of access to the courts whenever established law doesn't absolutely preclude that result, makes clear his use of a result-oriented double standard: He argues repeatedly for judicial restraint when courts act to protect individual rights, but he seeks with unbroken consistency to push the doctrines that limit access to the courts as far as he can, even reaching out to establish rules that would deny access more broadly than is necessary to resolve the cases at hand. Such a pattern calls into serious question his insistence that his judicial actions reflect a principled view of constitutional interpretation rather than simply a general lack of sympathy for those in our society who must seek the protection of the law and the courts to protect their individual rights.

C. Bork's General Advocacy of Protecting Presidential Power

Just as Judge Bork's asserted belief in "neutral legal principles" and "judicial restraint" has not limited his willingness to actively push his own belief in denying access to the courts whenever possible, it has also not prevented him from arguing from the vaguest separation of powers principles that the Constitution severely restricts Congress' ability to police the Executive Branch.[17]

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[17] As with the issue of denying access to the courts, Judge Bork has argued for judges to actively enforce "separation of powers" principles that "are not explicitly stated" in the Constitution. Bork, The Imposibility of Finding Welfare Rights in the Constitution, supra, 1979 Wash. U.L.Q. at 699.

Most significant in light of the current investigations of the Reagan Administration, Judge Bork has testified that the special prosecutor statute is, in his view, clearly unconstitutional. For Bork, general separation of powers concerns require the conclusion that once Congress passes substantive laws, full prosecutorial discretion regarding their enforcement must rest exclusively with the President. The Hearings Before the Senate Committee on the Judiciary: The Special Prosecutor, 93rd Cong. 1st Sess. (1973) 449-454. See also Nathan v. Smith, 737 F.2d 1067, 1077 (1984) (Bork, concurring).

Similarly, Judge Bork wrote that it would have been unconstitutional for Congress, during the Viet-Nam War, to try to limit the President's ability to send troops into Cambodia. Once Congress allowed any military activity in the area, full discretion over how to deploy military force must rest with the President as commander in chief. Bork, Comments on the Legality of U.S. Action in Cambodia, 1971 Am. Jour. of Int. Law 79-81.

Indeed, Judge Bork has even argued that Congress acted unconstitutionally in enacting a statute requiring the Executive to obtain a warrant prior to conducting espionage related surveillance on persons within the United States. For Bork, "the President's Article II powers as commander in chief and as the officer of government primarily responsible for foreign affairs" gave him a constitutional right to conduct warrantless searches and surveillance. In trying to protect individuals from unjustified and unreasonable surveillance, Congress, in effect, violated the President's constitutional right to be free from any congressional or judicial interference. *Foreign Intelligence Electronic Surveillance, Judicial Warrant Requirements: Hearings Before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary*, January 18, 1978, p. 134-135; *see also* Bork, *'Reforming' Foreign Intelligence*, Wall Street J., March 9, 1978.

Judge Bork is clearly willing to declare legislative enactments unconstitutional based on vague notions of a Presidential right to perform his function in disregard of Congressional will. But this is based on nothing more than his own view of the proper balance between congressional and executive power -- a view which is radically tilted in favor of the Executive. Moreover, his view is contrary to that of most constitutional scholars and to the leading Supreme Court precedents. *See*, *e.g.*, Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573 (1984); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). And, once again, his activism here stands in sharp contrast to his insistence that, in the area of individual rights, only enactments that are plainly contrary to clearly and explicitly articulated constitutional restrictions should be overturned.

D. *Bork's General Pro-Business Bias*

While Judge Bork repeatedly condemns "liberal judges" for incorporating their personal, social and political values into their decisions regarding individual rights, there is little doubt that Bork's decisionmaking is heavily influenced by his own hostility to government social and economic regulation and his extreme pro-business orientation.

Thus, to take a prime example, he decided in favor of a controversial takings clause and due process claim by a regulated utility that attacked its rate schedule as established by FERC. Jersey Central Power v. FERC, 810 F.2d 1168 (1987) (en banc). And, although Judge Bork has insisted that courts owe extreme deference to executive agencies, he has voted against the agency and in favor of the regulated industry in every non-unanimous rate regulation case in which he participated. By the same token, in every non-unanimous environmental case, consumer case, and private sector labor case, Judge Bork sided with business.[18]

Judge Bork's penchant for pro-business decisionmaking can be seen in what would otherwise have been a relatively uncontroversial diversity case involving the scope of a business's tort liability for its franchisees. See Wilson v. Good Humor, 757 F.2d 1293, 1310 (1986) (Bork, concurring). In an effort to limit the scope of liability, Bork wrote separately to reach an issue that the rest of the panel reserved. He speculated that D.C. would reject certain prevailing tort law rules because of what he viewed as the unfair and excessive costs that he believed the rules imposed on business.

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[18] Judge Bork did, to be sure, decide for the union and/or employee in two non-unanimous public sector labor cases. See NTEU v. FLRA, 800 F.2d 1165 (1986); York v. MSPB, 711 F.2d 401 (1983). The former, however, pitted a union against individual employees and thus implicated no clear employer interest; the latter involved a very narrow point of administrative procedure, only secondarily implicating any employee rights issues.

Although a federal judge in a diversity case is charged with predicting how local D.C. courts would decide the case, Judge Bork's only discussion of D.C. law was to establish that there was no binding D.C. precedent. He then rejected the prevailing view of the Restatement -- although D.C. courts have often followed it -- because the Restatement would impose excessive liability on business. He cited absolutely no D.C. authority for either rejecting Restatement views or adopting tort rules to protect business, and, indeed, the D.C. courts have generally taken an expansive view of tort liability. Judge Bork's exclusive reliance on policy arguments that had no necessary connection to D.C. law reflected nothing but an attitude that, where the legal issue is open, he will decide the case according to his own values.

Nowhere is Judge Bork's pro-business bias shown more clearly than in antitrust law, his primary field of scholarship. Here he has been a leader in the movement to radically reinterpret the antitrust laws to conform to Chicago-school, free-market economic theory, and thus to allow much greater business freedom and much higher levels of business concentration. To obtain his desired revisions, however, would require a root and branch reinterpretation of Congress' intent in passing the antitrust laws, an overturning of dozens of the leading Supreme Court precedents, and, often, an actual refusal to enforce specific provisions found in the statutes themselves.

The level of judicial activism that Judge Bork advocates in this regard is striking. While Bork deplores any reliance on the abstractions of political and social philosophy in the decision of individual rights claims, in antitrust law he is willing to completely subordinate the statutory texts to the abstractions of a particular economic theory. For example, the Robinson-Patman Act prohibits various forms of price discrimination in order to protect competition; but, as Bork explains his theory, "[i]f the new economics is right, there is never a case in which price discrimination injures competition." Lewin, Business and the Law, Antitrust Ideas: 3 Problems, N.Y. Times, March 8, 1985, p. D2 (quoting Bork's comments to an antitrust law conference). Because Bork believes in this "new economics" he would never enforce the statute's prohibitions:

> "In the Robinson-Patman Act, when Congress said it wanted to forbid price discrimination to protect competition, they said it with a wink. I don't think it's a judge's job to enforce winks. . . . If a judge is told that a tying arrangement [the linking of one product to another] is a company's way of leveraging itself into a monopoly in a new market, that's roughly the equivalent of being told that a man jumped out of the window and fell up . . . . If a judge knows that, he shouldn't let that go to the jury." Id. (quoting Bork).[19]

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[19] See also Bork, The Antitrust Paradox 408-411 (1978) (courts should have declared that practices branded as suspect under Clayton Act and Robinson-Patman Act, including tying arrangements, exclusive dealing contracts, vertical mergers, and price discrimination, will in fact "never injure competition and hence are not illegal under the laws as written.").

In essence Judge Bork rationalizes his actions by arguing that the "unmistakable" and exclusive purpose of all antitrust law is to maximize "consumer welfare," a phrase that Judge Bork assigns a very narrow meaning. He then argues that, under the one economic theory he believes to be true -- and he postulates it as being "true" in the same way that Newton's laws are true -- "consumer welfare" is not maximized by enforcing most of traditional antitrust law. Bork's writings in antitrust law thus present the irony of a man who purports to abhor a judge's reliance on his own values arguing that judges should refuse to enforce statutes that Congress has passed, because Congress did not -- and still does not -- sufficiently understand economic truth. Established precedents should similarly be ignored, because the Supreme Court, over a nine decade period, understood economics no better than the Congresses that passed the underlying statutes.

Needless to say, Judge Bork's approach to antitrust law is dubious at best. For example, other scholars have fiercely disputed his conclusions regarding Congress' intent in passing the Sherman Act.[20] And, it is the height of activism for him to call for the almost total restructuring of antitrust law on the basis of such disputed historical views. One antitrust scholar wrote as follows:

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[20] *See*, *e.g.*, Elzinga, *The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?* 125 U. Pa. L. Rev. 1191 (1982); Fox, *The Modernization of Antitrust: A New Equalibrium*, 66 Cornell L. Rev. 1140 (1981); Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 Hastings L.J. 67 (1982); Pitofsky, *The Political Content of Antitrust*, 127 U. Pa. L. Rev. 1051 (1979); Schwartz, *Justice and Other Non-Economic Goals of Antitrust*, 127 U. Pa. L. Rev. 1076 (1979). *See also* H. THORELLI, THE FEDERAL ANTITRUST POLICY (1955).

> Anyone who has read the entire legislative debate over the Sherman Act will see immediately that its congressional supporters spoke with many, and at times contradictory, voices about this legislation. . . . For Bork to 'find' the unequivocal, 'unmistakable' original intent amidst this cacophony suggests a remarkable ability to ignore the overwhelming inconvenience of contradictory facts. . . . While I embrace Judge Bork's attempt to supply an intelligent and consistent interpretation of the Sherman Act more than 75 years after it was passed, his process of interpretation has very little to do with the minds of 19th Century legislators. It does show, however, that when Bork wants to reach an outcome, he is quite facile in dressing his own subjective preferences in the garb of "original intent. [Donohue, Judge Bork, Antitrust Law and the Bending of "Original Intent," Chicago Tribune (7/22/87).]

Whatever the merits of Judge Bork's views on the Sherman Act, his willingness to generalize his conclusions to all of the other antitrust statutes is unsupportable. And, even apart from issues of congressional intent, many have attacked Judge Bork's particular school of economic science and its antitrust conclusions.[21] Under such circumstances, for Judge Bork to call for the judiciary to fail to enforce the specific terms of statutes -- as Judge Bork has called for with respect to the Clayton and Robinson-Patman Acts -- demonstrates an all but limitless capacity for activism.

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[21] See e.g., Rowe, the Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics, 72 Georgetown L. J. 1511, 1547-50 (1984) (analyzing Bork's economics and finding that his model is "delusive" and "circular")

It is not suprising that in antitrust law, Bork follows an economic theory that would free business from a vast array of government regulations, for Bork's own bias against government regulation of business is extreme. He has described his first exposure to Chicago-school, free-market economic theory as "a religious conversion" which "changed [his] view of the entire world." The Fire of Truth: A Remembrance of Law and Economics At Chicago, 1932-1970, 26 Journal of Law and Economics 163, 183 (1983) (Panel Discussion). And, he has written what almost amounts to a manifesto urging business to unite in resistance to welfare-state and regulatory policies that in his view are imperiling the very existence of capitalism. See Bork, Capitalism and The Corporate Executive 1 (1977).

"[C]urrent public policy," according to Bork, has "thrust [such] great and increasing costs upon business in order to achieve a wide variety of social goals" as to "impair the efficiency of our economic system." Id. at 1. "[F]urther reforms," in his view, could "threaten the continued existence of capitalism." Id. In essence, modern American corporations are beseiged by an "attack [which] arises from an alliance or, perhaps more properly, a congruence of interests and beliefs between socialists, populists, politicians, and intellectuals," id. at 3, and, Bork calls on business leaders to resist "reforms," to speak out "for the free market and the capitalist system," id. at 7, and, to "decide whether they are really willing to let the corporate system slide and perhaps expire without putting up a determined fight." Id. at 8. "The slide has gone pretty far already," he warns, "and, if corporate managers continue as they have, the rest of it may be shorter than they imagine." Id. at 8.

In contrast to his apocalyptic vision of a beseiged business community about to succumb, Bork has asserted that "[t]he premise that the poor or the black are underrepresented politically is quite dubious." Bork, The Impossibility of Finding Welfare Rights in the Constitution, 1979 Wash. U.L.Q. 695, 701. He views the past two decades as being marked by "an explosion of welfare legislation, massive income distributions, and civil rights laws of all kinds," which show that "the poor and minorities have had access to the political process and have done very well through it." Id.

Given these sentiments, it is not surprising that Judge Bork's writings on organized labor's activities have not been positive. He has condemned minimum wage laws, see Bork, Capitalism and The Corporate Executive, supra, at 4, and he has cited the power of municipal unions to extract supposedly unreasonable wage rates as an illustration of a major "structural defect" in our system of "representative government." American Enterprise Institute, Taxpayers' Revolt: Are Constitutional Limits Desireable? (1978) (Panel Discussion). In a judicial opinion concerned with union organizing efforts, he essentially mocked the idea that employers use delay in the legal process to frustrate union organizing. Ignoring an empirical study that refuted his view, as well as the common sense of the situation, he argued that delay might favor organizing unions just as much as employers resisting organization. ACTWU v. NLRB, 736 F.2d 1559, 1570-1571 (1984) (Bork, concurring). In another labor case, he overturned NLRB factual and legal judgments to uphold an employers' right to fire pro-union employees for union solicitation, even though the employer had consistently allowed numerous other forms of solicitation. Restaurant Corp. of America v. NLRB, 801 F.2d 1390 (1986).

Judge Bork's jurisprudence and his polemics reflect the same ideological perspective. He is on the side of business and the affluent and instinctively opposed to the claims of minorities, the poor, labor, and others who assert individual rights based on law, rather than relying on property and unrestrained markets.

V. Conclusion

As a Supreme Court Justice, Judge Bork would be far less limited by clearly established law than he has ever been in the past. As Solicitor General, he was accountable to the Ford Administration's policies, and he made clear that those policies, and not his own values, were the basis of his legal arguments. See note 1, supra. As a lower court judge, he has been required to follow previously established law, and he has recognized that he is subject to Supreme Court review if he seeks to implement his desire to alter significantly that Court's legal doctrines. See 1982 Confirmation Hearings at 5. Thus, neither of his previous public offices provide us a true depiction of Judge Bork's course as a Supreme Court Justice.

Even so, we know that as an appellate judge, Bork has developed a record remarkably consistent with his frequently voiced right wing agenda, and his writings reflect a passionate conviction that vast portions of current legal doctrine are "pernicious" and "clearly incorrect." If his beliefs are put into practice, we believe the nation would be profoundly harmed.

The President has depicted Judge Bork as a man who would act not in accord with any political or social agenda, but in accord with the doctrine of "judicial restraint." And, his supporters have argued that he would bring to the Court a refined and principled theory of constitutional analysis. But on inspection, his assertion of "judicial restraint," turns out to be more as cover for ideological decisionmaking than as indicating the true basis for his conclusions. "Judicial restraint" is a governing principle only where civil rights and civil liberties claims need, in his mind, to be rejected -- and not a doctrine to be concerned with when businessmen or the Executive Branch need, so far as he is concerned, the assistance of the judiciary.

One more word needs to be said. The issues in civil rights and civil liberties cases -- and in labor-management, health and safety, environmental and business regulation cases -- are ones to which both sides tend to bring a passionate belief in the essential rightness of their differing positions. Recognizing this, it is all too common during a dispute over confirming a nominee for the Supreme Court to view as overly idealistic an insistence on the importance of such qualities as a judge's open mindedness and his ability to bring a disinterested understanding to the decision of the particular case before him.

We do believe that Judge Bork's basic political and social views are profoundly wrong; but we also understand that the essential work of federal judges in general -- and of Supreme Court Justices in particular -- is to decide the difficult cases generated by the norms stated in the Constitution and statutes of the United States, and not to formulate social norms according to their preferences.

The questions presented to the federal judiciary are thus almost invariably ones of degree. We do not ask these judges whether there should be free speech or equal protection of the laws (or whether there should be a collective bargaining system or safe workplaces); rather, we ask them to apply the judgments that have been made in federal law to particular circumstances -- as best as those judgments can be understood. The source materials, however, are frequently indeterminate, and often, both sides have something of substance to say. In such circumstances, we trust that a judge will act in a way that is sensitive to all the legitimate interests at stake, according to an essential sense of fairness. That is what the litigants truly have the right to expect.

Judge Bork is a man whose career has had many accomplishments, but he does not possess these prime requisites for good judging. None of his work shows any concern for the nuance of judicial decisionmaking or for the legitimate rights and interests of any but a narrow segment of society. All legal questions are for him easy questions, and those who disagree with him do not simply see things differently: they are unprincipled.

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August 17, 1987

Positions Taken by Judge Bork in Non-Unanimous D.C. Circuit Decisions

In order to evaluate how Judge Bork exercises the measure of discretion inherent in the judicial process, the following list tallies Judge Bork's votes on those issues in which clear legal outcomes may not have been mandated. The list thus includes his votes in the following cases: (1) all panel decisions in which Judge Bork participated and in which a full or partial dissent was written; (2) all panel decisions in which Judge Bork participated and which generated a dissent from the denial of a suggestion for rehearing en banc, even though there had been no dissent among the three panel judges; (3) all en banc decisions in which Judge Bork participated and in which a full or partial dissent was written; and (4) all denials of suggestions for rehearing en banc in which a dissent was filed and in which Judge Bork took a written position.[1]

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[1] Where the same case and issue was presented to the D.C. Circuit at various levels, *e.g.* panel decision and *en banc* decision, or panel decision and opinion denying suggestion for rehearing *en banc* the case is only counted once.

I. Total Number of Cases in which Judge Bork Participated:....................................67 cases

II. Freedom of Information Act/Sunshine Act/ Privacy Act:.................................... 9 cases

A. FOIA/Sunshine Act/Privacy Act cases in which Bork Voted for the government.................. 9 cases

1 Doe v. United States, Slip op. No. 84-5613 (6/19/87) (en banc) (R. Ginsburg, for majority which included Bork) (Wald, joined by Mikva dissenting) (Privacy Act case in which plaintiff sought to correct allegedly incorrect information from personnel records: Bork joined majority opinion holding that the Act requires only that dispute be mentioned in the record, and expungement or correction was unnecessary).

2. Wolfe v. U.S. Dept. of HHS, 815 F.2d 1527 (1987) (Wright, for majority, joined by Robinson) (Bork dissenting) (FOIA case seeking disclosure of dates of each step of agency consideration of proposed FDA/HHS regulations: Bork would deny disclosure under broad view of "deliberative materials" exception and of executive privilege), vacated in order granting rehearing en banc, Slip Op. No. 86-5017 (7/2/87).

3. Greenberg v. FDA, 803 F.2d 1213 (1987) (Wright, for majority, joined by Edwards) (Bork dissenting) (FOIA suit against FDA: Bork would deny disclosure under broad view of confidential commercial information exception and based on technical pleading deficiencies).

4. Dettman v. U.S. Dept. of Justice, 802 F.2d 1472 (1986) (Starr, for majority, joined by Bork) (Gessell dissenting) (FOIA suit against FBI: Bork joined opinion holding that requester's failure to follow proper technical procedures barred suit).

5. Clark-Cowlitz v. FERC, 798 F.2d 499 (1986) (en banc) (Silberman, for majority, which included Bork) (Robinson concurring) (Wright, joined by Mikva, dissenting) Sunshine Act request for disclosure of transcript FERC meeting during which FERC litigation was discussed; request made after the litigation ended; Bork joined majority opinion holding that litigation materials exception applies even after litigation ends).

6. *Church of Scientology v. IRS*, 792 F.2d 153 (1986) *(en banc)* (Scalia, for majority which included Bork) (Silberman concurring) (Wald, joined by Robinson and Mikva, dissenting) (FOIA suit against IRS: majority denies disclosure under broad reading of exception for materials that might "be associated with or otherwise identify" a taxpayer, even where the identifying information is excluded), *cert granted* 107 S.Ct. 947 (1987).

7. *Sims v. CIA*, 709 F.2d 95 (1983) (Edwards, for majority, joined by Fairchild) (Bork dissenting in part) (FOIA suit against CIA: Bork would broadly define "intelligence sources" exception to FOIA to include any source promised confidentiality), *reversed* 471 U.S. 159 (1984).

8. *McGehee v. CIA*, 697 F.2d 1095 (1983) (Edwards, for majority, joined by Wright) (Bork dissenting in part) (In FOIA suit against CIA, Bork would not broadly define and allow disclosure under "intelligence sources" exception), *petition for rehearing granted* and *modified*, 711 F.2d 1077 (1983).

9. *Washington Post Co. v. Dept. of State*, 685 F.2d 698 (1982) *(dissent from denial of rehearing en banc)*. (Scalia dissenting, joined by MacKinnon and Bork) (In FOIA action against State Department, Bork joined opinion which argued for prohibiting disclosure for national security reasons), *panel decision vacated as moot*, 464 U.S. 979 (1983).

B. FOIA/Sunshine Act/Privacy Act cases in which Bork voted in favor of plaintiff:....... 0 cases

III. Labor Cases (inc. NLRA, FLRA, OSHA, Civil Service cases):.................................. 7 cases

A. Cases in which Bork voted for employer and against union/employees:...................... 5 cases

1. *Restaurant Corporation of America v. NLRB*, 801 F.2d 1390 (1986) (Bork, for majority, joined by Scalia) (MacKinnon dissenting in part) (Bork refused enforcement of NLRB order finding § 8(a)(3) violation, holding that employer allowance of employment related social solicitation cannot be basis for challenging discharges pursuant to no-solicitation rule).

2. AFGE v. FLRA, 778 F.2d 850 (1985) (Wald, for majority, joined by Bork)(Ginsburg dissenting) (Bork joined majority which upheld FLRA's rulings that (i) agency head may unilaterally reject a collective bargaining agreement which he believes is contrary to rule or law, even when agreement is imposed by Federal Impasse Board, and (ii) the union may not arbitrate the rejection).

3. Meadows v. Palmer, 775 F.2d 1193 (1985)(Bork, joined by Starr) (Mikva dissent (Bork held that employee who is reassigned to job with no duties cannot complain of reduction in rank, where status not technically changed).

4. Simplex Time Recorder v. Secretary of Labor, 766 F.2d 575 (1985) (Davis, for majority, joined by Bork) (Wald dissenting in part) (Bork affirmed ALJ finding that OSHA did not show that employer's safety violations were "serious"; dissent argued that the ALJ analysis was wrong).

5. Prill v. NLRB, 755 F.2d 941 (1985), cert. denied, 106 S.Ct. 313 (1985) (Edwards, for majority, joined by Wald) (Bork dissenting) (Majority held that NLRB erred in holding that under NLRA one employee complaining of an unsafe working condition could not be engaged in protected, concerted activity; Bork argued the Board was correct and no legally valid test could protect such individual activity).

B. Cases in which Bork voted in favor of union/employees:......................... 2 cases

1. NTEU v. FLRA, 800 F.2d 1165 (1986) (Bork, for majority, joined by Robinson) (Swygert dissenting) (Bork held that a federal government sector union may refuse to supply attorneys to nonmembers who seek to pursue non-contractual grievances without violating duty of fair representation because the activity was unrelated to the union's authority as exclusive representative).

2. York v. MSPB, 711 F.2d 401 (1983) (Bork, for majority, joined by Wright) (MacKinnon dissenting) (Remanding MSPB decision, on OPM's motion for reconsideration, which sustained discharge, requiring MSPB to explain basis of decision and standards for granting reconsideration).

IV. Criminal Procedure:............................. 3 cases

A. Cases in which Bork voted against criminal defendant............................ 3 cases

1. United States v. Meyer, Slip Op. No. 85-6169 (July 31, 1987) (Bork dissenting from denial of rehearing en banc of panel decision at 816 F.2d 295 (1987) (Bork argues that panel improperly interfered with prosecutorial discretion when it dismissed charges on basis of vindictive prosecution, where prosecutor, in the absence of any plea negotiations added new charges in response to defendants' challenge to charges initially made).

2. U.S. v. Singleton, 759 F.2d 176 (1985) (Bork, for majority) (Swygert dissenting) (Bork reverses trial judge's grant of suppression motion in new trial on basis of law of the case doctrine, asserting that prior appellate reversal of judge's setting aside of jury verdict precluded trial judge's grant of suppression motion at new trial), rehearing en banc denied, 763 F.2d 1432 (1985) (Bork defends position in separate opinion, responding to dissents).

3. U.S. v. Byers, 740 F.2d 1104 (1984) (en banc) (Bork joined plurality's rejection of Fifth Amendment challenge to use of court-ordered psychiatric examination for rebuttal of defendant's insanity defense; also joined plurality's rejection of Sixth Amendment challenge to exclusion of defendant's lawyer from psychiatric exam; also rejects any reliance on court's supervisory power).

B. Cases in which Bork voted in favor of criminal defendant:....................... 0 cases

V. Environmental Cases (includes EPA and NRC cases):.................................. 2 cases[2]

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[2] This figure does not include NRDC v. EPA, 804 F.2d 710 (1986), reversed upon en banc review, Slip Op., No. 85-1150 (7/28/87). In that panel decision, Judge Bork wrote an opinion denying NRDC's challenge to the EPA's decision to withdraw

(Continued)

A. Cases in which Bork voted against environmental interest:........................ 2 cases

1. San Louis Obispo Mothers v. NRC, 789 F.2d 26 (en banc) (1986), cert. denied 107 S.Ct. 330 (1987) (Bork for majority, joined by Edwards, Scalia and Starr, and in part by Mikva) (Mikva concurring in part) (Wald dissenting, joined by Robinson, Wright and Ginsburg) (APA challenge to NRC's licensing of the Diablo Canyon Nuclear Power Plant: Bork held that NRC did not have to consider certain effects of possibility of earthquake or safety of plant).

2. Bellotti v. NRC, 725 F.2d 1380 (1983) (Bork, for majority, joined by MacKinnon) (Wright dissenting) (Bork held that NRC properly defined "proceedings" that would be open to the public to exclude any issue of more stringent safety regulations than these proposed by NRC; thus, state attorney general had no standing to participate).

B. Cases in which Bork voted in favor of environmental interest:.................... 0 cases

VI. Civil Rights/Civil Liberties Cases (includes constitutional tort claims and statutory claims relating to free speech, free exercise of religion, civil rights attorneys fees, prisoners' rights, rights of political refugees, etc.).... 20 cases[3]

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[2] (Continued)

proposed toxic emission standards because of cost (rather than safety) concerns. Judge Wright dissented. On July 28, 1987, after en banc consideration, the en banc court reversed this holding by 11-0 vote, with Judge Bork, admitting he was wrong, authoring the en banc decision. The figure also does not include Save Our Cumberland Mountains v. Hodel, Slip Op. No. 85-5984 (8/7/87), where Judge Bork reduced the attorneys fees owed to a environmental group prevailing under a fee shifting statute. Because of the importance of fee shifting statutes to individual rights litigation, that suit is counted in the civil rights/civil liberties category. See, note 3, infra.

[3] Because of the importance that attorneys fee shifting statutes play in the civil rights/civil liberties field, this category includes cases construing such statutes, even if the particular case does not involve what would otherwise be considered a civil rights/civil liberties claim. See Save Our Cumberland Mountains v. Hodel, Slip. Op. No. 85-5984, infra (construing fee shifting provision in environmental law suit, although law established would equally apply to civil rights/civil liberties cases).

A. Cases in which Bork voted against civil rights/civil liberties plaintiffs:.................................. 18 cases

1. Save Our Cumberland Mountains v. Hodel, Slip Op. No. 85-59874 (Aug. 7, 1987) (Bork for majority, with R. Ginsburg joining and concurring separately) (Wald dissenting) (Majority and dissent disagree on method for calculating prevailing lawyer's fee under fee shifting statute, where lawyer's normal practice is predominantly a "public interest" practice; Majority's method would allow for lower fee awards than dissent's).

2. Martin v. D.C. Metro Police, Slip Op. No. 85-6072 (July 31, 1987) (Bork dissenting from denial of rehearing en banc of panel-decision at 812 F.2d 1425) (Bork argues that complaint alleging unconstitutional motivation for arrest should be dismissed prior to discovery in absence of non-conclusory allegations of unconstitutional motive; panel majority allowed limited discovery).

3. Bartlett v. Bowen, 816 F.2d 695 (1987) (Edwards, for majority, joined by Wright) (Bork dissenting) (free exercise clause challenge to Medicaid statute's discriminatory treatment of Christian Science care facilities: Majority holds that statutory limit on jurisdiction to review agency decisions was not intended to apply to constitutional attacks on statute; Bork argues that there is no jurisdiction to review and no constitutional problem in denying all judicial review of constitutional challenges to benefits programs). vacated upon grant of en banc review, ___ F.2d ___; order granting en banc review and vacating panel opinion withdrawn, ___ F.2d ___.

4. Haitian Refugee Center v. Gracey, 809 F.2d 794 (1987) (Bork, for majority, joined in part by Buckley) (Buckley concurring in part) (Edwards concurring in part, dissenting in part) (Bork rejected challenge to U.S. policy of interdicting ships that might be transporting Haitian refugees so that the ships cannot land and refugees cannot claim asylum, holding that plaintiffs lacked standing to sue).

5. Shultz v. Crowley, 802 F.2d 498 (1986) (Scalia for majority, joined by Bork) (MacKinnon dissenting) (Bork joins opinion reversing district court and denying civil rights attorneys fee claims under Equal Access to Justice Act).

6. Finzer v. Barry, 798 F.2d 1450 (1986) (Bork, for majority, joined by Davis) (Wald dissenting) (Bork rejects First Amendment challenge to statute that prohibits any demonstration within 500 feet of a foreign embassy if the demonstration is critical of foreign government), cert. granted, 107 S.Ct. 1282 (1987).

7. Hohri v. U.S., 793 F.2d 304 (1986) (dissent from denial of rehearing en banc) (Bork dissented from denial of rehearing, joined by Scalia, Starr, Silberman and Buckley) (Bork urged en banc reconsideration of panel's decision allowing suit by Japanese-American victims of U.S. internment program, arguing that panel improperly accepted that Supreme Court's prior approval of program was subject to "fraud on the Court" attack based on newly discovered evidence).

8. Abourezk v. Reagan, 785 F.2d 1043 (1986), (Majority by R. Ginsburg, joined by Edwards) (Bork dissenting) (Bork dissents from majority's refusal to dismiss suit brought by groups who had invited foreign speakers and sought to challenge State Department Standards for excluding foreign speakers from country) cert. granted, 107 S.Ct. 666 (1986)

9. Vinson v. Taylor, 760 F.2d 1330 (1985) (dissent from denial of rehearing en banc) (Bork, joined by Scalia and Starr,) (Bork urged rehearing of panel decision in favor of sexual harassment plaintiff on basis that broader employer defenses should be allowed), panel decision aff'd 106 S.Ct. 2399 (1986).

10. Paralyzed Veterans of America v. C.A.B., 752 F.2d 725 (1985), (dissent from denial of rehearing en banc) (Bork, joined by Scalia and Starr) (Bork urged dismissal of suit by handicapped against airlines on the grounds that the Rehabilitation Act does not extend to challenged airline practices), panel decision rev'd 106 S.Ct. 2705 (1986).

11. Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (1984) (en banc) (Wilkey, for majority) (Scalia dissenting, joined by Bork) (Unlawful takings and due process claim by U.S. citizen who owned cattle ranch in Honduras that was allegedly seized and destroyed for the construction of a U.S. military facility; Bork joined Scalia's dissent arguing that the suit implicated foreign policy matters beyond the scope of judicial review, while majority asserted plaintiff's right to relief if he can prove alleged facts) vacated and remanded 471 U.S. 1113 (1985).

12. Dronenburg v. Zech, 746 F.2d 1579 (1984) (dissent from denial of rehearing en banc of 741 F.2d 1388 a panel decision in which Bork wrote for the panel) (Robinson dissenting, joined by Wald, Mikva and Edwards) (Bork wrote opinion in response and in defense of panel opinion) (Bork rejected homosexual's challenge to discharge from military, arguing that the Supreme Court's constitutional "right of privacy" cases and equal protection cases express no principle that could protect homosexuals, and that lower courts should not engage in any expansion of the "privacy" line of cases since they provide no legal analysis that can be generalized to new situations).

13. Brown v. U.S., 742 F.2d 1498 (1984) (en banc) (Wright, for majority) (Bork dissenting, joined by Tamm, Wilkey and Starr) (Bork rejected holding that D.C. notice of claims statute could not bar federal civil rights claim).

14. White House Vigil for ERA v. Watt, 717 F.2d 568 (1983) (Per Curiam for Wald and Oberdorfer) (Bork dissenting) (Majority modifies regulations limiting demonstrators on sidewalk of White House, arguing that regulations unduly burden First Amendment rights; Bork argues that First Amendment requires no modification of regulations).

15. Council for and of the Blind v. Regan, 709 F.2d 1521 (1983) (en banc) (Wilkey, for majority which included Bork) (Robinson dissenting) (Bork joined opinion holding that plaintiffs lacked standing to sue, dismissing civil rights suit against Revenue Sharing Authority for non-enforcement of its anti-discrimination provisions).

16. Franz v. U.S., 707 F.2d 582 (1983) (Edwards, for majority, joined by Tamm) (Bork dissenting, at 712 F.2d 1428) (Bork argued that constitutional parental rights doctrine should not be applied to divorced non-custodial father since doctrine is based on traditional respect for stable family and should not be expanded by lower courts, thus rejecting constitutional challenge to government's permanent hiding of father's children pursuant to Witness Protection Program).

17. CCNV v. Watt, 703 F.2d 586 (1983) (en banc), (Scalia dissenting, joined by Bork) (In free speech suit by CCNV, Bork joined Scalia's dissent which stated that sleeping can never be "speech" and so is not protected by the First Amendment); rev'd, 468 U.S. 288 (1983).

18. Cosgrove v. Smith, 697 F.2d 1125 (1983) (Mikva, for majority, joined by Bonsal) (Bork dissenting in part) (In suit by D.C. Code violators incarcerated in federal prison, Bork rejected challenge to prison's use of much stricter federal parole standards in preference to more lenient parole standards used in D.C. prisons).

B. Cases in which Bork favors civil rights/civil liberties claims:................ 2 cases

1. Reuber v. U.S., 750 F.2d 1039) (1984) (Wald, for panel) (Bork concurring) (Starr dissenting) (In § 1983 constitutional tort suit against private party alleged to have conspired with U.S., to discharge employee for free speech activity Bork found that plaintiff stated a claim but urged that remedies should be very limited).

2. Ollman v. Evans & Novak, 750 F.2d 970 (1984) (en banc) (Starr for majority) (Bork concurring) (Robinson, Wright, Wald, Edwards, Scalia, dissenting) (Bork argues that in case brought by public figure First Amendment should protect libel defendant by requiring that alleged libel be unambiguous factual statement and not mixed statement of fact and opinion.

VII. Access to the Federal Courts (including standing, sovereign immunity, limits on judicial review and federal jurisdiction):....... 16 cases

A. Cases in which Bork denies or limits access to the federal courts:................. 16 cases

1. *Bartlett v. Bowen*, 816 F.2d 695 (1987), *supra*.

2. *Haitian Refugee Center v. Gracey*, 809 F.2d 794 (1987), *supra*.

3. *Robbins v. Reagan*, 780 F.2d 37 (Robinson and Wald, *per curiam*, for the majority) (Bork dissenting in part) (Majority accepted jurisdiction of APA suit by homeless challenging U.S. decision not to establish a "model shelter" as promised, but dismissed suit on merits; Bork dissented arguing that there can be no judicial review of agency decision, arguing that decision was within absolute agency discretion).

4. *San Luis Obispo Mothers v. NRC*, 789 F.2d 26 (1986) *en banc*, *supra*.

5. *California Assoc. of Physically Handicapped v. FCC*, 778 F.2d 823 (1985) (R. Ginsburg, for majority, joined by Bork) (Wald dissenting) (Bork joins opinion holding that organization for the physically handicapped did not have standing to challenge FCC procedure for allowing TV station, that allegedly had not served interest of handicapped, to transfer stock).

6. *Barnes v. Kline*, 759 F.2d 21 (1985) (McGowan, for majority, joined by Robinson) (Bork dissenting) (Bork rejected concept of congressional standing, dissenting from holding that members of Congress had standing to challenge President's assertion that bill had failed to become law due to "pocket veto"), *vacated as moot*, 107 S.Ct. 734.

7. *Securities Industry Assoc. v. Comptroller of the Currency*, 765 F.2d 1196 (1985) *(dissent from denial of rehearing en banc* of 758 F.2d 739) (Scalia dissenting joined by Bork) (arguing that security dealers' organization had no standing under McFadden Act to challenge enforcement policy of Controller General).

8. *Gott v. Walters*, 756 F.2d 902 (1985) (Scalia, for majority, joined by Bork) (Wald dissenting) (Bork joined opinion which held that military veterans and their families, lacked standing to challenge VA's methodology for determining benefits for veteran radiation victims), *vacated en banc*, 791 F.2d 172 (1985).

9. *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (1984) *en banc*, *supra*.

10. *Northland Capital Corp. v. Silver*, 735 F.2d 1421 (1984) (Starr, for majority, joined by Bork) (Wald dissenting) (Bork joined majority holding that a small investment company had no standing to sue under § 10-b-5 of Securities Exchange Act).

11. *Persinger v. Iran*, 729 F.2d 835 (1984) (Bork, for majority, joined by Bazelon) (Edwards dissenting) Bork dismisses suit by families of former Iranian hostages pursuant to foreign sovereign immunity, while dissent construed foreign sovereign immunity statute as allowing suit).

12. *Investment Co. Instit. v. FDIC*, 728 F.2d 518 (1984) (Bork and Scalia, *per curiam*) (Wright dissenting) (In suit challenging FDIC's failure to act on a petition to enforce its rules, Bork held that there could be no judicial review because decision within agency's discretion).

13. *Chaney v. Heckler*, 724 F.2d 1030 (1984) (dissent from denial of rehearing *en banc* of 718 F.2d 1174), (Scalia, dissenting from denial, joined by Bork) (Dissenting from review of agency non-enforcement decision, Bork argued that there was no judicial review permitted since decision within agency discretion), *panel decision rev'd*, 470 U.S. 821 (1985).

14. *Council of and for the Blind v. Regan*, 709 F.2d 1521 (1983) (*en banc*) *supra*.

15. *Lombard v. U.S.*, 690 F.2d 215 (1982) (MacKinnon, for majority, joined by Bork) (R. Ginsburg dissenting) (Bork joined opinion that, on basis of sovereign immunity, barred suit by a former serviceman for damages resulting from U.S. government's failure to warn of health risks from exposure to radiation at Los Alamos).

16. *Bennett v. Bennett*, 682 F.2d 1039 (1982) (Bazelon, for majority, joined by Bork) (Edwards dissenting) (In diversity suit for damages and injunctive relief against a non-custodial parent who kidnapped child, Bork joined opinion holding that only damages were available in federal court; injunctive relief could only be awarded by state court).

B. Cases in which Bork favored access to federal courts:.............................. 0 cases

VIII. Consumer and Rate Regulation Cases:.............. 10 cases

A. Cases in which Bork voted against consumers and/or in favor of regulated business:.................................... 10 cases

1. *Mississippi Industries v. FERC*, 808 F.2d 1525 (1987) (Edwards and Wright, *per curiam*) (Bork dissenting) (Bork granted utilities' challenge to FERC rate regulation decision regarding allocating of nuclear power plants), *vacated and rehearing en banc granted*, 814 F.2d 773 (1987), *order granting rehearing withdrawn*, ___ F.2d ___.

2. *Jersey Central Power and Light Co. v. FERC*, 810 F.2d 1168 (1987) (*en banc*) (Bork, for majority) (Mikva, Wald, Robinson, Edwards dissent) (Bork granted utility's claim that it is entitled to prior hearing on assertion that FERC rate regulation decision regarding of costs unsuccessful nuclear power plant development constituted unconstitutional taking).

3. *Telecommunications Research v. FCC*, 801 F.2d 501 (1986)) (Bork, for majority, joined by Scalia) (MacKinnon dissenting) (Bork holding that FCC's decision not to apply equal access and reasonable access policies to new technology (teletext) was proper).

4. *California Assoc. of Physically Handicapped v. F.C.C.*, 778 F.2d 823 (1985), *supra*.

5. *Norfolk & Western v. ICC*, 768 F.2d 373 (1985) (Bork, for majority, joined by R. Ginsburg) (Starr dissenting) (In suit under Stagger Act, Bork rejects ICC rate formulation which railroad challenged).

6. *Paralyzed Veterans of America v. C.A.B.*, 752 F.2d 725 (1985), *supra*.

7. Middle-South Energy, Inc. v. FERC, 747 F.2d 763 (1984) (Bork, for majority, joined by Starr) (R. Ginsburg dissenting in part) (Bork grants utility challenge and limits authority of FERC to suspend rate filings).

8. National Soft Drink Assoc. v. Block, 721 F.2d 1348 (1983) (McNichols, for majority, joined by Bork) (Wilkey dissenting) (Bork rejects a Department of Agriculture rule prohibiting the sale of junk food in schools).

9. Black Citizens for Fair Media v. FCC, 719 F.2d 407 (1983) (Bork for majority, joined by Jameson) (Wright dissents) (Bork rejects challenge to FCC deregulation).

10. McIwain v. Hayes, 690 F.2d 1041 (1982) (Bork, for majority, joined by Jameson) (Mikva dissenting) (Bork rejects consumer challenge to 20-year delay in FDA issuance of rules regulating food additives.

B. Cases in which Bork voted in favor of consumer interests and/or against regulated business .... 0 cases

IX. Miscellaneous Cases .... 7 cases

1. Catrell v. Johns Mansville, Slip Op. No. 83-1694 (August 7, 1987) Wald, for majority, joined by Starr) (Bork dissenting) (In wrongful death action, on remand from Supreme Court, majority found that summary judgment for defendant asbestos manufacturer was not appropriate under Supreme Court's standard; Bork would grant defendant's summary judgment motion).

2. United States v. Paddock, Slip Op. No. 86-5371 (August 2, 1986) (Silberman, fo majority, joined by Wald) (Bork dissenting) (Majority sustains Foreign Service Grievance Board's holding that certain employee travel expenses should be reimbursed under Foreign Service's policies; Bork would overrule grievance board's decision and hold that travel expenses were excessive).

3. Weisberg v. Dept. of Justice, 763 F.2d 1436 (1985) (Mikva and Starr, per curium) (Bork dissenting) (Bork's dissent is on a narrow technical ground - whether D.C. or Federal Circuit has jurisdiction).

4. *Catrell v. Johns Mansville*, 756 F.2d 181 (1985) (Starr, for majority, joined by Wald) (Bork dissenting) (In suit for wrongful death against asbestos manufacture, Bork argued that defendant was entitled to summary judgment), *rev'd* 106 S.Ct. 2548 (1986).

5. *Kennedy for Pres. Comm. v. FEC*, 734 F.2d 1558 (1984); *Reagan for Pres. Comm. v. FEC*, 734 F.2d 1570 (1984) (Wald, for majority, joined by Bork) (Starr dissenting) (Bork joined opinion holding that the FEC's formula for determining how federal matching funds may appropriately be used failed the test of reasonableness).

6. *Planned Parenthood v. Heckler*, 712 F.2d 650 (1983) (Wright, for majority, joined by Edwards) (Bork dissenting in part) (While agreeing with majority as to invalidity of HHS rules limiting teenage access to family planning, as issued, Bork refuses to enjoin implementation of rules but would remand to agency for possible further consideration and possible reissuance).

7. *AFGE v. Pierce*, 697 F.2d 303 (1982) (*dissent from denial of rehearing en banc* of panel opinion (*per curiam*) in which Bork participated) (Wright, Wald and Mikva would grant rehearing, Wald and Mikva writing dissents) (Panel dismissed suit against Secretary of HUD protesting RIF of 181 HUD employees, holding underlying statutory limit on Secretary was unconstitutional for containing legislative veto; dissenters argued that statutory provision was not clearly a legislative veto).

Bork's new image and Rehnquist's new book: the clear and present danger.

COUP AT THE COURT

BY RENATA ADLER

I.

THE UNPRECEDENTED, increasingly improper and deceptive campaign by and on behalf of Robert H. Bork for a seat on the Supreme Court is beginning to provide some measure of the degree to which Americans ought to be frightened by that nomination. In an essay "On Lying and Politics," Hannah Arendt long ago pointed out the entirely contemporary dangers in confusing Madison Avenue public relations with genuine politics—the difference between selling an, inherently "defactualized," "image" to a "consumer" and the legitimate political contention among electoral candidates for the decision of the voter, which, in an open society, necessarily involves some ascertainable element of fact.

But we have never had a political "candidate" marketed in this sense for the nation's highest court before. It is astonishing how far the "defactualization" has already gone. A law professor and a judge on a federal appellate court has, one would have thought undeniably, a factual "record." Bork's views on constitutional law, as expressed in his published articles and opinions, exist. Taken together they would amount to no more than a single, small volume or tract. But they are hard to read, cynical, poorly reasoned, and ideologically extreme to a degree that is unusual even on the outermost fringes of our public life. Few people apparently have taken the trouble to wade through them.

Every few days, however, the Bork lobby manages to plant, in the *New York Times* or the *Washington Post* or elsewhere, some story to the effect that, contrary to his record of more than 20 years, Bork is now, or has ever been, a "centrist," or a "moderate," or "open-minded," or anywhere near the "mainstream" of constitutional adjudication (going back more than 30, and in important lines of cases more than 60, years) that Bork himself has repeatedly and stridently denounced as "lawless," "unprincipled," "improper," and "deficient" in "candor," "logic," and "legitimacy." The resulting stories now unhesitatingly characterize as "liberal" anyone who happens to oppose Bork's nomination; they also promote an image of the nominee, contradicted surprisingly but absolutely by his published work, as a respecter of "original intent" and an advocate or a practitioner of "judicial restraint."

"The man," Bork once wrote, in his long, often quoted article in the *Indiana Law Journal* in 1971, "who *understands* the issues and *nevertheless insists* upon the *rightness* of the Warren Court's *performance* . . . occupies an impossible philosophic position" (emphasis added). (Look at the tone; look at the vocabulary; look particularly at the word "performance.") "Such a man," namely anyone who does not share Bork's own theories and ideological commitments, "prefers *results* to *processes*" and "claims for *the Supreme Court*" a "role as *perpetrator* of limited coups d'état" (emphasis added). Bork went on to say that he could see "no reason" why such a person should not entirely "ignore the Court whenever he can get away with it and overthrow it if he can"—or why this person should not choose to "argue the case to some other group, say the Joint Chiefs of Staff."

The putsch vocabulary of "coups d'état" is characteristic, as is the habit, the mentality, of extreme overstatement disguised as rational argument. And the "performance" of which this revised and repackaged "centrist" wrote with such derision has, of course, been the law of the land for more than 30 years. In some forums the Bork campaign has managed to convey the impression that the nominee has somehow tempered, or even changed, his more rigid and most often reiterated views. But with his real constituents, and outside the mainstream press, Bork leaves no doubt: "I finally worked out a philosophy which is expressed pretty much in that 1971 *Indiana Law Journal* piece," he said in the *Conservative Digest* in late 1985; and in June 1985 in the *District Lawyer*: "My views have remained about what they were." The reason we cannot dismiss much of his published work as instances of a simultaneously ponderous and cutting sarcasm, more refreshing perhaps in academic circles than becoming to a judge, is that it is Bork himself who turns out to prefer "results" to "processes." In fact, when it suits him he manages to set "processes," and the Constitution itself, entirely aside in order to reach his preferred "results."

"Logic has a life of its own," Bork wrote in the *Indiana Law Journal* piece, "and devotion to principle requires that we follow where logic leads." Bork likes the words "logic" and "logical," and categorical statements claiming "neutrality" or labeling themselves "neutral" but phrased in terms of absolutism and excess: "all," "any," "nothing," "no one," "none," "ugly," "offensive," "repugnant," "coerced," "compelled." And, "I would be appalled by many statutes that I am compelled to think would be constitutional." The five areas in which Bork has been most radically, insistently, and "logically" at variance with constitutional precedent, and in which he would think himself inescapably "compelled" to uphold "many statutes" struck down as unconstitutional in the past six decades by the Court, are these: privacy, equal protection, race, due process, and speech.

Privacy. Bork not only unequivocally denies, he repeatedly and scornfully derides the very notion that such a constitutional right exists. This view has consequences. It means, for instance, that *Roe* v. *Wade* must be overruled. Bork has called it an "unconstitutional decision" and a "wholly unjustified judicial usurpation"—which would require him, under his own constitutional oath, not to leave it in place in deference to precedent or to the continuity of the Court, but to overrule it. State legislatures would be empowered, of course, to pass criminal statutes that ban abortions. But since no right of privacy exists, and since a woman has no rights in the matter one way or the other, the states could as readily enact statutes that *impose* abortion—on welfare mothers, say, or on single mothers, or on any group of women defined by any criteria other than "invidious racial classification," the only category of discrimination that Bork acknowledges as forbidden by the 14th Amendment. Whether Bork would be "appalled" by such a statute is not clear. "Logic" and "devotion to principle" would oblige him to uphold it.

Equal protection. Bork explicitly finds in the equal protection clause of the 14th Amendment only "two legitimate meanings": "It *can* require formal procedural equality, and . . . it *does* require that government not discriminate along racial lines" (emphasis added). "But much more than that cannot properly be read into the clause." This too has consequences. Except maybe ("can require") in the strictest "formal procedural" sense, it excludes from constitutional equal protection of the law not only all women, and of course all homosexuals, but any other group or minority not explicitly defined by race. There is no constitutional impediment to enacting into law any community prejudice against groups defined, say, by class, affinity, profession, union, party affiliation, infirmity, age, culture, physical or mental attribute, non-racial physical similarity, or even religious belief.

State legislatures at present seem benign enough not to enact most statutes

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September 14 & 21, 1987

of that kind. But Bork has not in the past been perceptibly "appalled" by laws or policies that involve, for instance, sterilization. In the *Indiana Law Journal* piece, among many pre-Warren Court cases he found "improper" and "wrongly decided" was *Skinner* v. *Oklahoma*, a 1942 decision in which the Court struck down a statute that required sterilization of "habitual criminals", and as recently as 1984, in *Oil, Chemical, and Atomic Workers* v. *American Cyanamid*, he found no difficulty in adopting the language, and sympathizing with the conduct, of a company that "offered" its female employees, as an "option" under what it called its "fetal protection policy," the choice between "proof of surgical sterilization" and being fired. If, under the pressures of some not unimaginable or unforeseeable crisis, states were to pass some "racially neutral" statute ranging from discrimination against members of the unprotected groups to relocation or even sterilization of them, Bork would be "compelled" by "logic" and "devotion to principle" to uphold it.

Race. Since Bork finds in the equal protection clause nothing substantive, except that "government [may] not discriminate along racial lines," one might think he would hold firm at least on race. But no, or at least not on the side of equal protection and desegregation. There are not only intemperate and perhaps hastily drafted views: his infelicitous phrase in a 1978 article in the *Wall Street Journal*, for example, which characterized as "hard core racists of reverse discrimination" a group that would include at least four justices in *Bakke*—and perhaps also the main target of Bork's attack in that article, Justice Lewis Powell. Bork's relentless habit of extreme overstatement leads him to find in *any* decision that strikes down state enforcement of racial discrimination an unconscionable intrusion on some right or "freedom" to discriminate on racial grounds. Thus, among the many pre-Warren Court lines of cases that he explicitly states "logic" and "devotion to principle" oblige him to find unconstitutional is *Shelley* v. *Kraemer*, a 1948 case in which the Court struck down a state court decision to enforce contracts that included "a private, racially restrictive covenant."

"The rule of *Shelley*," Bork wrote, "would require the Court to deny the freedom of any individual to discriminate in the conduct of any part of his affairs." The "rule" would apply as well to "any situation in which the person claiming freedom in any relationship had a racial motivation." The rhetoric of sheer racist, alarmist demagoguery is not unfamiliar from white segregationist politicians in the South of the early '60s, most of whom came around far sooner and more generously than Bork to the acknowledgment that permitting blacks to exercise certain constitutional rights would not immediately and "logically" infringe upon the "freedom" of whites to discriminate "in *any* relationship." Bork has written several times that he would uphold *Brown* v. *Board of Education*—though not on the grounds on which the Warren Court decided it, and not with any of the remedies that the Court and Congress itself have used to implement the decision.

But if the "rule of *Shelley*," which after all upholds only the right of a willing black buyer to purchase a house from a willing white seller, seems to Bork so drastically to threaten the "freedom" of the individual to discriminate "in any part of his affairs," it is hardly credible that he would have concurred in *Brown*, which required the desegregation of the nation's entire school system. (Lord knows how he would, at the time, have formulated "the rule of *Brown*.") And it is of course how a judge or a justice decides a case *at the time* it comes before him, and not some belated and grudging acknowledgment that the law, to which the vast majority has long been reconciled, is workable and should therefore be upheld, that defines the exercise of his constitutional duty "to say what the law is."

DUE PROCESS. The Court has often used the constitutional guarantee that citizens shall not be deprived of liberty without due process of law to reach the results, particularly in the privacy cases, that Bork most consistently and vituperatively deplores. Thus, Justice John Paul Stevens, in an address on "liberty" before the Eighth Circuit Judicial Conference in July, used the arguments of due process to explain the Court's decisions in several important lines of cases, including specifically *Roe* v. *Wade* and *Griswold* v. *Connecticut* (a 1965 decision that struck down a statute that banned even married couples from using contraceptives), which Bork has always gone out of his way, as recently as his 1984 opinion in *Dronenberg* v. *Zech*, to deride.

A primary target of Bork's attack on Supreme Court precedent, and the decision to which he returns most obsessively, is *Griswold*. He has repeatedly compared the "right" of married couples, in *Griswold*, to use contraceptives to the "right" of a utility company to generate "smoke pollution." "The majority finds the use of contraceptives immoral. Knowledge that it takes place and that the State makes no effort to inhibit it causes the majority anguish, impairs their gratifications. . . . The smoke pollution regulation impairs . . . the company's stockholders' economic gratifications. . . . Why is sexual gratification more worthy than moral gratification? Why is sexual gratification nobler than economic gratification?" and so on. "The cases," he has written, more than once, "are identical."

Speech. It is on the issue of speech, oddly enough, that Bork's positions, and his possible appointment to the Court, pose the most radical threat to the whole constitutional system, and would set in motion the most immediate and far-reaching transformation of the society. Bork has never deviated in any significant respect from what he regards as his insight that the only speech protected by the Constitution is "explicitly and predominantly political speech." For years he excluded from protection all art, all science, philosophy, education, and literature. He has more recently relented, to include, in protected "political speech," "science" and "normative discussion." Art, literature, and the rest may still, without constitutional protection, be censored, banned, subject to criminal prosecution. But that is not the point. Bork specifically removes from his own category of constitutionally protected "political speech" "*any speech advocating the violation of law*" (emphasis added).

In this he consciously repudiates, as "deficient in logic and analysis as well as in history," the "clear and present danger" standard enunciated more than 60 years ago by Holmes and Brandeis and developed in the intervening decades by the Court. But what he misses entirely, in seeming so innocuously to exclude from protection "any speech advocating the violation of law," is the crucial question of who is to define "advocacy," or "violation," or even "speech." It is clear that if the judiciary, in the form of Justice Bork, refuses to make that determination, then someone else (the police, the neighbors, the prosecutor, at best the state legislatures or the federal executive or legislative branches) will. The Framers' very purpose in protecting speech so nearly absolutely ("Congress shall make no law . . . abridging the freedom of speech") rested on their enlightened perception that "tyranny" resorts immediately to repression by declaring criminal the articulation of unpopular ideas in speech.

Since any utterance other than a bland affirmation of the status quo can be construed as political "advocacy" of the unprotected kind, the result can be an intimidated, essentially totalitarian silence, in which the majority is not merely prevented by the absence of speech from deciding what laws it really wants, but is finally prevented even from knowing whether it still constitutes a majority. These are not abstract dangers. Bork's formulation, excluding from constitutional protection "any speech advocating the violation of law," ignores the possibility that there can be, indeed the certainty that there have been, in this century and even in this country, bad, as it turned out unlawful, laws. It was "advocacy" of the "violation" of bad, as it turned out constitutionally unlawful, state "law"—advocacy in the form of boycotts, sit-ins, marches, sermons, peaceful demonstrations—that brought the unlawfulness of those bad laws to the attention of the federal courts, and that obliged first the courageous, honorable, mostly Republican judges on the Fifth Circuit, and then the justices on the

Supreme Court, to "say what the law is," and thereby participate in one of the great periods of constitutional adjudication. If Bork's narrow conception of "explicitly political" speech had been the view of those "advocates" and those judges and that Court, it would have made impossible the whole peaceful and lawful transformation of the South.

As late as 1971, however, Bork could still write of the Framers that "they indicated a value when they said that speech in some sense was special." But they didn't "indicate a value," nor did they say that "speech in some sense was special." They said "Congress shall make no law." It was only because the plain language of the Constitution made it impossible for Bork to reach his preferred result, a formulation so narrow and repressive that it drained even the words "political" and "speech" of meaning, that he abandoned all pretense of "strict construction" or "judicial restraint" and went on to make laws of his own. In fact, there is a sense in which all issues of law, privacy, equal protection, race, due process, and speech are combined for Bork in a single set of ideological commitments, generally antagonistic to individual liberty, which he commonly expresses in terms of "morals," "public morals," "public morality."

IN TWO RECENT speeches on law and religion, for example, he ascribed dismissively to John Stuart Mill a notion that "an individual's liberty may not be infringed unless he causes harm to others," and that "material injury" counts as harm but "moral or aesthetic injury does not." "Thus," Bork wrote, as if warning of a particularly ugly and self-evidently untenable proposition, "morality becomes a matter for the individual, not for democratic regulation." Not pausing even to dismiss such a notion, he proceeded toward the "result" he had in mind: "relaxation of currently rigid secularist doctrine" and a few "sensible things to be done," namely the "reintroduction of some religion into public schools" and "some greater religious symbolism in our public life." So much for Supreme Court precedent in school prayer cases and in many matters of church and state.

The ease and frequency with which Bork uses the words "moral," "morality," "public morality"—let alone whatever is meant by "moral or aesthetic injury"—might disturb any judge, senator, or other citizen who is not altogether certain what these words, applied without definition or qualification of any kind to completely private and not violent or criminal conduct, can possibly mean. Bork has used the words most freely to apply to matters of sex, where he would impose "public morality" as "majoritarian" and "conclusively valid for that very reason", and to race, where (in an article published in THE NEW REPUBLIC in August 1963, and developed in many subsequent articles and decisions) he scathingly deplores precisely the "morality of enforcing" majoritarian "morals," and the resulting "loss in a vital area of personal liberty," indeed the "principle of unsurpassed ugliness" embodied in "self-righteously imposing" the degree of "morality" required by the Interstate Public Accommodations Act, which became Title II of the Civil Rights Act of 1964. In other words, where "morality" seems to him to have to do with sex, he wants to impose it; where it has to do with race, he can think of nothing uglier than imposing "morality."

II.

I HAVE BEEN a registered Republican all my voting life. I had set out, unalarmed, to review Robert Bork's writings, along with William H. Rehnquist's book, *The Supreme Court: How It Was, How It Is* (Morrow, 338 pp., $18.95). The book seems at first equable and innocuous, a chatty little memoir of Rehnquist's clerkship in 1952 for Justice Robert H. Jackson, and perhaps a modest civics lesson, which Rehnquist himself describes as a "history of the Court from the time of John Marshall to the middle of the 20th century," and an attempt to "give some idea of how the Court has responded to important developments in the history of our country." The tone is personable, informal—with nothing, for instance, of the aggressive, sarcastic, intellectually shallow, biased, and even dishonest quality that has been characteristic of many of Justice Rehnquist's opinions, particularly in dissent. In a Reagan Court, Rehnquist would be less frequently, if at all, in dissent; and the degree of compromise required to enlist four other justices in a majority for his decisions might seem congenial to the non-confrontational, non-ideological fellow who wrote this apparently not very substantial book. Then the substance emerges with great clarity. The most remarkable thing about this first book about the Supreme Court by a sitting chief justice has to do entirely, almost breathtakingly, with what it eradicates and omits.

Rehnquist, avowedly, omits all cases after 1953, "because I wanted to avoid any discussion of the cases and doctrines in which any of my present colleagues have played a part"; he does in fact mention a 1983 case, a 1974 case, and a 1954 case, *Brown* v. *Board of Education*—which, it may be recalled, Rehnquist, clerking for Justice Jackson, wrote a controversial memo to oppose. The least important category of omission has to do with this interesting aspect of his clerkship. Rehnquist's 1952 memo in *Brown*, which was entitled "Memo: A Random Thought on the Segregation Cases," included these words:

> But as I read the history of this Court, it has seldom been out of hot water when attempting to interpret these individual rights. . . . [*Brown*] quite clearly is not one of those extreme cases which commands intervention from one of any conviction. . . .
> To the argument made by Thurgood not John Marshall that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long run *it is the majority who will determine what the constitutional rights of the minority are* [emphasis added].

And

> One hundred and fifty years of attempts on the part of this Court *to protect minority rights of any kind*—whether those of business, slaveholders, or Jehovah's Witnesses—have all met the same fate. One by one the cases . . . have been sloughed off and crept silently to rest. . . . I realize that it is an unpopular and unhumanitarian position for which I have been excoriated by "liberal" colleagues, but I think *Plessy* v. *Ferguson* was right and should be reaffirmed [emphasis added].

At his confirmation hearings Rehnquist claimed that the memo, in which the word "I" appears five times, was a draft not of his own views, but of Justice Jackson's, in preparation for a "conference of the justices." This account has been disputed, in 1971 and 1986, as "a smear" by Elsie Douglas, Jackson's secretary, who added, "Justice Jackson did not ask law clerks to express his views." It has also been disputed by Jackson's biographer, Dennis J. Hutchinson, whom John A. Jenkins quoted in the *New York Times* of March 3, 1985, as having examined "every box, every detail" and having found no instance of Justice Jackson's ever having asked a law clerk to prepare a memo summarizing the justice's own views. And Jackson of course was part of a unanimous Court in *Brown*.

The memo was drafted, moreover, in evident ignorance of the fact that Justice Jackson himself had written major decisions "to protect minority rights" in many cases—one of the most eloquent and important of which was *Board of Education* v. *Barnette*, a 1943 decision upholding the rights precisely of Jehovah's Witnesses. And since Justice Jackson had also written, in perhaps his second most famous opinion, one of the major statements on behalf of "minority rights" in the history of the Court (his dissent in 1944 in *Korematsu* v. *U.S.*, the Japanese-American internment case), he would certainly have had no conceivable occasion, at a "conference of the justices" or elsewhere, to describe himself as having been "excoriated by 'liberal' colleagues." It does, in fact, seem inescapable from the very title of the memo, and from its form, style, and manifest content, that the "I" in this memo can be no one other than the clerk whose initials appear at the end of it, Rehnquist himself.

Hutchinson has more recently discovered two other memos drafted by Rehnquist as a clerk. Both opposed what turned out to be the majority opinion in *Terry* v. *Adams* (1953). "It is about time the Court faced the fact," Rehnquist wrote, "that the white people in the South don't like the colored people. . . . Liberals should be the first to realize . . . that it does not do to push blindly through towards one constitutional goal without paying attention to other *equally desirable values* that are being *trampled* on in the process" (emphasis added). The "one constitutional goal" upheld in *Terry* v. *Adams* (in which Jackson, joining seven other justices, concurred as he had in *Brown*) was the right of blacks in Texas to vote in a pre-primary that was in effect the local election, and the "equally desirable value" being "trampled on" was the "right" of whites to exclude blacks from the vote.

IT MIGHT BE understandable that Rehnquist does not want to revive interest in these memos, or for that matter in any substantive issue he might have addressed in his year and a half as clerk. What gives a small clue that there is an element of at least cosmetic "defactualization" in this personal reminiscence is the fact that the author refers three times to Justice Jackson's secretary Elsie Douglas, in breezy, comradely, clerkish terms. A reader would have no indication either that the memos exist, or that there had once been an important case called *Terry v Adams*, or even that this Elsie Douglas has troubled twice to make public distinctly uncomradely statements to the effect that the author is a liar by whom her boss Justice Jackson has been "smeared." This could all be evidence of a good-natured, friendly, bygones-be-bygones approach to controversies of the past.

But the second, astounding omission from this "history of the Court from the time of John Marshall to the middle of the 20th century," and from this account of "how the Court has responded to important developments in the history of our country," has ideological implications almost as strong as the most extreme positions declared by Bork. Rehnquist has left out, in addition to all the decisions of the Warren Court, in silence and as it were in passing, virtually all the major lines of cases (having to do with privacy; speech, whether political advocacy or other expression; voting rights; racial equality; prior restraint; right to counsel; illegal search and seizure; freedom of religion; and personal liberty) in which the Court has upheld an individual or minority right against the state, dating back through the '30s and '40s, under Charles Evans Hughes and Harlan Stone (both of whom Rehnquist professes to admire), and before.

Nothing here of Bork's despised 1948 *Shelley v Kraemer*. Nothing of Holmes's and Brandeis's "clear and present danger" cases of the 1920s. Nothing either of the Scottsboro Boys case in 1932, or even of the case in 1914 in which the Court first upheld the exclusionary rule. Nothing of the free speech victories of the Hughes Court, or of Hughes's eloquent decision in 1931 in *Near v. Minnesota* on behalf of freedom of the press. Nothing particularly of a proposition advanced by Stone, speaking for a unanimous, far from "liberal" Court in 1938, in *U.S. v. Carolene Products*. That statement, anathema to Bork and Rehnquist, has been crucial to the evolving doctrine of the Court with respect to the constitutional rights of individuals against the "presumption of constitutionality" Rehnquist and Bork most unhesitatingly accord "majoritarian" statutes that infringe upon and repress the "liberty" of citizens—which it was, after all, the declared purpose of the Constitution, even in its Preamble, to secure.

ALL THESE omissions, in which the response of the Court to "important developments in the history of our country" has been eradicated, might reflect nothing more alarming than an immense oversight, based on Rehnquist's apparently lifelong predisposition in favor of assertions of governmental power over individual and minority rights. With the single exception of the 1952 Steel Seizure case, in which the Court upheld a lower court decision enjoining President Truman from exercising an emergency authority to run the steel companies at the time of the Korean War (a decision Rehnquist explains, perhaps tellingly, as the result of public relations pressures on the Court), Rehnquist approves, indeed even mentions, only those 20th-century decisions that uphold the exercise of governmental power.

The result is that the book, far from being a bland civics lesson, turns out to be a work of disinformation. The effect of erasing all that history, namely, the history of the great decisions of the Hughes Court and the Stone Court in the 1930s and the 1940s, and the major opinions of Holmes, Brandeis, even Jackson, is not only to make the Warren Court and the Burger Court of the 1960s and '70s seem an aberration. It is to leave a blank, a silence as total as that which eliminates from the "histories" of the Soviet Union all persons and events uncongenial to official Soviet "history," and from German and Japanese textbooks all unwelcome references to even the most recent and major events in the history of those countries. And by eradicating from "history" an immense body of constitutional adjudication dating back at least six decades, the book attempts to establish for any act or agenda of a Reagan Court a legitimacy, a continuity with precedent, that can be based only on a "defactualizing" silence of this sweeping kind.

THIS RAISES still a third remarkable thing about the Rehnquist book. The work would have no interest, and no chance of publication, except for the position of its author, and the phenomenon of the first book about the Supreme Court by a sitting chief justice turns out to have ramifications of its own. Normally the people come to the Court for its decisions, not the other way around. What is "public" about the Court is precisely and only those decisions, not some public relations "image," least of all any electioneering of the sort that is proper to candidates for political office but not to members of the judicial, tenured branch. For the first time, with this book, as with the Bork campaign, judges, far from exercising "judicial restraint" or "deference" to the other branches, are reaching out, through speeches, books, manipulation of the press and television, to develop a political base of power and *a constituency for themselves*. If they succeed in that, they will become at once, with their life tenure and their last word in constitutional matters, not the least but the most dangerous branch.

In this context, a striking thing about Bork's writings is the political content of the speeches he has been making in recent years throughout the country. He has alluded in scornful, populist terms to the "gentrification" of the "judicial culture"—as though the Framers themselves had not been gentry, as though the values he imputes to that "culture" were not precisely the ones the Framers entrusted to the judiciary, and as though the only non-ideological credential he has for the nomination were not that degree of "gentrification" embodied in having taught at Yale. Another striking thing is the fact that the lines of pre-Warren Court cases Rehnquist omits are precisely the ones Bork has described most scornfully and that he would vote to overrule. A third is the degree to which these writings are incompatible with any "image" the public relations campaign for Bork's confirmation has been trying to promote. And the last is the intense "polarization," the attempt to raise again ugly and divisive issues on which the vast majority of citizens has long been reconciled, that this nomination, in defactualized, "centrist" disguise, brings to the nation's highest Court.

There exist, for example, only two occasions on which Bork has written anything even arguably in support of a First Amendment right: a concurrence in a minor libel case in which the plaintiff was a Marxist, the press defendants were Evans and Novak, and Bork's remarks were widely understood to be part of his lobbying effort, through his judicial opinions, for a position on the Court. (Usually these missives were addressed to Attorney General Edwin Meese, in this single instance, Bork addressed instead a vital instrument of that campaign, the press.) The second case was an opinion in which, in direct opposition to the will of Congress, as expressed in legislation vetoed by the president, Bork opposed the fairness doctrine. (In 1969, in *Red Lion v. FCC*, the Supreme Court upheld the fairness doctrine; and Justice White, speaking for a unanimous Court, wrote that the FCC's elaborations of the fairness doctrine "enhance rather than abridge freedoms of speech and press.") There also exists a single decision in which Bork appeared to uphold a plaintiff in an environmental claim. On July 28, 1987, outnumbered 11-to-1 on an environmental issue, Bork switched his vote and wrote a unanimous decision *en banc* for the D.C. appellate court. The case was described, in the *Times*, as an example of his "collegiality," his "open-mindedness," his "[illegible]ingness to change his mind," and, [illegible] things, his "ability to build a consensus."

When "defactualization" has reached these proportions, and when the press, and even some members of the political, legal, and academic establishments, acquiesce or even actively promote it, there exists the mentality, and a real danger, of judicial "coups d'etat." The Senate is being asked to confirm and perpetuate for years an ideology that has been decisively rejected, most recently in the 1986 elections, but really since the founding of the Republic. Rehnquist only omits mention of a vast body of constitutional law. Bork goes much further. His tone is far less amiable. And his published work, in contrast to his "image," makes unmistakable his intention to overrule whatever outcomes do not suit him. The choice is inescapably between the nominee and the Constitution. *The Supreme Court: How It Was, How It Is* leaves off in 1954. "The Supreme Court: How It Is, How It's Going to Be," if the nomination is confirmed, will resume around 1922, and the country will be unrecognizable for it. □

REPORT ON THE
CIVIL LIBERTIES RECORD
OF JUDGE ROBERT H. BORK

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Revised 9/9/87

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Pursuant to ACLU policy, established by the Board of Directors of the American Civil Liberties Union, this report examines the record of Robert H. Bork, Judge on the U.S. Court of Appeals for the District of Columbia Circuit, who has been nominated for the position of Associate Justice of the United States Supreme Court. The memorandum reviews Judge Bork's authored opinions while on the bench[1], his unpublished speeches (many given in the past five years), as well as his academic writings, congressional testimony, popular articles, speeches, and interviews.[2] Where Judge Bork has disclaimed a position previously taken, that is noted; otherwise, it is assumed that Judge Bork still adheres to these published views.

I. INTRODUCTION

Robert Bork's extreme judicial philosophy is reflected in a series of speeches, articles, testimony and court decisions. If his philosophy prevails, it would radically reduce the role of the Supreme Court and seriously diminish the force of the Bill of

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[1] The memorandum focuses on opinions which Judge Bork wrote (whether for the majority, concurring or in dissent), in order to distill Judge Bork's judicial philosophy from his own words. The memorandum does not address opinions which Judge Bork silently joined.

[2] Judge Bork provided texts of his unpublished speeches to the Senate Judiciary Committee. Copies are available from the ACLU Washington Office, 122 Maryland Ave., N.E. (202-544-1681) as are copies of all of Judge Bork's published articles and other writings. A complete list of this material is available from the ACLU.

Rights and the liberties it protects.

Judge Bork's view of the Constitution is that it creates a governmental structure designed, with few exceptions, to promote the majority will at the expense of individual rights.[3] This view is summarized by a quote from Chesterton, which he repeatedly cites:

> What is the good of telling a community that it has every liberty except the liberty to make laws? The liberty to make law is what constitutes a free people.[4]

In Judge Bork's opinion, the Constitution must be interpreted almost exclusively in light of its majoritarian purpose. This means that the only individual rights protected against the majority are those explicitly and unmistakably mentioned in the Constitution and the Bill of Rights. As a result, Judge Bork assigns a sharply limited role to the Supreme Court. Any doubt as to the constitutionality of a statute should be resolved by permitting the legislature to have its way. The Court may strike down a statute only if there is no doubt that a provision of the Constitution is clearly violated. Moreover, legal concepts, such as standing and justiciability, should be defined to reduce substantially the number of cases that the Court may accept for review.

Judge Bork sees the primary role of the Constitution as insuring that the majority is able to impose its moral judgments on the rest of society. His conception of the Court's role is radically different from most, if not all, of the Justices who have sat on the Court in the past forty years. In fact, Judge Bork has specifically rejected a long list of landmark constitutional rulings by the Supreme Court.[5] These rulings, which he has described as "pernicious,"[6] "unprincipled,"[7] and "utterly specious,"[8] include the following:

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[3] See generally Bork, Neutral Principles and Some First Amendment Problems, 147 Indiana L.J. 1 (1971) [hereinafter "Neutral Principles"].

[4] Bork, Morality and the Judge, Harper's 28, 29 (May 1985).

-- a decision striking down a statute making it a crime for married couples to use contraceptives;[9]

-- a decision barring judicial enforcement of racially restrictive covenants;[10]

-- a decision protecting illegitimate children against arbitrary discrimination;[11]

--a decision protecting the right to use obscene language for political purposes;[12]

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[5] See notes 10-22, infra.

[6] The Human Life Bill: Hearing on S.158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 308, 310 (1982) (statement of Professor Bork).

[7] Bork, Neutral Principles, supra, at 9.

[8] Id.

[9] Griswold v. Connecticut, 381 U.S. 479 (1965); see Bork, Neutral Principles, supra, at 11.

[10] Shelley v. Kraemer, 334 U.S. 1 (1948); see Bork, Neutral Principles, supra, at 15.

[11] Levy v. Louisiana, 391 U.S. 68 (1968); see Bork, Neutral Principles, supra, at 12.

[12] Cohen v. California, 403 U.S. 15 (1971); see Bork, "The Individual, the State and the First Amendment," Unpublished Speech, Univ. of Michigan (1979) (reported as 1977 or 1978).

-- decisions giving First Amendment protection to speech advocating violence for political reasons as long as there is no clear and present danger;[13]

-- decisions striking down state abortion laws;[14]

-- a decision holding unconstitutional a law requiring the sterilization of habitual criminals;[15]

-- decisions striking down state poll taxes and literacy tests;[16]

-- decisions upholding affirmative action plans in various circumstances;[17] and,

-- decisions striking down state laws permitting prayer in the schools or permitting use of government funds for public employees to teach in parochial schools.[18]

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[13] *E.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *see* Bork, *Neutral Principles*, *supra*, at 23.

[14] *E.g.*, *Roe v. Wade*, 410 U.S. 113 (1973); *see* *The Human Life Bill: Hearing on S.158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, *supra*, at 310.

[15] *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *see* Bork, *Neutral Principles*, *supra*, at 12.

[16] *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *see* *Nominations of Joseph T. Sneed to be Deputy Attorney General and Robert H. Bork to be Solicitor General: Hearings before the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. at 5, 16-17 (1973) (statement of R. Bork).

[17] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *see* Bork, *The Unpersuasive Bakke Decision*, The Wall Street Journal, at 8, col. 4 (July 21, 1978).

[18] *Aguilar v. Felton*, 473 U.S. 402 (1985); *Engel v. Vitale*, 370 U.S. 421 (1962); *see* Bork, Unpublished Speech, Brookings Institute, Washington, D.C. (Sept. 12, 1985), at 3.

Indeed, Judge Bork questions whether the Framers intended the Court to assume the power to review the constitutionality of statutes.[19] He is sure, however, that the power of judicial review should generally be exercised to facilitate the ability of the majority to impose its moral views on the minority.[20]

As Judge Bork interprets the Constitution, few rights are shielded from the majority's judgments. If confirmed, and if his views prevail, civil liberties in this country would be radically altered and the structure of government radically changed. The majority in each state could impose its moral values on the private lives and decisions of all citizens. Individual liberty would have a radically different meaning in each state.

II. JUDICIAL APPOINTMENTS: THE ROLE OF IDEOLOGY

Throughout most of our history, the Senate has engaged in a "practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him."[21] Indeed, the Framers rejected giving the Senate only a limited veto over the President's nomination, voting down a proposal that the President appoint unless "disagreed to by the Senate."[22] Both the text of the Constitution, as well as the history of the

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[19] See Bork, Judicial Review and Democracy, Society 5 (Nov.-Dec. 1986); Bork, Styles in Constitutional Theory, 26 S. Texas L.J. 383 (1985).

[20] Bork, Morality and the Judge, supra, at 28.

[21] Rehnquist, The Making of a Supreme Court Justice, 29 Harv. L. Rec. 7 (Oct. 8, 1959).

[22] 4 The Founders' Constitution 32-33 (Kurland & Lerner, eds. 1987).

Appointments Clause, demonstrate that the Senate has and should exercise a shared role with the President in the confirmation process.

A. *History of the Appointments Clause*

The Appointments Clause expressly provides for consensus by the two elected branches of government in the confirmation process. Article II, section two of the Constitution states that "the President ... shall nominate, and by and with the [a]dvice and [c]onsent of the Senate shall appoint ... Judges of the Supreme Court...."

The history of the clause clearly indicates that its language was a compromise between those who wanted appointment by the president alone and those who favored appointment by the Congress or Senate without a presidential role. The original Virginia Plan, introduced at the convention on May 29, 1787, provided that all judges would be appointed by the national legislature.[23] By June 13, the convention had decided that appointment by the whole legislature was unwieldy, and had therefore adopted Madison's proposal that the appointment power be lodged in the Senate alone.[24]

Two attempts to switch the appointment power to the president were defeated. On July 18, 1787, the convention voted down a proposal that the president appoint without congressional approval, and on July 21, the convention rejected a motion that the President appoint unless "disagreed to by the Senate."[25] Only near the end of the convention, on September 7, did the Framers agree to give the president any role in the selection of judges. The president's power to nominate, however, was carefully balanced by the requirement that the Senate advise and consent on every appointment.[26]

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[23] *Id*. at 30; *see generally* Black, *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 Yale L.J. 657, 660-62 (1970).

[24] 4 *The Founders' Constitution*, *supra*, at 31.

Eight years later, in 1795, the Senate rejected Washington's nomination of South Carolina's John Rutledge to the Supreme Court. John Rutledge had been one of George Washington's original appointments to the Court, as well as one of the principal authors of the first draft of the Constitution, He had resigned from the Court to become Chief Justice of South Carolina. The Senate rejected his second nomination in 1795 by a vote of 14 to 10 because Rutledge had attacked the recently ratified Jay Treaty and was regarded as a weak Federalist.[27] For those who find the "original intent" of the Framers persuasive, it is significant that three of the rejecting Senators had signed the Constitution.[28]

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[25] Id. at 32-33.

[26] Id. at 36. This formulation — nomination by the President, and appointment with the advice and consent of the Senate — was apparently patterned after the "experience of 140 years in Massachusetts." Id. at 32.

[27] Tribe, God Save This Honorable Court, 79-80 (1985).

[28] Schwartz, The Senate's Right to Reject Nominees, The New York Times, at A27, col. 2 (July 3, 1987).

B. How The Senate Has Exercised Its Role

Over 200 years, the Senate has rejected almost 20 per cent of the president's Supreme Court nominees.[29] Beginning with John Rutledge in 1795, the Senate has considered and rejected nominees because of their views on a range of issues, including federal supremacy, civil service, slavery, immigrants, unions, business, and civil rights. Sometimes the Senate has rejected a candidate outright; other times, the Senate has declined to take action or a candidate has withdrawn.[30]

In this century, the Senate rejected President Hoover's 1930 nomination of Chief Justice John Parker of North Carolina, by a vote of 41-39, largely due to Parker's racist campaign speeches and anti-union attitudes. The Senate also rejected President Nixon's nomination of Clement Haynsworth and Harold Carswell. Carswell's rejection was based in part on 1948 campaign speeches supporting white supremacy.

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[29] *Id.* Until 1900, the Senate rejected more than one out of four presidential nominees; since 1900, only one out of every 13 nominees has been rejected.

[30] The rejected nominees include: John Crittenden, John Quincy Adams' nominee, whose nomination in 1829 was never voted on because of his strong Whig leanings; George Woodward, who was rejected in 1845 by a vote of 29-20 due to his anti-immigrant views; Secretary of State Jeremiah Black, James Buchanan's nominee, whose opposition to the abolition of slavery led to his 26-25 rejection; and Caleb Cushing, Ulysses S. Grant's nominee, who withdrew after discovery of his war-time correspondence with Confederate President Jefferson Davis. Tribe, God Save This Honorable Court, *supra*, at 86-89. The Senate was particularly strong for approximately two decades after 1837, and ten of the 18 nominations made by the presidents serving between Jackson and Lincoln failed to win Senate confirmation. For example, in 1844, when Justice Baldwin died, two presidents sent a total of five nominations to the Senate before his seat was finally filled, two and one-half years later. *Id.* at 58-59.

C. The Senate's Appropriate Role

As Professor Charles Black has written:

> The Supreme Court is a body of great power. Once on the Court, a Justice wields that power without democratic check. This is as it should be. But is it not wise, before that power is put in his hands for life, that a nominee be screened by the democracy in the fullest manner possible, rather than in the narrowest manner possible, under the Constitution?[31]

Those who believe it improper for Senators to reject nominees for ideological reasons would seldom restrict the President in the same fashion. Yet there is nothing in the text of the Appointments Clause or in its application during the past 200 years to suggest that the Senate should be more limited or less diligent than the president in the range of factors it may or should consider. "He who advises gives or withholds his advice on the basis of all the relevant considerations bearing on [the] decision."[32]

While the President has broad discretion in most Executive appointments,[33] the Senate's role in appointing Justices to the Supreme Court may more aptly be compared to its co-equal partnership in making treaties, or to the President's role in vetoing legislation. In each case, the structure and text of the Constitution make plain that the governmental function is so important as to demand the concurrence of two branches.

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[31] Black, A Note on Senatorial Consideration of Supreme Court Nominees, supra, at 660.

[32] Id. at 659 (emphasis added).

[33] Historically, the Senate has adopted a more deferential role in reviewing the President's Executive appointments; it has rejected a higher percentage of Supreme Court nominations than for any other national office. Tribe, God Save This Honorable Court, supra, at 78.

Thus, constitutionally, the Senate has a shared role in the appointments process that obliges it to consider a broad range of factors, including a nominee's judicial philosophy.

III. CIVIL LIBERTIES RECORD

Judge Bork has been on the bench since 1982. During that time, he has written opinions involving key civil liberties issues: free speech, government secrecy, sexual discrimination, gay rights. He has not written opinions in many other areas such as church-state relations, race discrimination and its remedies, voting rights or reproductive freedom. However, his extra-judicial writings and speeches, including a series of unpublished speeches delivered mostly in the past five years, provide a clear expression of his views on these and other subjects.

A. Equal Protection and Voting Rights

Judge Bork's narrow view of the Equal Protection Clause is that it prohibits limited forms of discrimination against racial, ethnic or religious minorities, and very little else.[34] According to Judge Bork, "[t]he equal protection clause ... can require formal procedural equality, and, because of its historical origins, it does require that government not discriminate along racial lines. But much more than that cannot properly be read into the clause."[35]

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[34] Bork, Neutral Principles, supra, at 11. Judge Bork has not authored any equal protection cases while on the bench. He has, however, acknowledged in dictum that discrimination based on race, religion or ethnicity is constitutionally prohibited. See Dronenburg v. Zech, 741 F.2d 1388, 1397 (D.C. Cir. 1984).

He does not believe that the Fourteenth Amendment bars judicial enforcement of racially restrictive covenants.[36] He does not believe that it limits state constitutions from precluding fair housing enforcement.[37] He does not believe that it was intended to provide heightened protection for illegitimate children.[38] He does not believe it entitles Congress to remedy de facto discrimination, even against racial minorities.[39]

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[35] Bork, Neutral Principles, supra, at 11. Judge Bork's approach to the constitutional provisions regarding private property — the Contract and Takings Clauses — is significantly different. While admitting that the "intention underlying" these clauses "has been a matter of dispute," he suggests that the clauses "have not been given their proper force" and can be utilized to limit state regulation of private property. Bork, The Constitution, Original Intent, and Economic Rights, 23 San Diego L. Rev. 823, 829 (1986). This expansionist view is reflected in his judicial decisions. E.g., Jersey Central Power and Light Co. v. Federal Energy Regulatory Comm., 768 F.2d 1500, 1506, vacated and remanded, 810 F.2d 1168 (D.C. Cir. 1987) (en banc) (striking down utility rate regulation); Silverman v. Barry, 727 F.2d 1121 (D.C. Cir. 1984) (striking down local zoning ordinance).

[36] Bork, Neutral Principles, supra, at 11. The Supreme Court ruled otherwise in Shelley v. Kraemer, 334 U.S. 1 (1948).

[37] Bork, Neutral Principles, supra, at 11. The Supreme Court ruled otherwise in Reitman v. Mulkey, 387 U.S. 369 (1967).

[38] Bork, Neutral Principles, supra, at 12. The Supreme Court has ruled otherwise. See Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968).

[39] Equal Educational Opportunities Act of 1972: Hearings on S.3395. Before the Subcomm. on Education of the Senate Comm. on Labor and Public Welfare, 92nd Cong., 2d Sess. 1343 (1972). The Supreme Court ruled otherwise in City of Rome v. United States, 446 U.S. 156 (1980).

The Supreme Court's longstanding view of the Fourteenth Amendment is far more expansive. Thus, the Court has repeatedly struck down discriminatory laws supported by nothing more than "a bare ... desire to harm a politically unpopular group...."[40] It has recognized the propriety of carefully crafted affirmative action plans.[41] And it has rejected the contention that the Equal Protection Clause can or should be limited to race.[42] These Supreme Court holdings are not, as Judge Bork would have it, far-out interpretations of the Court without basis in law. They are the result of the Court's attempt over decades to fulfill its role as the interpreter of broadly stated constitutional provisions. Judge Bork would eviscerate that role, and leave individual liberty primarily in the hands of majorities in state and local legislatures.

Moreover, Judge Bork sees little risk in reducing the Court's role in promoting equality:

> The premise that the poor or the black are underrepresented politically is quite dubious. In the past two decades we have witnessed an explosion of welfare legislation, massive income redistributions, and civil rights laws of all kinds. The poor and the minorities have had access to the political process and have done well through it.[43]

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[40] U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 534 (1973); Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

[41] E.g., Johnson v. Transportation Agency, Santa Clara County, 55 U.S.L.W. 4379 (1987).

[42] E.g., Frontiero v. Richardson, 411 U.S. 677 (1973) (sex discrimination). See also notes 38 and 40, supra.

[footnote cont'd]

Judge Bork also minimizes the role of Congress in promoting equality, preferring instead to defer to local majorities, which historically have been the major source of racially discriminatory laws and customs. Thus, in 1972, Judge Bork testified that federal legislation dealing with remedies for *de facto* segregation, "would raise ... grave issues of constitutional policy...."[44] He stated:

> Th[e] difficulty with any interpretation that applies the strictures of the Fourteenth Amendment to *de facto* cases has led to attempts to say that Congress' power under the amendment is broader than that of the courts. Thus, it is suggested, the Court may not reach *de facto* situations but the Congress may. That solution leaves the legislative power where it belongs, in the Congress.... The solution seems improper, however, for it leaves the legislative power where it belongs only as between Congress and the Court, and shifts it impermissibly to Congress from the state legislatures. There is no warrant in the language or history of Section 5 to suppose that it is a national police power superior to that of the states. The power to "enforce" the Fourteenth Amendment is the power to provide and regulate remedies, not the power to define the scope of the amendment's command or to expand its reach indefinitely.[45]

This view, which Judge Bork has not repudiated in any material available publicly, would resurrect the discredited doctrine of states' rights with respect to racial discrimination.

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[43] Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 3 Wash. U.L.Q. 695, 701 (1979).

[44] *Equal Educational Opportunities Act of 1972: Hearings on S. 3395 Before the Subcomm. on Education of the Senate Comm. on Labor and Public Welfare*, *supra*, at 1343.

[45] *Id.*

Judge Bork also rejects Supreme Court doctrine that relies on the Fourteenth Amendment to ensure equality of the franchise, criticizing the one-person, one-vote cases as lacking any "constitutional ... excuse.[46] According to Judge Bork:

> The principle ... runs counter to the text of the Fourteenth Amendment, the history surrounding its adoption and ratification and the political practice of Americans from colonial times up to the day the Court invented the new formula [of one-person, one-vote].[47]

Based on his extremely restrictive view of the scope of the Fourteenth Amendment and the role of the Supreme Court in enforcing it, Judge Bork also disagrees with the Supreme Court's decision in Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966), invalidating Virginia's use of a poll tax in state elections.[48] He disagrees with the Supreme Court's decision in Katzenbach v. Morgan, 384 U.S. 641 (1966), upholding a congressional ban on English literacy tests for voters who had completed the sixth grade in a Puerto Rican school.[49] In short, Judge Bork repudiates key Supreme Court precedent in the voting rights area under the Fourteenth Amendment.

Consistent with his narrow views on the Fourteenth Amendment, Judge Bork has also been a critic of the Supreme Court's affirmative action decisions, describing Justice Powell's Bakke opinion[50] in the following terms: "As politics, the solution may seem statesmanlike, but as constitutional argument, it leaves you hungry an hour later."[51]

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[46] Bork, The Supreme Court Needs a New Philosophy, Fortune 138, 163 (Dec. 1968).

[47] Bork, Neutral Principles, supra, at 18. Judge Bork suggests that the Guarantee Clause of the Constitution requires "rational" reapportionment to protect majority rule, but does not "easily translate[ ] into the one person, one vote requirement ...." Id. at 19.

[48] Nominations of Joseph T. Sneed to be Deputy Attorney General and Robert H. Bork to be Solicitor General: Hearings before the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 5, 17 (1973) (statement of R. Bork).

[49] Id. at 16.

Judge Bork has even suggested that employment and education issues are too subjective for judicial review.

> Certain forms of discrimination present the problem of criteria that are real but cannot easily be established by evidence. It is easy enough to establish whether a person has been turned away from a restaurant because of race or sex -- the variables are few. But employment discrimination presents a different problem. The decision concerning who is to be hired or not hired, who is to be promoted or passed over, does not always, or perhaps even usually, turn upon objective and quantifiable data. Such decisions also rest upon elements of judgment and intuition. On a case-by-case basis, therefore, the employer's decision will usually turn out to be unreviewable. Unless he admits bias, it is almost impossible to prove that he discriminated.
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> We are beginning to see that there are areas in which a government of men rather than of laws is to be preferred.[52]

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[50] Regents of the University of California v. Bakke, supra, 438 U.S. 265.

[51] Bork, The Unpersuasive Bakke Decision, supra, at 8, col. 5.

[52] Bork, We Suddenly Feel That Law Is Vulnerable, Fortune 115, 136 (Dec. 1971).

B. Sex Discrimination

Judge Bork has an even more restrictive view of the Fourteenth Amendment and the role of the Supreme Court with respect to sex discrimination.

This flows directly from Judge Bork's radical judicial philosophy. In 1984, Judge Bork wrote: "The Constitution has provisions that create specific rights. These protect, among others, racial, ethnic, and religious minorities."[53] Women are conspicuously absent from this list. Judge Bork's view is that because women are not explicitly mentioned in the Fourteenth Amendment, the amendment offers them no distinct constitutional protection. While Judge Bork would not protect racial minorities from most state and local discrimination, he would not protect women under the Constitution from any discrimination, federal, state or local.

Judge Bork has also opposed passage of the Equal Rights Amendment, stating that "the role that men and women should play in society is a highly complex business, and it changes as our culture changes."[54] This leads Judge Bork to conclude that judges should not be asked to decide "all of those enormously sensitive, highly political, highly cultural issues" that are inherent in determining the meaning of equality.[55]

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[53] Dronenburg v. Zech, 741 F.2d 1388, 1397 (D.C. Cir. 1984) (Bork, J.).

[54] McGuigan, Judge Bork Is A Friend Of The Constitution, 11 Conservative Digest 91, 95 (Oct. 1985). Judge Bork explained that these were views held ten years ago, and that, as a judge, he no longer feels free to comment on the Equal Rights Amendment.

[55] Id.

Even where Congress has legislated in favor of sexual equality, Judge Bork has declined to enforce statutory guarantees by adopting narrow rules of construction. Thus, in *Vinson v. Taylor*[56], Judge Bork suggested that Title VII of the 1964 Civil Rights Act may not protect women against on-the-job sexual harassment. His view was unanimously rejected by the Supreme Court in an opinion written by Chief Justice Rehnquist. "*[W]ithout question*," the Court held, "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."[57]

Judge Bork adopted a similarly narrow construction of the Occupational Safety and Health Act of 1970, which requires an employer to provide "each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm...."[58] Despite the statute's broad remedial goals, Judge Bork rejected a challenge to a company policy demanding that women of childbearing age be surgically sterilized as a condition of employment in certain plant departments.[59] Judge Bork held that relief could be granted only if "the words of the statute *inescapably*" require it.[60]

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[56] 753 F.2d 141, *reh'g denied*, 760 F.2d 1330 (D.C. Cir. 1985) (Bork, J., dissenting), *aff'd*, *Meritor Savings Bank v. Vinson*, 106 S. Ct. 2399 (1986).

[57] *Meritor Savings Bank v. Vinson*, *supra*, 106 S. Ct. at 2404 (emphasis added).

[58] 29 U.S.C. § 654(a)(i).

[59] *Oil, Chemical & Atomic Workers Int'l Union v. American Cyanamid Co.*, 741 F.2d 444 (D.C. Cir. 1984) (Bork, J.).
[footnote cont'd]

C. Church/State

Judge Bork has never been called upon to rule on the religion clauses of the First Amendment. But he has, in a series of recent unpublished speeches,[61] offered an interpretation of the religion clauses that is contrary to traditional legal thought and the weight of historical evidence.[62]

In Judge Bork's view:

> The religious clauses state simply that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The establishment clause might have been read merely to preclude the recognition of an official church, or to prevent discriminatory aid to one or a few religions. The free exercise clause might have been read simply to prohibit laws that directly and intentionally penalize religious observance. Instead both have been interpreted to give them far greater breadth and severity.[63]

Far from regarding government support of religion as a violation of the Establishment Clause and a threat to religious freedom, Judge Bork sees danger in maintaining a wall of separa-

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[60] Id. at 448 (emphasis added).

[61] See Bork, Unpublished Speech, Brookings Institute, Washington, D.C. (Sept. 12, 1985) [hereinafter, Brookings Speech]; Unpublished Speech, "Comments on Professor Morawetz's Paper," Woodrow Wilson International Center for Scholars, [Princeton University] (June 13, 1985); Unpublished Speech, University of California, Berkeley, Cal. (Apr. 29, 1985) [hereinafter, Berkeley Speech]; Unpublished Speech, "Religion and the Law," John M. Olin Center for Inquiry Into the Theory & Practice of Democracy, Univ. of Chicago (Nov. 13, 1984) [hereinafter, "Religion and the Law."]

[62] See generally, Levy, The Establishment Clause: Religion and the First Amendment (1986); Swomley, Religious Liberty and the Secular State (1987).

[63] Brookings Speech, supra, at 1.

tion between church and state, a wall which he believes has led to a dangerous "privatization of morality."[64]

> There may be in man an ineradicable longing for the transcendent. If religion is officially removed from public celebration, other transcendent principles, some of them very ugly indeed, may replace them.[65]

Whatever "political divisiveness" may be caused by the presence of religious "symbolism" in public celebrations, Judge Bork believes the "thoroughgoing exclusion of religion is ... an affront and ... the cause of great divisiveness."[66] Thus, Judge Bork criticizes well-settled Supreme Court establishment doctrine, calling it "rigidly secularist."[67]

Judge Bork's articulated philosophy suggests that he would not permit the Supreme Court to overrule local laws that have an overtly religious purpose.[68] According to Judge Bork, "[t]he first amendment was not intended to prohibit the nondiscriminatory advancement of religion, so long as religious belief was not made a requirement in any way."[69] On those grounds, he has criticized the Supreme Court's decision in Aguilar v. Felton, 473 U.S. 402 (1985), striking down the use of public funds to pay teachers in religious schools.[70]

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[64] Brookings Speech, supra, at 6.

[65] Brookings Speech, supra, at 12; accord Bork, "Religion and the Law," supra, at 15-16.

[66] Bork, "Religion and the Law," supra, at 15-16; accord Brookings Speech, supra, at 11.

[67] Brookings Speech, supra, at 10. He specifically criticizes the current three-prong test for determining violations of the Establishment Clause, which provides: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, ... finally, the statute must not foster 'an excessive government entanglement with religion.'" Lemon v. Kurtzman, 403 U.S. 602, 612-3 (1971), quoting Walz v. Tax Commission, 397 U.S. 664 (1970).

[68] Bork, "Religion and the Law," supra, at 5.

[footnote cont'd]

More broadly, Judge Bork supports government action that generally advances religion.[71] He therefore welcomes, "the reintroduction of some religion into the public schools and some greater religious symbols in our public life."[72] He dismisses the threat of entanglement by noting that "government is inevitably entangled with religion."[73]

Judge Bork would even limit the federal court's power to hear First Amendment claims that implicate religion. Well-settled doctrine allows an individual to sue to stop the expenditure of government funds for religious purposes. Judge Bork contends this doctrine is wrong and "bring[s] into court cases in which nobody could show a concrete harm."[74]

If adopted, Judge Bork's position on the establishment clause could return prayer to the schools, allow nondiscriminatory state aid to religious institutions, and use the powerful arm of the state to coerce personal morality in vast and varied ways.

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[69] Id. at 6.

[70] Bork, Brookings Speech, supra, at 3.

[71] Id.

[72] Id. at 11.

[73] Id. at 3.

[74] Bork, "Religion and the Law," supra, at 3-4; accord Brookings Speech, supra, at 3-4.

Judge Bork likewise criticizes the "breadth and severity"[75] of the Free Exercise Clause, as interpreted by the Supreme Court. Twenty years ago, the Court stated: "[I]t is too late in the day to doubt that the libert[y] of religion may be infringed by the denial of or placing of conditions upon a benefit or privilege."[76] Justice O'Connor confirmed that test last Term:

> Only an especially important governmental interest pursued by narrowly tailored means can justify enacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens.[77]

The Court has thus struck down laws that condition government benefits on an individual's relinquishment of the right to free exercise.[78]

Judge Bork apparently rejects this doctrine. He has criticized the Supreme Court for having "require[d] government to make special allowances for activity motivated by religious belief of such scope that, if government had done the same thing, without a court order, it would have violated the Establishment Clause."[79] In short, he does not believe that the Free Exercise Clause bars indirect abridgements of religious freedom, no matter how severe.

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[75] Bork, "Religion and the Law," supra, at 2; accord Brookings Speech, supra, at 1.

[76] Sherbert v. Verner, supra, 374 U.S. at 404.

[77] Bowen v. Roy, 106 S. Ct. 2147, 2167 (1986) (O'Connor, J., concurring in part and dissenting in part).

[78] Hobbie v. Unemployment Appeals Comm. of Florida, 107 S. Ct. 1046 (1987); Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707 (1981); Sherbert v. Verner, supra, 374 U.S. at 398 (1963).

[79] Berkeley Speech, supra, at 5.

D. Freedom of Speech and Press

Judge Bork believes that the First Amendment protects only speech that relates to the political process mandated by the Constitution, *e.g.*, voting and legislative action. He bases this view on the structure of government established by the Constitution -- "a form of government that would be meaningless without freedom to discuss government and its policies."[80]

At one point he wrote that the First Amendment protects only speech that is "explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or ... pornographic."[81] More recently, he stated that the First Amendment protects speech that "is essential to running a republican form of government," including "speech about moral issues, speech about moral values, religion and so forth, all of those things [that] feed into the way we govern ourselves."[82]

In situations where Judge Bork sees the First Amendment as applying, he is generally protective of speech.[83] Judge Bork has argued that political dialogue should be absolutely immune from libel claims. Going beyond current Supreme Court doctrine, Judge Bork's concurrence in Ollman v. Evans[84] urged absolute immunity for a newspaper report that a Marxist professor "had no status within the profession."[85] According to Judge Bork, the professor was "not simply a scholar," but rather "an active proponent ... of Marxist politics,"[86] and therefore had "to accept the banging and jostling of political debate, in ways that a private person need not...."[87] He wrote:

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[80] Bork, *Neutral Principles*, at 31.

[81] *Id*. at 20. *See id*. at 26 ("All other forms of speech [than 'explicitly and predominantly political'] raise only issues of human gratification, and their protection against legislative regulation involves the judge in making [illegitimate] decisions...."); *id*. at 27 ("[T]he protection of the first amendment must be cut off when it reaches the outer limits of political speech."); *id*. at 29 ("[c]onstitutionally, art and pornography are on a par with industry and smoke pollution.").

[82] Unpaginated Transcript, Public Affairs Television, Inc., *Moyers: In Search of the Constitution #107 Strictly Speaking* (Attorney General Edwin Meese and Judge Robert Bork) (Airdate May 28, 1987).

> Those who step into areas of public dispute, who choose the pleasures and distractions of controversy, must be willing to bear criticism, disparagement, and even wounding assessments. Perhaps it would be better if disputation were conducted in measured phrases and calibrated assessments, and with strict avoidance of the ad hominem; better, that is if the opinion and editorial pages of the public press were modeled on the Federalist Papers. But that is not the world in which we live, ever have lived, or are ever likely to know, and the law of the First Amendment must not try to make public dispute safe and comfortable for all the participants.[88]

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[83] The principal exception to this speech-protective attitude is Judge Bork's willingness to permit even political speech to be suppressed in furtherance of an alleged foreign policy interest. See Finzer v. Barry, 798 F.2d 1450 (D.C. Cir. 1976), cert. granted sub nom. Boos v. Barry, 107 S. Ct. 1282 (1987); Abourezk v. Reagan, 785 F.2d 1043, 1062 (D.C. Cir.) (Bork, J., dissenting), cert. granted, 107 S. Ct. 666 (1986).

[84] Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (Bork, J., concurring).

[85] Id. at 996.

[86] Id. at 1004.

[87] Id.

[footnote cont'd]

Judge Bork has similarly criticized those restrictions on campaign finance that were upheld by the Supreme Court in *Buckley v. Valeo*[89] on the ground that they permit the "government [to] regulate ordinary political speech and thus influence the outcomes of democratic processes."[90] And he ruled that a photomontage depicting President Reagan could not be banned from the District of Columbia subways, emphasizing that the poster "conveys a political message" and that the subway had transformed itself into a public forum.[91]

Judge Bork's view that political debate should be unregulated by the government also leads him to reject the fairness doctrine.[92] Contending that "fairness" can better be assured through competition than regulation, he has urged the Supreme Court to "revisit this area of the law and either eliminate the distinction between print and broadcast media ... or announce a constitutional distinction that is more usable than the present one."[93]

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[88] *Id.* at 993.

[89] 424 U.S. 1 (1976); *see* Bork, "The Individual, the State and the First Amendment," Unpublished Speech, Univ. of Michigan, 1977 or 1978.

[90] *Id.*

[91] *Lebron v. Washington Metropolitan Area Transit Authority*, 749 F.2d 893 (D.C. Cir. 1984) (Bork, J.).

[92] The fairness doctrine requires broadcasters to provide evenhanded coverage of controversial issues. Its constitutionality was upheld by the Supreme Court in *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1967). However, in August of this year, the FCC declared the fairness doctrine unconstitutional on the theory that the factual premises of *Red Lion* were no longer valid. *In re Syracuse Peace Council* (Aug. 6, 1987).

[93] *Telecommunication Research and Action Center v. FCC*, 801 F.2d 501, 509 [footnote cont'd]

On the other hand, Judge Bork refused to protect the speech of political demonstrators who sought to picket outside foreign embassies in Washington, D.C. He contended that criticism of foreign governments whose embassies we host would produce "ill treatment of ambassadors to the United States ... [and] adversely affect the interest of the United States."[94]

In addition, Judge Bork excludes from his definition of protected political speech any advocacy of violence or civil disobedience designed to achieve a change in the government. Judge Bork would forbid such advocacy even where it represents no "clear and present danger."[95] He would, therefore, give no constitutional protection to the work of writers advocating civil disobedience, such as Thoreau, Gandhi or Martin Luther King, Jr. "Speech advocating ... the frustration of ... government through law violation has no value in a system whose basic premise is democratic rule," Judge Bork has asserted.[96]

He thus disagrees with many of the leading free speech cases of the last half-century in which the Supreme Court has held that speech advocating the overthrow of government is constitutionally protected unless it is intended and likely to produce imminent, lawless action.[97] According to Judge Bork:

(D.C. Cir. 1986), cert. denied, 55 U.S.L.W. 3821 (1987).

[94] Finzer v. Barry, 798 F.2d 1450, 1459 (D.C. Cir. 1986) (Bork, J.), cert. granted sub nom. Boos v. Barry, 107 S.Ct. 1282 (1987).

[95] Bork, "The Individual, the State and the First Amendment," supra.

[96] Bork, "The Individual, the State and the First Amendment," supra.

[97] E.g., Brandenburg v. Ohio, supra, 395 U.S. at 444.

> The tradition of support for civil disobedience and even violence is deeply disturbing, particularly disturbing because it is so firmly established in the institutions that mold opinions.[98]

The Supreme Court, by contrast, has firmly adopted the view articulated by Justice Brandeis in his famous concurrence in Whitney v. California,

> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.[99]

Judge Bork would permit any local community to bar speech it found offensive. At the time of the Skokie case, for example, he said that "the fundamental issue raised by Skokie ... is whether a creed of that sort ought to be allowed to find voice anywhere in America."[100] He found it "remarkable" that "the legal order" would assume "that Nazi ideology is constitutionally indistinguishable from republican belief."[101]

Furthermore, Judge Bork's view of the First Amendment as limited to "political" speech places the entire realm of artistic expression outside the protection of the First Amendment or, at best, "towards the outer edge."[102] "It is sometimes said," Judge Bork has asserted, "that works of art ... are capable of influencing political attitudes. But ... [they] are not on that account immune from regulation."[103] This radically restrictive view of the First Amendment, coupled with Judge Bork's deference to legislated morality, raises the possibility that books like *Ulysses*, or indeed the variety of books that have more recently been the subject of attempted censorship by local school boards, could once again be banned if deemed offensive to the public at large.

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[98] Bork, We Suddenly Feel That Law Is Vulnerable, supra, at 116.

[99] 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

[100] Bork, "The Individual, the State and the First Amendment," supra.

[101] Id.

Although Judge Bork has an expansive view of the Supreme Court's role in protecting certain forms of expression under the First Amendment, Judge Bork is in fact far outside the broad range of traditional First Amendment jurisprudence. He would narrow the Supreme Court's protection of free expression primarily to political speech. Even within this category, he excludes speech that advocates civil disobedience or "offensive" political ideologies.

Thus, Judge Bork's approach to the First Amendment would diminish the Supreme Court's role in protecting freedom of expression from governmental trespass and once again allow local majorities to determine what is acceptable.

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[102] Unpaginated Transcript, Public Affairs Television, Inc., *Moyers: In Search of the Constitution*, *supra*.

[103] Bork, "The Individual, the State and the First Amendment," *supra*.

E. Privacy

Judge Bork does not find a right to privacy in the Constitution. It is a right he says, that "strikes without warning" and lacks "intellectual structure."[104]

> [T]he so-called right to privacy cases, which deal mainly with sexual morality and which generally conclude that sexual morality may be regulated only in extreme cases[,] ... share the common theme that morality is not usually the business of government but is instead primarily the concern of the individual.[105]

Accordingly, Judge Bork rejects Supreme Court doctrine that has recognized, over the last half-century, a constitutional right to privacy in a wide variety of contexts,[106] including: the purchase and use of contraceptives by married people,[107] single individuals,[108] and minors;[109] the decision of a woman, in consultation with her physician, to determine whether to have an abortion;[110] a parent's right to defend his or her relationship with a child, whether the parent is mother or father, married or unmarried,[111] and, the individual's right to possess obscene material in the privacy of the home.[112]

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[104] McGuigan, Judge Robert Bork Is A Friend of The Constitution, supra, at 97.

[105] Bork, Brookings Speech, supra, at 6.

[106] Bork, Neutral Principles, at 7. See also Unpaginated Transcript, Public Affairs Television, Inc., Moyers: In Search of the Constitution, supra.

[107] Griswold v. Connecticut, supra, 381 U.S. 479. The Court protected the activities of medical personnel distributing contraceptives, as well as activities in the privacy of the marital bedroom.

[108] Eisenstadt v. Baird, 405 U.S. 438 (1972), invalidated a Massachusetts law prohibiting distribution of contraceptives to single people.

[109] Carey v. Population Services International, 431 U.S. 678 (1977).

[110] Roe v. Wade, supra, 410 U.S. 113 (1973); Thornburgh v. American College of Obstetricians, 106 S. Ct. 2169 (1986).

As to Roe v. Wade, which upholds a woman's right to control reproduction, Judge Bork has testified: "I am convinced, as I think most legal scholars are, that Roe v. Wade is, itself, an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of State legislative authority."[113]

As a Court of Appeals judge, Judge Bork has refused to enforce claims of privacy that he is empowered to adjudicate, contending that a lower court should not enforce a right unless the Constitution, by its express terms, or a Supreme Court decision squarely on point, prevents the government from taking a challenged action.[114]

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[111] Stanley v. Illinois, 405 U.S. 645 (1972); Santosky v. Kramer, 455 U.S. 745 (1982).

[112] Stanley v. Georgia, 394 U.S. 557 (1969).

[113] The Human Life Bill: Hearings on S.158 Before the Subcomm. on the Separation of Powers of the Senate Comm. on the Judiciary, supra, at 310. See Greenhouse, No Grass is Growing Under Judge Bork's Seat, N.Y. Times, at A18 (Aug. 4, 1987).

[114] Judge Bork refused to recognize a constitutional right to privacy when James L. Dronenburg challenged a government decision dismissing him from the Navy solely on grounds that he engaged in homosexual sex. Dronenburg v. Zech, 741 F.2d 1388, 1395 (D.C. Cir. 1984). In Dronenburg, Judge Bork speculated that the mere presence of homosexual men in the military causes damage:

> Episodes of this sort are certain to be deleterious to morale and discipline, to call into question the evenhandedness of superiors' dealings with lower ranks, to make personal dealings uncomfortable where the relationship is sexually ambiguous, to generate dislike and disapproval among many who find homosexuality morally offensive, and, it must be said, given the powers of military superiors over their inferiors, to enhance the possibility of homosexual seduction.

[footnote cont'd]

Judge Bork's comments about privacy reveal a great deal about his judicial philosophy. Judge Bork grants the community broad power over the individual. The Supreme Court, by contrast, has repeatedly recognized what Justice Brandeis described as "the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men."[115] Within that zone of privacy, the individual is protected against unwarranted community intrusion.[116]

Judge Bork denies the right to privacy because it is not explicitly mentioned in the Constitution. However, as Judge Bork has acknowledged in the libel context, "[a] judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty."[117]

Dronenburg v. Zech, *supra*, 741 F.2d at 1398.

Judge Bork's parade of horribles that can result from the presence of male homosexuals on the job stands in sharp contrast to his dismissive attitude toward the problem of male heterosexual harrassment of women.*Vinson v. Taylor*, *supra*.

Although the Supreme Court in *Bowers v. Hardwick*, 478 U.S. ____ (1986), subsequently upheld the constitutionality of state sodomy laws, it specifically did not duplicate Judge Bork's generalized rejection of a constitutional right to privacy.

[115] *Olmstead v. United States*, 277 U.S. 438, 378 (1928) (dissenting opinion).

[116] *See* *Poe v. Ullman*, 367 U.S. 497, 539 (1961) (Harlan, J., dissenting) ("I believe that a statute making it a criminal offense for *married couples* to use contraceptives is an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life.") (emphasis in original).

[117] *Ollman v. Evans*, *supra*, 750 F.2d at 996.

F. Criminal Law

Judge Bork's record in the area of criminal law also reveals a disregard of Supreme Court precedent at the expense of fundamental rights.

It is well-settled, for example, that the Fourth Amendment provides people suspected of crime with a series of protections against unreasonable searches including the exclusion of evidence seized in violation of the procedures mandated by the Amendment. Judge Bork has suggested that the exclusionary rule be abandoned. "The only good argument [for the exclusionary rule] really rests on the deterrent rationale, and it's time we examine that with great care to see how much deterrence we are getting and at what cost."[118] He takes this position in the face of overwhelming evidence that the exclusionary rule has virtually no negative effect on law enforcement or crime rates and would not, if abolished, enhance public safety. Because Judge Bork opposes the exclusionary rule, however, he would impose a heavy burden on those who support it to show that its effects are socially beneficial.

In sharp contrast, Judge Bork endorses the death penalty without any effort to justify its deterrent effect, relying on the references in the Fifth and Fourteenth Amendments to "capital offenses" and the "deprivation of life." He does not believe that the Eighth Amendment, which bars "cruel and unusual punishment," provides any limitations on those clauses, disputing that the standard of what is cruel and unusual should evolve over time.[119]

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[118] McGuigan, An Interview with Robert H. Bork, supra, at 6.

In general, Judge Bork's approach to criminal appeals reflects little respect for the rights of the innocent who may be mistakenly accused, or for the role of the courts in protecting those rights.[120]

In United States v. Mount, Judge Bork argued that the court's supervisory power could never be invoked to exclude evidence obtained by means which shock the conscience,[121] although the issue was not before the court (indeed the doctrine warranted only a footnote in the majority decision).[122] Judge Bork insisted that the Supreme Court had created a general bar against the use of supervisory power to suppress evidence, stating:

> [O]ur supervisory powers have been substantially curtailed by the Supreme Court's recent decision in United States v. Payner, 447 U.S. 727 (1980).[123]

In fact, the Supreme Court had specifically disavowed the construction which Judge Bork placed on its opinion, noting:

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[119] Id. at 5-6.

[120] Similar limitations on access to courts are manifest in Judge Bork's opinions in related areas. See, e.g., McClam v. Barry, 697 F.2d 366 (D.C. Cir. 1983) (holding that Section 1983 action alleging police misconduct was barred by plaintiff's failure to comply with local six-month notice requirement); and, Brown v. United States, 742 F.2d 1498 (D.C. Cir. 1984) (where majority held that McClam was erroneously decided and where Bork dissented, adhering to his reasoning in McClam, and taking a more restrictive view of the issue than did Justice Scalia, then a member of the Brown majority).

[121] United States v. Mount, 757 F.2d 1315, 1320 (D.C. Cir. 1985).

[122] Id. at 1318 n.5.

[123] Id. at 1320

> [O]ur decision today does not limit the traditional scope of the supervisory power in any way.[124]

Although criminal law is not an area in which civil liberties has fared well in the Supreme Court in recent years, Judge Bork would go much further than existing Supreme Court rulings to cut back on due process rights.

G. Access to the Courts

Judge Bork has consistently closed the courthouse door to individuals seeking relief for a broad range of constitutional and statutory violations.[125] His radical restriction of federal jurisdiction reflects the limited role he grants the federal courts to vindicate individual rights.

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[124] 447 U.S. at 735 n.8. In addition, Judge Bork insisted that the Supreme Court had announced a general rule that exclusion of evidence is never appropriate unless that remedy would have a deterrent effect on law enforcement practices, 757 F.2d at 1321, attributing to the Court the "holding" that "where the exclusionary rule 'does not result in appreciable deterrence,' its use is not warranted," citing United States v. Leon, 468 U.S. 897, (1984).

The cited language is not the holding of Leon. It is not even an accurate quotation. Rather, the language appears in a discussion of non-criminal proceedings (in which the exclusionary rule may be less likely to deter misconduct) and is a quotation from an earlier case in which the Court declined to extend the rule to civil proceedings:

> '[i]f ... the exclusionary rule does not result in appreciable deterrence, then, clearly, its use in the instant situation [federal civil proceedings] is unwarranted.'

468 U.S. at 909 [emphasis added], quoting United States v. Janis, 428 U.S. 433, 454 (1976).

[125] Bork has also urged Congress to cut back access to the federal courts. He has testified that:

> The only solution to the workload problem is a drastic pruning of jurisdiction of all Federal Courts.... So far as the Supreme Court is concerned, part of their [sic] difficulty is self-inflicted. The have, over a period of years, taken on types of cases which the Supreme

[footnote cont'd]

Words like "standing," "justiciability" and "immunity" may sound far-removed from civil liberties.[126] But as Judge Bork has put it, "[i]n constitutional law philosophical shifts often occur through what appears to be mere tinkerings with technical doctrines."[127] Whether a court denies a civil liberties claim on the merits or refuses to hear a civil liberties claim on jurisdictional grounds, the effect is the same: Civil liberties are denied.

Judge Bork enforces jurisdictional bars in an extreme manner that often places him in a position of dissent from his colleagues.[128] In other cases, where his judicial colleagues

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> Court previously did not do and invited a great deal of litigation that previously was not there.

Hearings on S.1847 Before the Subcomms. on Courts and Agency Admin. of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. at 9, 13-14 (1982).

[126] A basic principle of American constitutional law requires that federal courts adjudicate only live cases and controversies between parties who have a real stake in the outcome of the litigation. These requirements are central to our constitutional structure and serve many vital functions: They assure that cases will be decided in a context in which concrete facts can illuminate abstract principle and that the energy of federal judges will be devoted to cases that truly demand judicial resolution. Nevertheless, if requirements of justiciability are enforced with excessive rigor, individuals with legitimate grievances are denied not only their rights but also their day in court.

[127] Bork, "Religion and the Law," *supra*, at 2.

[128] For example, *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1984) (Bork, J., concurring), *vacated*, 107 S. Ct. 734 (1987), involved a challenge to President Reagan's pocket veto of a human rights certification bill. Bork dissented, on grounds that legislators lack standing. *Brown v. United States*, 742 F.2d 1498 (D.C. Cir. 1984) upheld a prisoner's right to bring a damage action in federal court against prison officials for an alleged violation of his constitutional rights. Bork dissented, saying that the prisoner had not complied with state [footnote cont'd]

have held that a claim is not justiciable, Judge Bork has written separately to urge a broader rule to deny access for civil liberties claims to an even larger group of potential litigants.[129] He gives little apparent weight to the need to enforce the Constitution against violations by the political branches of government or to the central importance of federal courts in enforcing civil liberties.

1. Restrictions on Standing to Sue in Federal Court

Standing is the determination of whether a particular person is the proper party to bring a matter to the court for adjudication. Judge Bork has explicitly stated that standing doctrine should limit "the number of occasions upon which courts will frame constitutional principles to govern the behavior of other branches and of states."[130]

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procedural rules. Hohri v. United States, 793 F.2d 304 (D.C. Cir. 1986) (en banc) upheld the rights of Japanese-Americans to challenge government action confiscating their property during World War II. Bork dissented, asserting that the claims should have been filed at the time and are now barred by the statute of limitations. Bartlett v. Bowen, 816 F.2d 695 (D.C. Cir. 1987) allowed Medicare beneficiaries to present a First Amendment challenge to restrictions on services in Christian Science nursing homes. Bork dissented, on grounds that the statute does not allow any challenge, even on constitutional grounds, where the claim is for less than $1,000.

[129] E.g., Robbins v. Reagan, 780 F.2d 37 (D.C. Cir. 1985) held that the government could close a homeless shelter if alternative housing were provided. Bork concurred, arguing that the court had no jurisdiction to hear the case. Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. 1983) found no jurisdiction. Bork concurred, articulating broader grounds for denying relief. Telecommunications Research & Action Center v. Allnet Communications Servs. Inc., 806 F.2d 1093 (D.C. Cir. 1986) denied an organization standing to claim money damages for its members in the circumstances of the case. Bork concurred, advocating a per se rule barring any organization from suing for money damages for its members. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) denied Israeli plaintiffs access to federal courts to redress a tort allegedly committed in violation of the law of nations. Bork concurred, arguing that the 1789 statute creating federal jurisdiction over actions in these circumstances had virtually no modern role.

[footnote cont'd]

It is not simply that Judge Bork strictly adheres to existing limits on standing.[131] Rather, Judge Bork pushes the

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[130] Barnes v. Kline, supra, 759 F.2d at 55.

[131] An example of his narrow reading of current law can be found in his limited view of the types of injuries that are sufficient for standing. The Supreme Court has held that plaintiffs must allege a personal injury to have standing. See, e.g., Gladstone, Realtors v. Village of Bellwood 441 U.S. 91, 100 (1979); Sierra Club v. Morton, 405 U.S. 727, 735 (1972). Judge Bork has rejected claims of injury in circumstances where current law would seem to allow standing. For example, in Northwest Airlines v. F.A.A., 795 F.2d 195 (D.C. Cir. 1986), an airline sued the Federal Aviation Administration to challenge a decision permitting a pilot who had been suspended for intoxication to fly commercial planes. The Airlines claimed that the threat to traffic safety gave it standing to sue. Although this injury is within the zone of interests protected by the Federal Aviation Act, Judge Bork found the injury "far too speculative and conjectural to provide a basis for standing." Id. at 202.

Similarly, in Citizens Coordinating Committee on Friendship Heights v. Washington Area Metropolitan Transit Authority, 765 F.2d 1169 (D.C. Cir. 1985), the court, in an opinion by Judge Bork, denied standing to a plaintiff alleging violations of the Clean Water Act by the Transit Authority's pollution of a stream. The Supreme Court has explicitly ruled that environmental and aesthetic injuries are sufficient for standing. See, e.g., Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978); United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973); Sierra Club v. Morton, 402 U.S. 727 (1972). Nonetheless, Judge Bork's found the alleged noneconomic injury insufficient for standing.

Similarly, where an injury is "indirect," Judge Bork would deny standing to a party challenging government action lest the court become involved "in the continual supervision of more governmental activities than separation of powers concerns should permit." Haitian Refugee Center v. Gracey, 809 F.2d 794, 810 (D.C. Cir. 1987). In Gracey, a non-profit corporation that exists to help Haitian refugees sued to stop a federal government program designed to interdict undocumented aliens on the high seas. The plaintiff claimed, in part, that it would be injured in that it could not perform its counseling function because the government's program kept Haitians from contacting the Center.

The Supreme Court had allowed standing on an almost identical claim in Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982). Moreover, plaintiff alleged that the federal government's program was causing its inability to counsel and that a favorable court decision would allow it to resume counseling, which should have satisfied the requirement that plaintiff allege that the defendant's actions caused the harm and that a favorable court decision is likely to remedy the injury. See, e.g., Allen v. Wright, 468 U.S. 737 (1984). Nonetheless, Judge Bork found no standing because of "separation-of-powers principles central to the analysis of Article III." As Judge Edwards argued in dissent, Judge Bork's opinion ignored precedent and created a new limit on standing by ruling that the separation of powers concept leads a court to deny causation where it otherwise factually exists. Gracey, 809 F.2d at 826-27 (Edwards, J., dissenting).

law, in dissent and concurrence, beyond existing limits.

For example, Judge Bork has argued in dissent, that "[w]e ought to renounce outright the whole notion of congressional standing."[132] Judge Bork acknowledges that no Supreme Court precedent supports his position. Nonetheless, he insists: "Though we are obligated to comply with Supreme Court precedent, the ultimate source of constitutional legitimacy is compliance with the intentions of those who framed and ratified our Constitution."[133]

Similarly, Judge Bork has argued that associations should not be permitted to sue for monetary damages on behalf of their members.[134] The Supreme Court has expressly allowed associations -- for example, environmental and other public interest groups -- to sue on behalf of their members under specific circumstances.[135] Judge Bork, by contrast, would "frame a *per se* rule against an association's standing...to assert damage claims on behalf of its members."[136]

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[132] *Barnes v. Kline*, *supra*, 759 F.2d at 41.

[133] *Id.* at 56.

[134] *See* *Telecommunications Research & Action Center v. Allnet Communication Servs.*, *supra*, 806 F.2d at 1097.

[135] *Hunt v. Washington State Apple Advisory Comm.*, 432 U.S. 333 (1977).

[136] *Telecommunications Research & Action Center v. Allnet Communication Servs.*, *supra*, 806 F.2d at 1097.

2. Expansion of Sovereign Immunity Protection for the Government

A second way in which Judge Bork has attempted to limit access to the federal courts is by expanding the scope of sovereign immunity.[137] Sovereign immunity is a medieval doctrine that assumes the monarch can do no wrong. In its modern form, the Executive cannot be sued for illegal action unless consent has been given to suit. Thus, the doctrine protects the government from suit even if individuals have suffered a violation of their rights. Judge Bork has frequently argued to expand such immunity.[138]

3. Narrow Construction of Jurisdictional Statutes

Judge Bork has also urged extremely narrow interpretations of statutes creating federal court jurisdiction. Even where Congress has passed legislation requiring the federal courts to hear certain claims, Judge Bork has declined to find jurisdiction.[139]

In restricting access to the court, Judge Bork firmly rejects the remedial tradition which we have come to associate with the federal judiciary.

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[137] Judge Bork's expansive view of sovereign immunity takes the form of narrowly construing the provisions of the Federal Torts Claims Act, the primary statute where Congress has waived the United States' immunity. See, e.g., Jayvee Brand, Inc. v. United States, 721 F.2d 385 (D.C. Cir. 1983) (Bork, J.).

[138] For example, in Bartlett v. Bowen, 816 F.2d 695 (D.C. Cir. 1987), Judge Bork argued that the government had not waived sovereign immunity with respect to a First Amendment challenge to the administration of a thee federal Medicare program. See also Brown v. United States, 742 F.2d 1498 (D.C. Cir. 1984) (en banc) (rejecting Judge Bork's dissenting view that a local ordinance barring damages claims by inmates also barred any claim seeking to vindicate constitutional rights).

[139] E.g., Tel-Oren v. Libyan Arab Republic, 726 F.2d 774; (D.C. Cir. 1984) Persinger v. Islamic Republic of Iran, 729 F.2d 835 (D.C. Cir. 1984). Both cases are discussed more fully in the section that follows on Executive Power.

H. Executive Power

Judge Bork's judicial philosophy can be understood as an attack on the basic notion of checks and balances. One aspect of that philosophy is the extremely limited role he grants to the courts in mediating disputes between the individual and the government. Another aspect is his willingness to enlarge the power of the presidency at the expense of the legislatures, the judiciary and civil liberties.

As Solicitor General, Judge Bork argued that members of Congress lacked standing to challenge his firing of Archibald Cox. A federal court disagreed and also found the firing illegal.[140]

Judge Bork has also expresssed views suggesting that the Independent Counsel Act[141] has serious constitutional defects. Testifying before Congress on bills that would have shifted control over appointment and removal of a Special Prosecutor from the president to Congress, Judge Bork stated: "To suppose that Congress can take that duty from the Executive and lodge it either in itself or in the courts is to suppose that Congress may b[y] mere legislation alter the fundamental distribution of powers dictated by the Constitution."[142]

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[140] *Nader v. Block*, 366 F. Supp. 104 (D.D.C. 1973).

[141] 28 U.S.C. §§ 591-8 (1978).

[footnote cont'd]

In an exchange with Senator Burdick, Judge Bork asserted that Congress must be satisfied with the President's "promise" not to remove the Special Prosecutor.

> Senator Burdick: This is one of the things that bother[s] me, Mr. Bork. The President, when Mr. Cox was dismissed, contended that he had the power to do so regardless of the contract. Is that not correct?
>
> Mr. Bork: The President said he had the power to do so regardless of the charter, yes.
>
> Senator Burdick: And any charter we make here, at this time, still does not change the powers of the President?
>
> Mr. Bork: No; it does not.
>
> Senator Burdick: In other words, regardless of what we do, the President has the inherent power to dismiss the Special Prosecutor?
>
> Mr. Bork: I admit the President has the legal power. I think he has made a promise to the American people.[143]

Judge Bork did indicate that if the Attorney General were t appoint the Special Prosecutor, without Senate confirmation, Congress might be able to impose conditions on removal. Under n circumstances, however, could Congress prevent the President fro removing the Special Prosecutor.

Turning to the question of the President's authority to use military force without congressional approval, Judge Bork, in 1971, defended President Nixon's decision to bomb Cambodia,

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[142] Hearings on the Special Prosecutor before the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 451 (1973).

[143] Nominations of William B. Saxbe to be Attorney General: Hearings Before the Sen. Comm. on the Judiciary, 93d Cong., 1st Sess. 92 (1973).

insisting that Congress had no power to limit the President's discretion to stage the attack:

> [T]here is no reason to doubt that President Nixon had ample constitutional authority to order the attack upon the sanctuaries in Cambodia.... That authority arises both from the inherent powers of the Presidency and from congressional authorization. The real question in this situation is whether Congress has the constitutional authority to limit the President's discretion with respect to this attack.[144]

Contending that the Gulf of Tonkin Resolution amounted to a declaration of war against North Vietnam, Judge Bork argued that the President could claim a free hand to execute military and strategic "details", including the attack on a third country.

> I arrive, therefore, at the conclusion that President Nixon had full constitutional power to order the Cambodia incursion, and that Congress cannot, with constitutional propriety, undertake to control the details of the incursion. This conclusion in no way detracts from Congress' war powers, for the body retains control of the issue of war or peace. It can end our armed involvement in Southeast Asia and it can forbid entry into new wars to defend governments there.[145]

Judge Bork has asserted exclusive Executive power in other contexts as well. Thus, Judge Bork testified that Congress has no power to require Executive intelligence agencies to obtain a warrant before wiretapping an American citizen suspected of engaging in clandestine intelligence activities on behalf of a foreign country.[146]

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[144] Bork, Comments on Legality of United States Action in Cambodia, 65 Am. J. Int'l. L., at 79 (1971) (emphasis added).

[145] During his confirmation hearings as Solicitor General, Bork responded to questions about how Congress could constitutionally act to end the war in Southeast Asia. Bork responded that he had "not studied the question of the particular form your efforts take ...," reciting the general principle that "the ultimate power of war and peace resides in the Congress." Nominations of Joseph T. Sneed to be Duputy Attorney General and Robert H. Bork to be Solicitor General: Hearings before the Senate Comm. on the Judiciary, supra, at 9-10.

On the bench, Judge Bork would insulate the President from challenge in court by legislators. For example, *Crockett v. Reagan* involved a suit by 29 members of Congress challenging the legality of the President's maneuvers in El Salvador.[147] Judge Bork concurred separately, stating that legislator standing would violate the Constitution -- notwithstanding two prior panel decisions rejecting that view.

In *Abourezk v. Reagan*,[148] Judge Bork once more advocated deferring to the Executive at the expense of a congressional enactment that sought to protect civil liberties. Responding to the Executive's repeated exclusion from this country of aliens belonging to proscribed organizations, Congress passed the McGovern Amendment, which generally bars exclusion of an alien based on political views or organizational affiliation. Abourezk concerned the denial of visas to four aliens, including the Nicaraguan Minister of the Interior and a former NATO general who had become an advocate of nuclear disarmament. The majority held that the visa denials appeared to circumvent the McGovern Amendment. Judge Bork dissented, stating that the majority opinion demonstrated "a lack of deference to the determinations of the Department of State ...."[149]

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[146] *Foreign Intelligence Surveillance Act: Hearings on H.R. 7308 Before the Subcomm. on Courts and Civil Liberties of the House Comm. on the Judiciary*, 95th Cong., 2d Sess. 130, at 134 (1978). Bork also argued that federal courts have no jurisdiction under Article III to issue warrants in this area, although they routinely do so in criminal matters. Moreover, Bork argued that judges should not even ensure that surveillance complies with constitutional standards. *Id*. According to Bork, abuse by intelligence agencies is not a realistic concern: "The possibility of future abuses has been greatly lessened because of [the] exposure [of past abuses]. We have established a new set of expectations, a new tradition, about how we want our intelligence agencies to behave." *Id*. at 132.

[147] The legislators claimed that the President had violated the War Powers Resolution, 50 U.S.C. §§ 1541-48 (1976), and the War Powers Clause of the Constitution by introducing military officials into situations "where imminent involvement in hostilities is clearly indicated by the circumstances." *Crockett v. Reagan*, 720 F.2d at 1355.

[148] 785 F.2d 1043, 1075 (D.C. Cir.) (Bork, J., dissenting) *cert*. *granted*, 107 S. Ct. 666 (1986).

Judge Bork's deference to the Executive, at the expense of Congress, is evident as well in his refusal to find federal jurisdiction over claims based on violations of international human rights, despite a statutory enactment providing for such jurisdiction. Plaintiffs in Tel-Oren v. Libyan Arab Republic [150] were Israelis who alleged a violation of international law arising out of the deaths of children in an attack on a school bus by the Palestinian Liberation Organization. Judge Bork argued, in effect, that the 1789 federal statute upon which plaintiffs relied for jurisdiction created jurisdiction only over legal claims that existed in the eighteenth century.

Similarly, in Persinger v. Islamic Republic of Iran,[151] Judge Bork wrote a decision refusing to allow a former Iranian hostage to sue Iran in United States courts, despite a provision in the Foreign Sovereign Immunity Act permitting suits against foreign governments for injuries occurring within "all territory and waters, continental or insular, subject to the jurisdiction of the United States."[152] Plaintiff's injuries occurred within the American Embassy. Judge Bork concluded, however, that embassies were not sufficiently within the jurisdiction of the United States to trigger jurisdiction under the statute.[153]

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[149] 785 F.2d at 1076.

[150] 726 F.2d 774 (D.C. Cir. 1984).

[151] 729 F.2d 835 (D.C. Cir. 1984).

Finally, Judge Bork has relied on a cramped view of the statute of limitations to bar review of the Executive policy that placed Japanese-Americans in internment camps during World War II. The victims of that internment policy sought compensation for lost property in Hohri v. United States[154]. Plaintiffs' claims turned on whether military necessity justified their internment. Had the claims been brought earlier, they would have been dismissed due to the Court's war-time deference to Congress and the Executive. Recently, however, Congress has disclosed documents establishing that military necessity had never existed. Judge Bork nevertheless found plaintiffs' claims to be time-barred.

Judge Bork's views on Executive power also lead him to shield Executive action from the checks-and-balances of public scrutiny.

Thus, Judge Bork has given a narrow reading to the Freedom of Information Act, a statute designed to promote democratic accountability by opening up government processes to review. Judge Bork frequently urges a restrictive interpretation of the statute, which prevents disclosure of information to reporters, research groups, and others.

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[152] 28 U.S.C. § 1603(c).

[153] 729 F.2d 839.

[154] 793 F.2d 304 (D.C. Cir. 1986) (denial of rehearing en banc) (Bork, J., dissenting).

For example, in *McGehee v. C.I.A.*, 697 F.2d 1095 (D.C. Cir. 1983), Judge Bork argued against even *in camera* inspection of documents pertaining to the "People's Temple" in Guyana, which the C.I.A. had withheld from a journalist for more than two years. The majority wrote: "[W]here, as here, an agency's responses to a request for information have been tardy and grudging, courts should be sure they do not abdicate their own duty."[155] Judge Bork, by contrast, found no evidence of bad faith on the part of the agency, despite its dilatory and evasive behavior.

Second, Judge Bork would insulate the process of administrative deliberation by restricting access to information about the deliberative process and thereby often restrict effective lobbying. Indeed, he has stated that "[c]oncern about the effect of lobbying on agencies may itself" bar access to information.[156]

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[155] 697 F.2d at 114. *See also Meeropol v. Meese*, 790 F.2d 942 (D.C. Cir. 1986) (Bork, J.) (declining to order additional discovery against the F.B.I. based on a sampling of one percent of the pages withheld). Judge Bork also insulates corporate and commercial activity from public scrutiny. *E.g.*, *Greenberg v. Food and Drug Administration*, 803 F.2d 1213 (D.C. Cir. 1986) (dissenting from denial of summary judgment to bar disclosure to publication group of list of health care facilities owning CAT scanner manufactured by particular company).

[156] *Wolfe v. Department of Health and Human Services*, 815 F.2d 1527, 1538 (D.C. Cir. 1987), *reh'g en banc granted*, ___ F.2d ___ (July 2, 1987) (Bork, J. dissenting). Faced with a request for disclosure of an agency log that [footnote cont'd]

Third, Judge Bork would enlarge the scope of Executive privilege, which he describes as "an attribute of the duties delegated to each of the branches by the Constitution."[157] He contends that to restrict the privilege "to the President himself" would be "troubling" because it "ignores the President's need, both long-established and all the more imperative in the modern administrative state, to delegate his duties."[158] Judge Bork's judicial colleagues criticized his effort "to extend the privilege ... to the entire Executive Branch, [and thereby] create an unnecessary sequestering of massive quantities of information from the public eye."[159]

IV. CONCLUSION

This concludes our report on Judge Bork's record. . We believe it fairly characterizes his views, and the judicial philosophy behind it, based on the entire body of his work to the extent it has been available to us.

On the basis of this record, we do not believe it is possible to locate Judge Bork within the broad range of accept-

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recorded the progress of topics considered for regulation, Judge Bork argued that the agency's deliberative process would be seriously harmed by disclosure. Judge Bork contended that the agency had a right to conduct its deliberations, prior to publication of a decision in the Federal Register, free and clear of public scrutiny and without being lobbied by interest groups.

[157] Id. For a full discussion of Executive privilege, see R. Berger, Executive Privilege (1975); Dorsen & Shattuck, Executive Privilege, Congress and the Courts, 34 Ohio St. L.J. 1 (1974).

[158] Id. at 1539.

[159] Id. at 1533.

able judicial thought consistent with a commitment to liberty and democracy, and the institutions designed to protect and assure both. Nor do we think it possible to locate Judge Bork within the conservative judicial tradition exemplified by Justices Felix Frankfurter, John Harlan or, lately, Justice Lewis Powell.

Judge Bork may well have strong intellectual credentials, but that is not enough. The Senate has a constitutional responsibility to scrutinize a nominee's judicial philosophy and determine whether it is consistent with the function of the Supreme Court in protecting individual rights. Judged by that standard, Robert Bork's nomination as Associate Justice of the Supreme Court should be rejected.

Senator **Thurmond**. Thank you, Mr. Chairman.

Very briefly, I want to ask this question of each of you. I will start with Mr. Stewart and go right down the line.

Is it your opinion that Judge Bork has the competency, the dedication, the courage, the character and the fairness to be a Justice of the Supreme Court of the United States?

Mr. **Stewart**. Yes, and I would just reiterate the need to look at his record as a whole and add, Senator Thurmond, we need excellence in high Government posts. He has excellence. We need him.

Mr. **Born**. I agree completely, Senator.

Senator **Thurmond**. I cannot hear you. Speak up.

Mr. **Born**. I agree completely, Senator.

Senator **Thurmond**. Secretary Hills.

Ms. **Hills**. I do as well.

Mr. **McConnell**. Yes, sir.

Senator **Thurmond**. Mr. Campbell.

Mr. **Campbell**. Senator, I entirely agree. I simply add to what Professor Stewart said. In the area of his expertise, antitrust, he is a scholar beyond measure, superb.

Senator **Thurmond**. Now, I want to propound this question to each of you.

Do you know of anything he has said or done that would disqualify him from becoming an Associate Justice of the Supreme Court of the United States?

Mr. **Stewart**. I do not, Senator.

Mr. **Born**. No, sir. I do not.

Ms. **Hills**. No, sir.

Mr. **McConnell**. While I disagree with him on some things, I see no bar to his being a Justice of the Supreme Court.

Mr. **Campbell**. No, Senator.

Senator **Thurmond**. Would you recommend to this committee that this committee approve him to be a Justice of the Supreme Court of the United States?

Mr. **Stewart**. I would, Senator.

Mr. **Born**. As strongly as I could, Senator.

Ms. **Hills**. Very definitely so, Senator.

Mr. **McConnell**. Yes, sir.

Senator **Thurmond**. Speak up. I cannot hear you.

Mr. **McConnell**. Yes, sir.

Mr. **Campbell**. Yes, Senator.

Senator **Thurmond**. That is all. I want to thank you very much for your appearance here. We have kept you much longer than we thought we would. I think you have made excellent witnesses. I think you have given me the impression that you are really unbiased. You just want to see this country get a good Associate Justice and I appreciate your appearance.

Thank you very much.

The **Chairman**. Thank you all very much.

Our next panel of witnesses: Mr. Lee Bollinger, Dean of the University of Michigan Law School where he has taught since 1973 and a nationally known authority on the first amendment; Robert Rauschenberg, who is an artist of renown, has had many major museum exhibitions over the last 25 years in eight countries and has received Grand Prize, Gold Medals and other major awards on three continents for his work; and Mr. William Styron, who is a renowned author, but as far as the Senator from Alabama will be concern, of interest to him as he was a marine in World War II. He has won the Prix de Rome from the Academy of Arts and Letters and also receive Pulitzer Prize for "The Confessions of Nat Turner" and an American Book Award for "Sophie's Choice," and many other books and essays and collections.

It is a pleasure and honor to have the three of you here, and we will start, if we can, Dean Bollinger, with you first, if we may.

TESTIMONY OF PANEL CONSISTING OF LEE BOLLINGER, WILLIAM STYRON, AND ROBERT RAUSCHENBERG

Mr. **Bollinger**. Thank you, Senator.

I offer my testimony as a scholar of the first amendment and I do not in any way represent or speak on behalf of the University of Michigan Law School, of which I am presently the Dean.

The **Chairman**. You all are aware and you are going to try to keep within 5 minutes if we could for any statements.

Mr. **Bollinger**. Yes, Senator.

The central point I wish to make in my testimony today is simply this, that the first amendment scholarly writings of Judge Bork raise grave concerns about the wisdom of the nomination. His writings reflect an extreme and quite radical view of the proper interpretation and scope of the first amendment and a habit and quality of mind that disturb my confidence in his judicial temperament.

The **Chairman**. Dean, I apologize for interrupting. In my haste—and it will not be taken out of your time—in my haste to move this along I failed to swear the three of you in.

Would you all please rise to be sworn. Do you swear to tell the whole truth and nothing but the truth so help you God?

Mr. **Bollinger**. I do.

Mr. **Styron**. I do.

Mr. **Rauschenberg**. I do.

The **Chairman**. Dean, again, I apologize. Would you please begin again for us so we are not distracted.

Mr. **Bollinger**. Yes. I offer my testimony as a first amendment scholar and I do not in any way represent or speak on behalf of the University of Michigan Law School.

The central point I wish to make in my testimony today is simply this, that the first amendment scholarly writings of Judge Bork raise grave concerns about the wisdom of this nomination. His writings reflect an extreme and quite radical view of the proper interpretation and scope of the first amendment and a habit and quality of mind that disturb my confidence in the judicial temperament he would bring to the Supreme Court.

While a professor of law, Judge Bork expressed his views about the first amendment quite forcefully on at least two major occasions—one in the well known Indiana Law Journal article and the other in a lecture delivered at the University of Michigan Law School in 1979.

His thesis has three principal elements. First, that the only justification for giving constitutional protection to speech is that speech is relevant for the political life of a democracy. Second, that the only speech protected under the Constitution is explicitly political speech. And third, that speech advocating illegality or overthrow of the Government, regardless of the danger it presents, is not protected by the first amendment.

Now, there is much to be noted about this position. One must understand at the outset that there is nothing particular original or creative about the thesis. Sometimes a person develops a wholly unexpected and as yet undiscovered way of looking at a problem, and the originality of the new thesis is what makes it so distinctive from what everybody else in the field is saying. Such was not the case here.

What Judge Bork did was to adopt a position everyone already knew was possible but had thus far rejected as too constrained a reading of the first amendment. Everyone already knew that one rationale of the first amendment was that open and free discussion was necessary for a democracy. Judge Bork, however, was one of the very few who was prepared to make it the only rationale for free speech.

Everyone already knew it was possible to protect only explicitly political speech. Judge Bork, however, was the only one to embrace the idea. And everyone already knew there was a kind of paradox in using free speech to protect speech designed to overthrow the Government or to urge illegality. Judge Bork simply aligned himself with one side of the debate.

It is clear that Judge Bork, in his lectures and writings, staked out for himself a highly extreme position in first amendment jurisprudence, one he himself described as "departing drastically from existing court-made law," and "from the views of most academic specialists in the field."

It was, to put it in commonly understood terms, a position considerably to the right of the Burger court and of the moderate and conservative justices of the Warren court. Blaming the Supreme Court for being unduly influenced by what he has called the "intellectual class," and accusing proponents of free speech of building their theories of protection on a ground of "hedonism," and "moral relativism," Judge Bork undeniably established himself in a posture of polemical isolation.

I would like to focus very briefly on one of the main parts of Judge Bork's idea about the first amendment, and that is the notion that it protects only speech related to the political process.

It has long been understood in first amendment jurisprudence that one of the central purposes behind the first amendment is that it secures for every person a realm of personal liberty in which the individual may attempt to find personal meaning through the act of self-expression, without regard to whether others view it as advancing the general public interest.

Zachariah Chaffee, one of the earliest and greatest first amendment scholars, described this purpose as an individual interest in expression one needed "to make life worth living."

Judge Bork has always rejected this rationale of freedom of speech. His argument is that to recognize this individual interest in self-expression is tantamount to saying that anything that gives one pleasure should be protected against legal restriction—a position, of course, all would reject.

He argues that because many people have different ways of giving themselves pleasure, like creating art or going to baseball games or fixing prices, a judge would have no principled basis on which to hold that the activity of speech is entitled to any higher protection from social regulation.

The general thesis is unpersuasive. Just because people may differ about what things give them pleasure does not mean there is no widespread public consensus in the society about the importance of preserving the realm of speech as a special area of human activity through which people may achieve self-understanding and dignity.

To be sure, this reflects a value judgment, though it is, I believe, a judgment about society's values. But the fact of the matter is that there is no mechanical or value-free basis on which any system of freedom of speech can be constructed. That does not mean that there are no constraints on what judges may decide or that some choices may be more value laden than others. But in the sphere of authority reserved to them, our judges are asked to draw upon our traditions, including what we believe the Framers intended, together with our ever-evolving public values, as they set about resolving the issues before them, and there is no reason without more to think that these conventional sources of law are any less a guide when it comes to securing the individual interest in self-expression than when we try to decide what speech is important to the political process.

One might ask why it is important that we recognize multiple purposes of the first amendment—that it is, for example, both relevant to the political process and relevant to the individual interest in self-expression? One reason, of course, is that the scope of protection afforded may vary depending upon the purpose recognized. But there is another, even more fundamental matter at stake here, and I will close with this.

Our concern here is not just with the scope of protection afforded by the first amendment, but with the values being articulated by our highest court when enforcing that right. The Supreme Court does much more for our society than simply decide cases. It also helps us define our basic social values and ideals. And it is surely a matter of concern if we come to see all protection of speech under the first amendment, including artistic expression, as justified solely in terms of its utility to the political process. Our vision of ourselves would be sadly lessened.

Thank you, Senator.

The CHAIRMAN. Thank you very much, Dean.

Mr. Styron.

TESTIMONY OF WILLIAM STYRON

Mr. STYRON. Thank you, Senator.

My name is William Styron. I am a writer. I have published five novels: "Lie Down in Darkness," "The Long March," "Set This House on Fire," "The Confessions of Nat Turner," and "Sophie's Choice." I have also published a collection, "This Quiet Dust and Other Writings."

I am a member of the executive board of the American Center of PEN, the international association of poets, playwrights, essayists, editors, novelists and translators. I am speaking before you both as a writer and as spokesman for the 2,000 American writers of PEN.

We are a group of writers who value deeply our freedom to write as we wish, to express ourselves in prose and poetry on whatever subject and in whatever way we choose, free of every sort of governmental restraint.

We are able to enjoy this freedom because we live and write in a country whose highest law, the Constitution, guarantees it, and whose highest judicial organ, the Supreme Court, enforces it.

I and my colleagues do feel that Judge Bork spoke in good faith last week when he noted—and I am going to quote only one of the several quotations available to me—when he said:

> I now think * * * first amendment protection applies to moral discourse, it applies to scientific speech, it applies to news, it applies to opinion, it applies to literature. My views—I have given up my attempt to construct a new theory there.

I am not a lawyer, but I am by virtue of my profession a reader and listener who strives to understand the actions and beliefs of men and women through the compendium, the whole, of their language and thoughts. Therefore I can understand the statements Judge Bork has made before this committee only in the context of his written and spoken words over the past 16 years about the extent to which literature should or should not be protected by the first amendment.

Time would not really permit me to cite all of these. They are too familiar and famous to all who are gathered here. However, to refresh everyone's mind, I would like to repeat one of these statements made or written in a Michigan speech in 1979:

> There is no occasion * * * to throw constitutional protection around forms of expression that do not directly feed the democratic process. It is sometimes said that works of art, or indeed any form of expression, are capable of influencing political attitudes. But in these indirect and relatively remote relationships to the political process, verbal or visual expression does not differ at all from other human activities, such as sports or business, which are also capable or affecting political attitudes, but are not on that account immune from regulation.

As I and my colleagues reread these views, and as we considered and reconsidered them in the context of Judge Bork's statements here last week, we found ourselves troubled on two accounts. The first is as elemental as it is solemn. Judge Bork is a man of obvious erudition and intelligence who has devoted his life to pursuing questions of law, and who at the same time, and certainly for the last 16 years, has either explicitly placed literature outside first amendment protection or has failed to recognize the necessity of such protection.

Can we fully trust and believe that this man henceforth will be a staunch defender of first amendment freedom for literary expression? Judge Bork has spoken with admirable candor about certain large changes in his views about first amendment protections. I have no reason to question that he spoke in good faith. But how can we be sure that upon further reflection, and in similar good faith, he will not return to his earlier views, held for so long?

Both as individual writers and as members of PEN, we maintain that a full and absolutely unwavering protection of all literatures must be a matter not of passing opinion, but of conviction and faith. We are not persuaded that Judge Bork has that conviction or that faith.

The second point which disturbs us is an apparent lack of an adequate understanding of the properties of literature. Nowhere in Judge Bork's extensive testimony before this committee did he address himself to the existence of or necessity for, first amendment protection for an undefined category of nonobscene speech, which some might see as provocative. That such a category exists in his mind is clear from his reference to literature and art that, to use his own words, "approach pornography." But with this word "approach" many works of literature, indeed, many great classics, might be open to censorship.

We have learned during these hearings that Judge Bork agrees that "Tropic of Capricorn" by Henry Miller should be protected because it contains political ideas, but how would he rule on "Fanny Hill" by John Cleland, which contains no political ideas whatsoever, but which has been found protected by the Supreme Court? And how and why can any nonobscene literary work be considered unprotected as a matter of law?

The presence of an undefined category of nonobscene but possibly unprotected work in Judge Bork's scheme of things is dangerous to free, literary expression in the United States. Every day, books considered to approach pornography are removed from classrooms and library shelves. I am personally quite sensitive to this issue because as recently as last spring one of my own books, namely "The Confessions of Nat Turner," was removed from a school library in Iowa at the insistence of a mother who objected to her adolescent son's reading the book and finding in the book certain sexually explicit passages.

To the best of my knowledge, this book, which was banned by a majority vote of the school board, remains banned. It is extremely disturbing to any writer to know that his or her work can be, in effect, sequestered and ultimately condemned at the whim of a school board. Many of my fellow writers have in the recent past suffered this kind of censorship.

In closing, I want to take the liberty of recalling for the members of this committee the centrality to our country of a free literature and art. No person should be elevated to the country's highest judicial office who has not persuasively demonstrated that he believes unreservedly in that freedom.

Thank you.

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Testimony of William Styron
before the
Senate Judiciary Committee
Chairman Joseph R. Biden, Jr.
September 22, 1987

My name is William Styron. I am a writer. I have published five novels: Lie Down in Darkness, The Long March, Set This House on Fire, The Confessions of Nat Turner, and Sophie's Choice. I have also published a collection, This Quiet Dust and Other Writings. I am a member of the Executive Board of the American Center of PEN, the international association of poets, playwrights, essayists, editors, novelists, and translators. I am appearing before you both as a writer and as spokesman for the two thousand American writers of PEN.

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PEN American Center, a non-profit incorporation,
is an affiliate of International PEN, an association of writers
—poets, playwrights, essayists, editors, novelists—
with centers in Europe, Asia, Africa,
Australia and the Americas

I and my colleagues do feel that Judge Bork spoke in good faith last week when he noted:

> "I now think . . . First Amendment protection applies to moral discourse, it applies to scientific speech, it applies to news, it applies to opinion, it applies to literature. My views — I have given up my attempt to construct a new theory there."
>
> "The determination of what is pornographic for First Amendment purposes has to be made by the Supreme Court or by the lower Federal courts. Otherwise, if you let a state's definition of what is pornographic govern, things that are not pornographic in a Constitutional sense might be banned."
>
> "It seems to me that the settled law is now that the person writing the book does not have to prove that it's political or in any way connected to politics. The settled law is that the government has to prove it's obscene."

I am not a lawyer, but I am by virtue of my profession a reader and listener who strives to understand the actions and beliefs of men and women through the compendium, the whole, of their language and thoughts. Therefore I can understand the statements Judge Bork has made before this Committee only in the context of his written and spoken words over the past sixteen years about the extent to which literature should or should not be protected by the First Amendment. Please allow me to cite some now famous quotes:

In the Indiana Law Journal in 1971, Robert Bork stated:

> "Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic. Moreover,

> within that category of speech we ordinarily call political, there should be no constitutional obstruction to laws making criminal any speech that advocates forcible overthrow of the government or the violation of any law."

Judge Bork repeated this in a Michigan speech in 1979, saying:

> "There is no occasion . . . to throw constitutional protection around forms of expression that do not directly feed the democratic process. It is sometimes said that works of art, or indeed any form of expression, are capable of influencing political attitudes. But in these indirect and relatively remote relationships to the political process, verbal or visual expression does not differ at all from other human activities, such as sports or business, which are also capable or affecting political attitudes, but are not on that account immune from regulation."

However, by 1984 Judge Bork had somewhat modified these views, stating in the American Bar Association Journal:

> "I do not think that First Amendment protection should apply only to speech that is explicitly political. . . . I have long since concluded that many other forms of discourse, such as moral and scientific debate, are central to democratic government and deserve protection. . . . I continue to think that obscenity and pornography do not fit this rationale for protection."

Judge Bork said this again in his Worldnet interview in June 1987, adding:

> "I think political speech — speech about public affairs and public officials — is the core of the amendment, but protection is going to spread out from there, as I say, in the moral speech and the scientific speech, into fiction and so forth. . . . There comes a point at which the speech no longer has any relation to those processes. When it reaches that level, speech is really no different from any other human activity which produces self gratification. . . . Clearly as you get into art and literature, particularly as you get into forms of art — and if you want to call it literature and art — which are pornography and things approaching it — you are dealing with something now that is in any way and form the way we govern ourselves, and in fact may be quite deleterious. I would doubt that courts ought to throw protection around that."

As I and my colleagues reread these views and as we considered and reconsidered them in the context of Judge Bork's statements here last week, we found ourselves troubled on two accounts. The first is as elemental as it is solemn. Judge Bork is a man of obvious erudition and intelligence who has devoted his life to pursuing questions of the law, *and* who at the same time — and certainly for the last sixteen years — has either explicitly placed literature outside First Amendment protection or has failed to recognize the necessity of such protection. Can we fully trust and believe that this man henceforth will be a staunch defender of First Amendment freedoms for literary expression? Judge Bork has spoken with admirable candor about certain large changes in his views about First Amendment protections. I have no reason to question that he spoke in good faith; but how can we be sure that, upon further reflection, and in similar good faith, he will not return to his earlier views, held for so long? Both as individual writers and as members of PEN, we maintain that a full and absolutely unwavering protection of all literatures must be a matter not of passing opinion but of conviction and faith. We are not persuaded that Judge Bork has that conviction and faith.

The second point which disturbs us is an apparent lack of an adequate understanding of the properties of literature. Nowhere in Judge Bork's extensive testimony before this committee did he address himself to the existence of, or necessity for, First Amendment protection for an undefined category of non-obscene speech, which some might see as provocative. That such a category exists in his mind is clear from his reference to "forms of art — and if you want to call it literature and art -- pornography and things approaching it." With this word "approaching," many works of literature, indeed many great classics, might be open to censorship. We have learned during these hearings that Judge Bork agrees that Tropic of Capricorn by Henry Miller should be protected because it contains political ideas. But how would he rule on Fanny Hill by John Cleland, which contains no political ideas whatsoever, but which has been found protected by the Supreme Court? And how and why can any non-obscene literary work be considered unprotected as a matter of law?

The presence of an undefined category of non-obscene but possibly unprotected work in Judge Bork's scheme of things is dangerous to free, literary expression in the United States. Every day, books considered to approach pornography are removed from classrooms and library shelves. I am personally quite sensitive to this issue because as recently as last spring one of my own books, namely The Confessions of Nat Turner, was removed from a school library in Iowa at the insistence of a mother who objected to her adolescent son's reading the book and finding in the book certain sexually explicit passages.

To the best of my knowledge, this book, which was banned by a majority vote of the school board, remains banned. It is extremely disturbing to any writer to know that his or her work can be in effect sequestered and ultimately condemned at the whim of a school board. Many of my fellow writers have in the recent past suffered this kind of censorship.

In closing, I want to take the liberty of recalling for the members of this Committee the centrality to our country of a free literature and art. No person should be elevated to the country's highest judicial office who has not persuasively demonstrated that he believes unreservedly in that freedom.

Senator KENNEDY [presiding]. Thank you very much.

TESTIMONY OF ROBERT RAUSCHENBERG

Mr. RAUSCHENBERG. My name is Bob Rauschenberg. I am a painter.

Senator KENNEDY. I have had the opportunity to read your testimony. It is just superb. I know we are running into close time, Bob, but I thought it was a very eloquent expression of what you believe. If you can do that within a fair amount of time, we would like to give you the opportunity to do so.

Mr. RAUSCHENBERG. Okay. Democracy is not the product of law; democracy is the need of people to be free in dreams and reality. Controversy is part of creation and changes are essential to current survival nationally, and therefore internationally. The doors of control should be broad minded and wise with experience, compassion and understanding. This, without doubt, must be the history of the future.

In all totalitarian governments the greatest threats to evil powers have been the philosophers, the artists, the writers, the scientists, who represent the uncontrollable conscience, the observers and chroniclers to injustice. Hitler attacked the Bauhaus before starting on the Jews.

I worked over the last 6 years in China. The Chinese are changing, fearfully, and are trying to reconstruct the culture of the thousands of years of philosophy, religion and art that provided individual self-respect, dignity and a purpose to life to millions of people.

I have traveled and worked in Chile and Tibet and have witnessed the repression of the artists and the intellectuals, and have seen what it has done to the specific and general morale of the entire countries.

I have seen the cultural civil war destruction in Sri Lanka and the post-war waste in Thailand. I have just returned from Cuba, which is starving for a free-world culture.

Art is one of, if not the most, economical exchanges that dissonant ideologies can negotiate with and understand. Everyone is a winner without transgression or translator. Socrates and Plato, as seen on TV yesterday, are an "in accord" disagreement for their time, but are no more than history. Art cultural evaluations are in the present. Avant garde has to be publicly rejected as an intrinsic insurance of their newness and value, but legally protected.

Back to Bork: The Supreme Court is a final discriminating force to guide us into the future of global concerns. This responsibility requires a talent as creative and tolerant as the world is unpredictable. Flexibility, resilience and sensitivity are tantamount. A fixed point of view will only lead to disaster.

I am speaking/writing to express the unanimous fears that the art world has toward the nomination of Bork. Young, old, rich and hopeful are united by repulsion that a nouveau changeling, by his tongue and his unproven change of ideology, might entrap decades of innocences and artistic freedoms. Law is not a fixed point of view, even supremely, but a just love of people. There must be persons with less controversial and destructive qualifications to assume this highest office.

Art is the nourishment of society and the energy leading to the continuation and the universality of life. In my defensive research of Bork I have discovered a compulsive insistence on the letter of the law, and abuse to the exceptional and the minorities.

If this country is to remain the enviable land of growth and promise, this is what has to be gardened.

Jurisdictional responsibility begins before law.

Thank you.

[Prepared statement follows:]

ROBERT RAUSCHENBERG STATEMENT
ON ROBERT BORK

SEPTEMBER 22, 1987

DEMOCRACY IS NOT THE PRODUCT OF LAW; DEMOCRACY IS THE NEED OF PEOPLE TO BE FREE IN DREAMS AND REALITY. CONTROVERSY IS PART OF CREATION AND CHANGES ARE ESSENTIAL TO CURRENT SURVIVAL, NATIONALLY AND THEREFORE INTERNATIONALLY. THE DOORS OF CONTROL SHOULD BE BROADMINDED AND WISE WITH EXPERIENCE, COMPASSION AND UNDERSTANDING. THIS, WITHOUT DOUBT, MUST BE THE HISTORY OF THE FUTURE.

IN ALL TOTALITARIAN GOVERNMENTS THE GREATEST THREATS TO EVIL POWERS HAVE BEEN THE PHILOSOPHERS, THE ARTISTS, THE WRITERS AND THE SCIENTISTS, WHO REPRESENT THE UNCONTROLLABLE CONSCIENCE, THE OBSERVERS AND CHRONICLERS TO INJUSTICE. HITLER ATTACKED THE BAUHAUS BEFORE STARTING ON THE JEWS.

I WORKED, OVER THE LAST SIX YEARS, IN CHINA. THE CHINESE ARE CHANGING, FEARFULLY, AND ARE TRYING TO RECONSTRUCT THE CULTURE OF THE THOUSANDS OF YEARS OF PHILOSOPHY, RELIGION AND ART THAT PROVIDED INDIVIDUAL SELF RESPECT, DIGNITY AND A PURPOSE TO LIFE TO MILLIONS OF PEOPLE.

I HAVE TRAVELED AND WORKED IN CHILE AND TIBET AND HAVE WITNESSED THE REPRESSION OF THE ARTISTS AND INTELLECTUALS, AND HAVE SEEN WHAT IT HAS DONE TO THE SPECIFIC AND GENERAL MORALE OF THE ENTIRE COUNTRIES.

I HAVE SEEN THE CULTURAL CIVIL WAR DESTRUCTION IN SRI LANKA AND THE POST-WAR WASTE IN THAILAND. I HAVE JUST RETURNED FROM CUBA, WHICH IS STARVING FOR A FREE-WORLD CULTURE.

ART IS ONE OF, IF NOT THE MOST, ECONOMICAL EXCHANGES THAT DISSONANT IDEOLOGIES CAN NEGOTIATE WITH AND UNDERSTAND. EVERYONE IS A WINNER WITHOUT TRANSGRESSION OR TRANSLATOR.

SOCRATES AND PLATO, AS SEEN ON T.V., ARE "IN ACCORD" DISAGREEMENT FOR THEIR TIME, BUT ARE NO MORE THAN HISTORY. ART CULTURAL EVALUATIONS ARE IN THE PRESENT. AVANT GARDE HAS TO BE PUBLICLY REJECTED AS AN INTRINSIC PART OF THEIR NEWNESS AND VALUE, BUT LEGALLY PROTECTED.

BACK TO BORK: THE SUPREME COURT IS A FINAL DISCRIMINATING FORCE TO GUIDE US INTO THE FUTURE OF GLOBAL CONCERNS. THIS RESPONSIBILITY REQUIRES A TALENT AS CREATIVE AND TOLERANT AS THE WORLD IS UNPREDICTABLE. FLEXIBILITY, RESILIENCE AND SENSITIVITY ARE TANTAMOUNT. A FIXED POINT

OF VIEW WILL ONLY LEAD TO DISASTER.

I AM SPEAKING/WRITING TO EXPRESS THE UNAMIMOUS FEARS THAT THE ART WORLD HAS TOWARD THE NOMINATION OF BORK. YOUNG, OLD, RICH AND HOPEFUL ARE UNITED BY REPULSION THAT A NOUVEAU CHANGLING, BY HIS TONGUE AND HIS UNPROVEN CHANGE OF IDEOLOGY, MIGHT ENTRAP DECADES OF INNOCENCES AND ARTISTIC FREEDOMS. LAW IS NOT A FIXED POINT OF VIEW, EVEN SUPREMELY, BUT A JUST LOVE OF PEOPLE. THERE MUST BE PERSONS WITH LESS CONTROVERSIAL AND DESTRUCTIVE QUALIFICATIONS TO ASSUME THIS HIGHEST OFFICE.

ART IS THE NOURISHMENT OF SOCIETY AND THE ENERGY LEADING TO THE CONTINUATION AND UNIVERSALITY OF LIFE. IN MY DEFENSIVE RESEARCH OF BORK I HAVE DISCOVERED A COMPULSIVE INSISTANCE ON THE LETTER OF THE LAW, AND ABUSE TO THE EXCEPTIONAL AND THE MINORITIES.

IF THIS COUNTRY IS TO REMAIN THE ENVIABLE LAND OF GROWTH AND PROMISE, THIS IS WHAT HAS TO BE GARDENED.

JURISDICTIONAL RESPONSIBILITY BEGINS BEFORE LAW.

--ROBERT RAUSCHENBERG

Senator **Kennedy**. Thank you very much.

I think all of the statements have been very powerful in addressing some of the items which we have addressed in a rather preliminary way during the course of the hearings. I think particularly with regard to first amendment issues in the areas of writing, authors, as well as painting, your testimony has been very helpful.

Mr. Styron, you have been recognized with awards which you richly deserve. You have written about controversial items and emotions and feelings in our society, and out of those writings have come stimulated discussion and insight about these controversies.

I am sure you will probably remember the old book-burning days. The first book-burnings was of the Bible as I understand it. You have mentioned here that one of your books that received the Pulitzer Prize, "The Confessions of Nat Turner," you have mentioned has been removed from libraries in parts of the country. And you have talked about the importance of defining what is obscene material and what should not be confused with obscene material.

One of the great statements on that and wise advice we got in our country was given a number of years ago by President Eisenhower up at Dartmouth College in 1953, and I quote:

"Don't join the book-burners. The right to speak ideas, the right to record them, the right to have them accessible to others is unquestioned or it isn't America."

I think President Eisenhower described the danger of book-burning in very clear terms. You haven't referenced the dangers of actual book-burning, but you have drawn in your testimony the very clear definition between obscene material and other types of material, and I am just wondering if you would again review with us why you believe that first amendment protection for journalists is so important, to be able to write and to assure that we would not return to a book-burning type of a society.

Mr. **Styron**. Well, Senator, I don't feel that we are going to return to a book-burning society. I certainly hope not. Nor do I feel that Judge Bork is a zealot-type book-burner.

I do believe, though, his pronouncements about speech, his statements limiting the protection of the first amendment to political speech alone, leave us much in doubt as to how he would treat, let us say, a case which came to the Supreme Court in which the dark areas of obscenity or pseudo-obscenity raised their head.

As I said before, I and my fellow writers feel that we should write anything we want to write. We should be able to treat sex with frankness and candor commensurate with our artistic aims. When books are taken off shelves, this seems to me a very dangerous act on the part of the citizenry.

My feeling about Judge Bork is that, given his past statements, he would not be friendly to writers who wanted to write in the way I just described. This bothers me. I am sure, because I have talked with enough of them, that it deeply bothers and troubles most American writers.

Senator **Kennedy**. The obvious book-burning that President Eisenhower was referring to was actually not the type of burning that we saw in Nazi Germany, but he was talking more in terms of an expression or an attitude, as I was, and I think your response was certainly related to that.

Mr. Rauschenberg, you have talked about your visits to countries of totalitarian regimes and the repression there that you saw in terms of art. Clearly, they don't have a first amendment.

The absence of these kinds of protection for art does this diminish a culture, and diminish a tradition, and diminish free expression, and diminish creativity?

Mr. RAUSCHENBERG. Absolutely. And on an extremely wide horizon. The personalities, the incentives, the motivations of all activities are not active or alive because of this kind of repression.

In China, while I was there they started sort of opening up. Not because I was there, but I just happened to be, fortunately, there right on the beginning edge of it. And they had—which I don't really approve of either, and if they had the first amendment they couldn't have done that either, and that was that—it wasn't exactly a law, but it was suggested, and it was supported, that all political slogans were removed from all the works, antique or new. Now that over here should be considered some form of destruction.

Let's see, where else? Well, Cuba is very upset about being cut off from all kinds of cultural aspects, and Sri Lanka is being torn apart. But the main thing is this attitude of the people. It affects everything that they do.

I know that, you know, I am talking about—I guess I am one of those people—calls it private interest or something? But, I mean, anybody would have to be out of their mind to decide that private interest should be art.

Senator KENNEDY. My time has expired.

Senator Specter, Senator Metzenbaum just had a brief comment, then I would yield to you, if that is all right.

Senator METZENBAUM. I am going to have to excuse myself, but I just want to say how pleased I am to see this panel. I am sorry I wasn't with all of you. Robert, I am happy to see you. We are all friends. And, Mr. Styron. Mr. Bollinger.

I think there is something rather reassuring to have two such renowned persons as you, Mr. Styron, and you, Bob Rauschenberg, coming forward to express your views. It isn't often done. As cochairman of the Concerned Senators for the Arts, it is reassuring to us who believe in the arts, to know that you have a concern about the kind of government that we have here, the kind of Supreme Court we have, and I am grateful to you for being with us today and expressing your views.

And you, Mr. Bollinger, we thank you for——

Mr. RAUSCHENBERG. It is a privilege of the first amendment.

Senator METZENBAUM. Thank you, Mr. Bollinger. We don't intend for Ohio State to have any special sympathy for your team, notwithstanding your being present.

Senator SPECTER. Thank you very much, Mr. Chairman.

The testimony has been very impressive. I saw some of it on television as I was moving through the Capitol. We just had a vote, so I missed a little bit of it.

I do believe that the expression of your concern is certainly understood. I believe that the first amendment gives substance to the values which you have articulated here today, is firmly embedded in the Constitution, and firmly embedded in the values of our society.

I can understand the concerns which you have expressed based upon the writings of Judge Bork going back to the 1971 Indiana Law Review. There have been some modifications of his position. I understand the statements which you, Mr. Styron, made about being concerned about intent, about feeling as opposed to change of position, and being concerned about another change of position, and that is a concern which a number of us have expressed.

Judge Bork has stated that he will accept settled doctrine in the first amendment area, even though, as for example, on the clear and present danger test, he disagrees philosophically with it. So he has given those assurances.

The Court is solid on this issue, has been for a very, very long time. *Brandenburg* is a unanimous opinion, and the first amendment freedoms which extend to Fanny Hill and other books have been firmly established in the judicial process for a very, very long time.

Mr. Bollinger, I would have one question for you. You made a comment about the Supreme Court establishing the values as well as protecting individual rights. There is some thought that it is a matter for the legislature to articulate the values in our society, and I would be interested to hear just a little more on your view on that, the General Assemblies and the Congress expressing majority role, which is a little different than the protection of a constitutional right when you come to the issue of the protection of a value, or the articulation or establishment of a value.

Mr. **Bollinger**. I think the issue of how to go about interpreting the Constitution and the issue of the proper role of the Supreme Court in our governmental system are difficult ones. A lot of people have found it very difficult to give some coherent statement of what it is we should look to when interpreting the Constitution.

It is very easy in light of that difficulty to say simply that you are in favor of doing whatever the framers intended. The problem is, of course, that we frequently don't know what the framers intended; and, even when we do know what they intended, it may still be the case that they intended only particular things for their time and assumed that the meaning of the document could change as the society changed.

If that is true, then, of course, we are back to the problem of how to decide what the Constitution should mean today? What should we look to? Here people often speak of discovering our "public values." I take it that even Judge Bork has recently found himself trapped by relying on current public values in the gender area, raising questions about his commitment to the simplistic formula of exclusive reliance on original intent.

Let me just stress two points about Judge Bork's position in the first amendment area, the position he stated and developed with great forcefulness while a professor at the Yale Law School.

One is to note that he would limit the range of first amendment protection to explicitly political speech. That is a very narrow scope of protection, and an extreme position given the jurisprudence and the academic writing of our time. My point is that this nomination must be considered in light of that background, and that it is reasonable for those who hold a very different view of what the first amendment means to oppose this nomination because of a disagreement about the proper scope of rights like that of freedom of speech and press.

The second point I want to emphasize is that it is not only a matter of what speech is protected, but also of why it is protected. Now by that I mean that, even if a court is prepared to protect novels or art, for example, it is still a matter of importance to know what the rationale for protection is. If the speech is protected only because it has utility for the political process, that will in itself can express a value about what we think of art and its role in the society.

That is because people look to the judicial branch for more than simply resolving disputes. Cases like those dealing with racial discrimination do more issue results, they help us think about and define the general values of the society.

I think the testimony here states powerfully that people who engage in creative work, are deeply affected by the general atmosphere of the society, whether it is repressive and unsympathetic or liberal and open, and our courts contribute to that atmosphere.

Senator SPECTER. Thank you very much.

The CHAIRMAN. I have one question, Dean. There has been a lot of talk about how Judge Bork is in the mainstream. Can you tell us whether any recent Justice of the Supreme Court has taken a position on the first amendment, freedom of expression, that Judge Bork took up through June of this year?

Mr. BOLLINGER. None that I know of. I guess I should say I think it depends upon which branch of his thesis you are talking about. If you are talking about Judge Bork's view that the first amendment should not protect anyone who advocates illegality or overthrow of the government, regardless of the likelihood of that occurring, then, of course, one can find Justices who took that position. You can go back to 1919 and find Justice Sanford, for example, and that is, of course, what Judge Bork said, that he agreed with Justice Sanford.

If, however, you take the proposal that the first amendment protects only political speech, explicitly political speech, then I think Judge Bork stands alone.

The CHAIRMAN. And I say to Mr. Rauschenberg and Mr. Styron—I have one question for each of you, and it is the same question. You, obviously, are very concerned or you wouldn't be here. Could you tell me what leads you to feel that anything in your work, either one of you, might be in jeopardy as a consequence of the philosophy, as you understand it, articulated by Judge Bork?

That doesn't mean you still wouldn't be against him if it is nothing in your work, but I am curious. Can you personalize a little for me?

Mr. STYRON. I will try, Senator. I don't know if this is valid or not, but we know, for instance, that pornography is a very lively issue in the United States. We also know that the line is often blurred between pornography and art. At the moment I think we live in a pretty healthy environment. People know what pornography is in general, and people know what art is in general.

But I could conceive of a situation which might be a recapitulation of the year 1933, when Joyce's masterpiece "Ulysses" became a legal matter here, and the famous Judge Woolsey let the book into the United States over the dead bodies of many Puritans. I don't foresee a situation like that, but I could conceive of it.

I could conceive of a situation in a particularly repressive, puritanical environment—which seizes America from time to time—in which a work of literature, going up the chain of command from court to court, could end up before the Supreme Court of the United States. And I could conceive, I believe, given what I feel about him and what I know about him, that Judge Bork might take a work of art, call it pornography, and commit therefore a disgraceful act of philistinism upon the people of the United States.

This, of course, is a fantasy scenario, but, to answer your question, it is what I could foresee.

The **Chairman**. Mr. Rauschenberg.

Mr. **Rauschenberg**. Somehow I guess we overlap there, but I would be most concerned about cutting—well, any form of censorship in the arts because it is very tricky. Because it is not an essential, it is not measurable explicitly about what the value pound by pound might be. But it can rot a society, the lack of expression.

And I know that this happened in Florida. That like the first part of the budgets they cut is art, which includes music and writing, and so forth, and books. It is a subtle move to destroy a society, like I pointed out that Hitler's first move was to get rid of the Bauhaus.

Now, a lot of people, unless you were in Germany, didn't even know what the Bauhaus was. But it was an extraordinary attitude toward the relationship of objects, man and thinking, and so it was more evil than any religious move.

The **Chairman**. Well, my time is up. I thank you.

The Senator from Wyoming.

Senator **Simpson**. I welcome you to the panel, and regret that I was not here for your presentation, but I have had it pressed upon me and have not missed very much of these proceedings. I heard your presentation and I have come to admire your work. I have read some of your material, sir, and you have made an impressive contribution to literature in this country.

And I think what my good friend from Massachusetts says, Senator Kennedy, that your writings have been provocative, stimulating and works which encourage discussion and debate. I think that is great. We need a yeast in our society.

And Robert Bork threw a little yeast into the sourdough a few years ago. He wrote an article in the Indiana Law Journal, which they have wrapped around his neck like a tire iron for the last 6 days, it is called freedom of expression, I believe. It is theory. It is lots of things. He calls it general theory, ranging shots, arguments, evolving, informal. Thought it not worthwhile to convert these speculations and arguments into a heavily researched, balanced or thorough presentation for that would result in a book. He has had this thing driven home like a golf ball for every second I have been sitting in this place.

Doesn't that kind of grab you as a little bit, you know, different from what you are saying and what everybody is saying? How total freedom of expression—is that only for artists and thoughtful authors, or is for those who wish to kind of go into a flight of fancy and throw something on a piece of paper, and say there is something provocative for you, chew around on that one for a while, and not have it brought up 26 years later as gospel?

What is your thought on that?

Mr. STYRON. Are you addressing that to me, sir?

Senator SIMPSON. Yes, I am.

Mr. STYRON. Okay. Well, again, I want to reiterate, I am not a lawyer. I am not at all comfortable with legal terminology, and Judge Bork writes, to my mind, rather dense and difficult prose. I don't relate to it very well.

Aside from that, the gist of that particular statement in the Indiana Law Journal seems to be that unless writing is, as he says, explicitly political, it does not enjoy the same protection of the first amendment.

Mr. RAUSCHENBERG. May I say something?

Senator SIMPSON. Yes, sir.

Mr. RAUSCHENBERG. I would not want him to ever have not written anything that he has written, but to put someone with such a negative, open negative point of view in charge of what everyone else writes, it seems to me to be the problem.

Senator SIMPSON. The interesting thing to me, and I think to you, if you have observed this, is that we have had an inordinate amount of time spent on this article. I have said, and it seems to me that the way this article has been dissected and masticated it is going to have a chilling effect on people who are going to present themselves to any President for any future nomination to the U.S. Supreme Court.

I don't think that is something that any one of you, or me, want to see, but I can assure you it is. Because, you see, this man has been on the federal court and was approved by this panel unanimously. Judge Robert Bork was approved by this panel unanimously twice, once under a Republican Senate, once under a Democratic Senate, and he went to the bench of the second most important court in the land, the District of Columbia Court of Appeals, and he has served there for nearly 6 years, and not one single person has come forward in this chamber yet to challenge his integrity or his decisions from that court.

Hear what I am saying. The Supreme Court of the United States didn't challenge 106 of them. No attempt to bring them up for appeal. There were 400 or so, 6 dissents. And of those six dissents of a gutsy judge in the District Court of the Appeals of Columbia, the U.S. Supreme Court by majority decision upheld his dissents. You guys would have to like that. That is the way you have lived.

And I have sat here and listened to how this man would sterilize the human race, that he is antiwoman, antiblack, anti-first amendment, and if anybody can read, his case of *Ollman* v. *Evans* where he opens the first amendment expands it far beyond *New York Times* v. *Sullivan* in the political arena, and talks about the expansion of the meaning of the first amendment. I can't help but believe that there is so much distortion here—it is good for the people of the United States to hear this kind of a hearing.

I was fascinated—it was Archibald Cox who once described Dr. Alexander Meiklejohn's book, which is called "Free Speech," and its relationship to self-government. I am sure many of you have, perhaps, read that. In his early writings, and this was his early writings, Meiklejohn said, the purpose of the first amendment—he was interested only in the political speech issue. I see that the professor is nodding his head, Dean Bollinger. You know that is all he was interested in at first.

And he said the purpose of the first amendment "is to give every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal."

"And later on in a remarkable life, Dr. Meiklejohn came to define the spectrum of protected speech broadly to include "education, the achievements of philosophy, and the sciences, literature and the arts."

Isn't it odd that as Judge Bork pursued his odyssey through life that he has been condemned in a ferocious fashion for embarking upon the same intellectual journey undertaken by Dr. Meiklejohn. Fascinating.

Yes? If you would have a response to that, I would be interested. My time has expired.

Mr. **Bollinger**. To begin, I think that to believe freedom of speech should be uninhibited robust and wide open, to use the words *of New York Times* v. *Sullivan,* certainly does not commit one to appoint to the Supreme Court anybody who happens to have a view.

I also think it inappropriate to regard being provocative or challenging to conventional views as necessarily a virtue.

Taking a racist view, which surely may be very provocative, we would hardly regard as a virtue. We ought to look at the substance of what people say. I think precisely the same thing is true with this nomination. It is reasonable for people to examine the views Judge Bork has expressed or the positions he has taken, that bear on his likely performance as a Supreme Court Justice.

The views of Judge Bork I have referred to, I should add, were not expressed merely in one article. He expressed them throughout the 1970's and, as I understand it, up into the 1980's as well. I participated with Judge Bork on a panel discussion in February 1979, following a lecture he delivered at the University of Michigan Law School, and he took precisely the same position he had in his 1971 article.

Now, again, Judge Bork's views of the first amendment were not terrible, but it is important to know what they were and if you disagree with those views, as I do, I think it is reasonable to take them into account in deciding whether to oppose this particular nomination.

Now, let me say something about Judge Bork's judicial performance. I quite agree that his judicial opinions in the first amendment area have been very good. In fact, I authored a letter to the ABA Committee on the Judiciary, which stated that a group of us on the Michigan Law School faculty had examined all of Judge Bork's opinions and concluded that they displayed a basic judicial competence required of a Justice of the Supreme Court.

I think, for example, that Judge Bork's opinon in *Ollman* v. *Evans* is very fine. I think a number of his opinions are very fine.

But there are two points to be considered in deciding what these opinions indicate about Judge Bork's likely performance as a Supreme Court Justice. One has been made repeatedly, but the other point has not. The first is that, of course, being on the Supreme Court is different from being on the court of appeals. You are freer to create law. That is a fact of our judicial system.

Senator SIMPSON. Dean, when you said—excuse me for interrupting. When you said you were part of a panel that recommended he be put on the Supreme Court, did you mean circuit court? Or Supreme Court?

Mr. BOLLINGER. No I am sorry. The ABA Committee on the Judiciary, which I believe testified here yesterday, recently asked a group of us at the University of Michigan Law School to examine the entire body of Judge Bork's judicial opinions to see whether they exhibited characteristics of basic judicial competence that would justify consideration as an appointment to the Supreme Court.

Senator SIMPSON. I see. Okay.

Mr. BOLLINGER. We did as the committee asked. I signed the letter that summarized our evaluation, which concluded that indeed he had displayed the requisite qualities to merit consideration for an appointment to the Supreme Court. We left open the possibility that there would be other considerations that might lead one to oppose the nomination

The second point I wanted to make, to go back, as to why Judge Bork's performance on the court of appeals cannot in fairness be taken as conclusively overriding his past history as a scholar is because he was not presented with cases while a court of appeals judge that tested him on whether he continues to hold the positions he advocated throughout his scholarly life.

It is not possible, based on his judicial record, to say that indeed he would live by *Brandenburg* v. *Ohio*. It is not possible to say, based on his judicial performance, that in fact he would protect artistic expression. It is not possible because he wasn't presented with cases raising those issues.

Judge Bork's record as a judge is therefore not conclusive. Now of course, one has his testimony here, and that is very important. But one also, in making a judgment about the future, take into account his past history as a writer on what the first amendment can and should mean.

Senator SIMPSON. I hope you will take a look at that case and take a look at——

Mr. BOLLINGER. Oh, I have.

Senator SIMPSON [continuing]. *Lebron* v. *WMATA*. He protected that fellow, and that fellow is now still doing his work, and it is called art or it is called political objection. I just think that it is important that we remember that instead of just talking the talk, this guy has walked the walk. And you get into all the theory you want, and the next guy up, if we lose Bork, you won't get to ask much. You won't find out much.

The CHAIRMAN. The Senator from New Hampshire.

Senator **Humphrey**. Mr. Chairman, a number of citizens apparently share the concerns of Mr. Rauschenberg, who suggested that the Senate has no business, to use Mr. Rauschenberg's words, putting Judge Bork in charge of what everyone else writes. That is Mr. Rauschenberg's concern. I can assure him that that need not be his concern. If that is truly his concern, then he has been victimized, as have been so many in our society today, by those who have deliberately misrepresented Robert Bork's position, in this case on the first amendment.

What are the nominee's words as he testified before the committee last week? I read from the transcript, page 168—don't know if that is of the entire thing or for a particular day. But in any case, Judge Bork had this to say about his views on the first amendment.

He acknowledged that as a college professor he had created what he called a bright line that surrounded political discourse, I guess you would say, but he said this, in any event, in his testimony:

"And now I think, I have for some time, first amendment protection applies to moral discourse, it applies to scientific speech, it applies to news, it applies to opinion, it applies to literature, and by clear implication art and forms of art. My views, I gave up my attempt to construct a new theory there"—this wasn't the first time, by the way, that he talked about—publicly talked about his change of opinion over the years and why, indeed, he had changed his opinion and his views.

I read from the, or refer to the 1984 edition of the ABA Journal, in which he responded to the criticism, which has surfaced here again today, saying in his letter to the Journal:

"As it happens, Jamey Calvin"—who was his critic at that time—"Jamey Calvin's summary of my views is both out of date and seriously mistaken. I do not think, for example, that First Amendment protection should apply only to speech that is explicitly political. Even in 1971, I stated that my views were tentative and based on an attempt to apply Professor Herbert Wechsler's concept of neutral principles."

And get this part, this tells you a lot. "As the result"—Judge Bork continues—"As the result of the responses of scholars to my article, I have long since concluded that many other forms of discourse, such as moral and scientific debate, are central to democratic government and deserve protection. I have repeatedly stated this in my classes." Obviously which occurred before he became a job. "I continue to think that obscenity and pornography do not fit this rationale for protection."

Now, if we look at the cases the Judge has decided, we can see that he applies what he espouses. In the *Brown and Williamson Tobacco Corp.* v. *FTC*, in 1985, he joined with Judges Scalia and Edwards. This case involved commercial speech. Commercial speech to be sure, not novels or other kinds of literature, but at the same time to be sure not political discourse, either. Commercial speech was what this case involved.

The *Brown and Williamson* opinion vacated an injunction restricting a cigarette company's ability to engage in certain kinds of advertising. I mean, what party today is a lower skunk than tobacco companies and their advertising, and yet he stood up for the right of free speech, in this case commercial speech, in that decision.

There are other cases as well. If I could find my way through this pile of paperwork, I would come to them. The Senator from Wyoming referred to *Lebron* v. *Washington Metropolitan Area Transit Authority,* which ought to be of interest to our artists and our writers, in which Judge Bork held it unconstitutional for the Washington, D.C. subway system to prevent an artist from displaying a poster which was blatantly and obnoxiously, I think you would say, anti—how to phrase it? Critical of the President. Critical of the President. Free speech.

So, yes, as a professor he had a doctrinaire point of view on the first amendment at first, but over the years, as he matured in his opinions, and in part due to——

But over the years, as he matured in his opinions, and in part due to the dissection of his opinions by his fellow academics, he came to a much broader understanding of the first amendment. And, as he said in testimony, "I now think and have for some time that the first amendment applies to moral discourse, scientific speech, news, opinion, and literature."

So the criticism might have been valid 10 or 15 years ago, but I really don't think it is today. And I hope that is somewhat reassuring to Mr. Rauschenberg—perhaps it isn't, perhaps it is—and to others who share that concern, which I feel is largely based on attempts to smear the nominee purely for political reasons.

Mr. RAUSCHENBERG. Even 15 years ago I can't imagine anybody making a statement like that.

Senator HUMPHREY. Fair enough, fair enough—but people change.

Mr. BOLLINGER. May I say something?

The CHAIRMAN. Yes. Time is up, but please respond, if you will, to the Senator, and then we'll move on.

Mr. BOLLINGER. I think Judge Bork has in his testimony apparently changed two branches of his previous views about the first amendment. He has said that he now believes the first amendment should protect something more than explicitly political speech, and that he accepts *Brandenburg* v. *Ohio*. There remains in my own mind some confusion as to what he means by those statements.

The primary problem is that one needs more than general, fuzzy, statements to know what will happen when real cases arise. It is possible, as we know from the communism cases of the 1950's, for people to issue strong statements of support for freedom of speech but to allow law to be applied in highly repressive ways.

Nevertheless, even if you take his present testimony, Judge Bork remains committed to one very important branch of his original theory, and that is that the first amendment protects speech only because of its relevance for the political process. That raises concerns too, and I think the testimony here today helps emphasize the importance of having a first amendment that protects speech not only for its political value but for its value as a means of achieving individual dignity and creativity.

May I say just one more thing?

The CHAIRMAN. Surely.

Mr. **Bollinger**. Again, I wish to stress that Judge Bork expressed his views about the first amendment not only in his Indiana Law Journal article. He did not, for example, change his views about limiting protection to explicitly political speech. Because in 1979 he took exactly the same position. Quoting from pages 8 and 9 of his lecture at the University of Michigan Law School, he said: "It is sometimes said that works of art or indeed any form of expression are capable of influencing political attitudes, but in these indirect and relatively remote relationships to the political process, verbal or visual expression does not differ at all from other human activities, such as sports or business, which are also capable of affecting political attitudes."

Now, it is a disservice to Judge Bork, and in any event incorrect, to treat his scholarly views as nothing more than a provocative statement said in 1971.

The **Chairman**. My recollection, I say to my colleagues, is somewhat similar to yours, Dean, because I remember asking him, assuming it's not, quote, pornography—which is obviously a tough line to draw—isn't art for art's sake, just because it makes us laugh, just because it makes us cry, just because it makes us feel good—it can have no other purpose than that, none, zero—isn't that worth having, isn't that worth protecting? And my recollection is—although we will check the record, I am sure everyone will—he did not share that same intellectual rationale. I believe art for art's sake, all by itself, even if it has no relationship to anything, other than it makes the artist feel good, is worth protecting.

But, at any rate, I want to thank you all.

Mr. **Rauschenberg**. Could I just say one more thing?

The **Chairman**. Sure.

Mr. **Rauschenberg**. Just addressing to that point—it will be very short. And that is I don't see how anybody can separate sports and business and art and food from any other aspect of life, and all of this influences politics—or it should, because it's the search of the people.

The **Chairman**. I see Senator Leahy has arrived.

Senator **Leahy**. Thank you, Mr. Chairman, sorry I had to step out briefly. I will ask my question only of you, Mr. Styron, and hope that the other two members of the panel won't feel they have been neglected—but they have answered the same questions that I would ask. Incidentally, as the chairman said, this is a distinguished panel, I didn't think this committee would be asking questions of the author of "The Confessions of Nat Turner" and "Sophie's Choice" and others, but I think you are probably the ideal witness, after all the law professors and lawyers we have talked to. And your statement—I was listening to you as you gave it—you spoke not being a lawyer. Of course, the question of the first amendment goes to all people and not just lawyers. And you said in your testimony—and it's probably why your testimony carried even more weight, coming from a nonlawyer—you said that for a Supreme Court nominee a full and absolutely unwavering protection of all literature must be a matter not of passing opinion but of "conviction and faith." And in our household that's the way the Leahy siblings were brought up, and it really provides a context within which this committee has got to evaluate Judge Bork's statements.

Let me just ask you two questions that may be relevant to this evaluation.

First, Judge Bork has been the beneficiary of that same rich tradition of freedom of expression that you describe. Now, there aren't too many nations in the world in which a law professor and a judge could call so many major rulings of the highest court in his land "unprincipled," "specious," or "unconstitutional," or describe the highest court in his country as "the perpetration of limited coup d'etat" without having some fear of reprisal. So we'd all agree that Judge Bork himself has been a beneficiary of that rich tradition of freedom of speech.

Now, based on what you know about Judge Bork and his views, do you think that the fact that he has benefited so extensively from first amendment protections might have given him the conviction and faith that a broad reading of the first amendment is essential to in our way of life?

Mr. **STYRON**. Well, Senator, I don't know if he has been an inheritor of that noble concept, but I would say that, like the rest of us, he should have. All the cliches need not be trotted out again, but it is our most precious heritage, the freedom to write and to speak as we wish. And it would be my earnest hope that anyone who attained to the high position of Justice of the Supreme Court would be a man who honored that very important trust, that he would not see the writing of books like "Ulysses" or "Tropic of Capricorn"—or even books more explicit, more, if you will, raunchy—as a threat, so long as they were works of artistic merit in the eyes of the peers of that writer.

I do think that Judge Bork is an inheritor of the same tradition, with the same rights and freedoms that you and I enjoy.

Senator **LEAHY**. Thank you. Mr. Chairman, you have covered the other areas. I have no further questions.

The **CHAIRMAN**. Gentlemen, thank you very, very much. You have enriched this hearing.

Senator **THURMOND**. I want to thank you all.

The **CHAIRMAN**. Now our next panel is a law enforcement, and while they are coming up, speaking of freedom of speech, I was handed a note suggesting that I had implied or said I was stepping down as chairman from this committee. I want the record to show I'm not; this gavel is mine until they take it from me, and that only occurs in an election.

Senator **THURMOND**. I didn't hear you.

The **CHAIRMAN**. Someone passed me a note saying there was a wire story saying I was stepping down and giving the gavel to Senator Kennedy. But you all are stuck with me.

And we have a heck of a group here coming up—and I mean that sincerely. While they are sitting down—Robert Fuesel, president of Federal Criminal Investigators Association; Dewey Stokes, president of the Fraternal Order of Police; Jerry Vaughn, executive director, International Association of Chiefs of Police; John Bellizzi, executive director, International Narcotics Enforcement Officers Association, a police organization; Donald Baldwin, executive director of the National Law Enforcement Council; Cary Bittick, executive director of the National Sheriffs Association; John Duffy, chairman, Law and Legislative Committee, National Sheriffs Association; Johnny Hughes, director of the National Troopers Coalition; and Frank Carrington, executive director of Victims 'Assistance Legal Organization.

Gentlemen, it's a true pleasure to have you all here. We have shared this relationship across the table many times. Ninety-nine percent of the time we are agreeing; we may disagree on this one. But I am delighted to have you all here. And your testimony means a great deal to the hearing.

So I tell you what, let's just begin in the order that you are seated. And the Chair may have a statement to make.

Senator **THURMOND**. I have a question for Mr. Bollinger that he can answer for the record.

The **CHAIRMAN**. All right. The photography corps is standing over there like this.

[The Chairman holds up his right hand.]

I don't think they are waving to me; I think they are reminding me. Would you please stand and give them a photo opportunity?

[Members of the panel stand.]

Do you swear that the testimony that you are about to give is the whole truth and nothing but the truth, so help you God?

[All reply: "I do."]

TESTIMONY OF PANEL CONSISTING OF DONALD BALDWIN, DEWEY STOKES, ROBERT FUESEL, JERRY VAUGHN, JOHN BELLIZZI, CARY BITTICK, JOHNNY HUGHES, FRANK CARRINGTON

Mr. BALDWIN. Mr. Chairman, the group has asked me if I would just start off.

The CHAIRMAN. Sure.

Mr. BALDWIN. If you don't mind, we will be very brief. I think you did indicate that Mr. Robert Fuesel is here, who is president of the Federal Criminal Investigators Association, and Mr. Dewey Stokes who is the national president of the Fraternal Order of Police; Mr. Jerry Vaughn, the executive director of the International Association of Chiefs of Police; Mr. John Bellizzi, who is the executive director of the International Narcotics Enforcement Officers Association; and Mr. Johnny Hughes, the National Troopers Coalition; and Mr. Frank Carrington, who will be speaking for the Victims' Assistance Legal Organization and other victims' groups.

So we will be as brief as we can—we know it's a long day—and we do appreciate the indulgence of the committee.

I didn't see Cary Bittick, the executive director of the National Sheriffs Association—I'm sorry, Cary.

My name is Donald Baldwin. I am the executive director of the National Law Enforcement Council, an umbrella group for 15 national law enforcement and criminal justice organizations. Through the heads of these organizations, most of whom you see sitting here, the council reaches over 400,000 law enforcement officers throughout the country. The following organizations are members: Airborne Law Enforcement Association; Association of Federal Investigators; Federal Criminal Investigators Association; FBI National Academy Associates; Fraternal Order of Police; International Association of Chiefs of Police; International Narcotics Enforcement Officers Association, Inc.; International Union of Police Associations; Law Enforcement Assistance Foundation; National Association of Police Organizations; National District Attorneys Association; National Sheriffs Association; National Troopers Coalition; Society of Former Special Agents of the FBI; and Victims Assistance Legal Organization.

As you can appreciate, Mr. Chairman, the council is by far the largest law enforcement organization representing principal law enforcement associations with nationwide membership.

On the panel with me today are the national presidents and top executives of a majority of our members. These gentlemen will speak for themselves and for their organizations. We will express what we believe is the strong feeling of law enforcement in general for the endorsement of Judge Robert Bork for confirmation as Associate Justice of the Supreme Court of the United States.

Much has been said these past few days by the opponents of Judge Bork's confirmation. And it appears to many of us that these opponents think a person's own interpretation of our laws, or what some might prefer would be the interpretation of our laws, should be the motivating factor for how Judge Bork, or any judge, might vote on a specific issue.

That view, that one's own personal view of the application of the law should prevail, misses the whole point of our republic form of government. Ours is a government of the people, by the people, and for the people, not a government of special-interest groups.

Our Founding Fathers, in writing the Constitution, decided—and I believe rightly so—that our nation should be a nation governed by co-equal branches of the government: the legislative, executive, and judiciary. The legislative branch writes the laws, the executive carries them out, and the judiciary branch interprets our laws—they do not write our laws. The country is quite clearly a nation governed by laws, not by man.

There is, I am certain, not a member of this distinguished Senate Judiciary Committee who has not at one time read our Constitution or our Bill of Rights. You understand the concept that guided the great minds of the time when they gathered together to write our great Constitution. Many have attempted to build a case that this basic document, which has held our society together for over 200 years of steady growth—and we just celebrated that last week, the signing of our Constitution—is not suited for our times and that it has outlived its usefulness. But I submit it is this very document, our Constitution, that has in fact kept us a free nation, a nation with guaranteed rights and freedoms for all, without restrictions of any kind. Everyone is equal with equal rights guaranteed under the Constitution. Ours is a nation of laws, not a nation governed by the power of any one or any group of men or women. It is these laws, this Constitution, that protects us and guarantees these freedoms.

As representatives of the vast majority of law enforcement and others who are charged with upholding the laws of our land, I think my colleagues here will agree that Judge Bork has demonstrated that he is committed to the idea that judges should confine themselves to interpreting the laws rather than advocating their ideas of what some might think is wise public policy.

As the Los Angeles Times stated in a July 2, 1987, editorial: "Judge Bork has proved to be a man who follows the law and legal precedent—not his personal preferences—in arriving at his opinions."

We would not survive as a free nation if we were to give in to some of the critics of Judge Bork who advocate a nation governed by men and not by laws. It is important to remind ourselves that our revolution for independence was fought against rule by a man, whether that man is King George or a Justice of the Supreme Court. It is our very laws, our Constitution, that prevents anyone from taking over our government, dictating to us and robbing us of our guaranteed rights spelled out so clearly in our Constitution.

The members of this committee have been reminded by many previous witnesses that Judge Bork is a man of high intellect. His career as a distinguished Yale University professor of law, partner in several prestigious law firms, Solicitor General of the United States, and distinguished judge of the Circuit Court of Appeals for the District of Columbia certainly leaves no doubt of the Judge's outstanding qualifications. And the ABA's awarding him their highest rating, based on a thorough examination of his opinions and qualifications, should leave no questions of his qualifications to sit as a member of the Supreme Court of the United States. It is a matter of record that not all of our sitting Justices of the Supreme Court received the ABA's highest rating.

What then could possibly stand in the way of his unanimous confirmation to the Supreme Court? And we remember, five years ago, this very committee, with concurrence of the full Senate, accorded Judge Bork its highest vote of confidence, a unanimous vote in confirming him to the Circuit Court of Appeals for the District of Columbia.

What is different now?

As law enforcement officers, our members are sworn to uphold the law. The Judge Borks of the country must be counted on to interpret the laws as they were written and as they were intended, not according to the personal predilections of a judge.

Apparently you agreed with him when, in 1982, 5 years ago, you confirmed Judge Bork unanimously for his current judgeship. During the confirmation hearing 5 years ago you asked him to "define judicial activism," and, sitting right where I am sitting now, he told you "I think what we are driving at is something I prefer to call judicial imperialism. . . . I think a court should be active in protecting those rights which the Constitution spells out. Judicial imperialism is really activism that has gone too far and lost its roots in the Constitution or in the statutes being interpreted."

The CHAIRMAN. Mr. Baldwin, I hate to interrupt you—and I won't—but I hope you finish soon. You are about 4 minutes over.

Mr. BALDWIN. I have two paragraphs here and I am concluded. "When a court becomes that active or that imperialistic, then I think that it engages in judicial legislation, and that seems to me inconsistent with the democratic form of government we have. . . ."

I hope that you will again agree with all of us in law enforcement who are sworn to uphold our laws that Judge Bork must be confirmed, because he believes and he understands that we are a nation governed by laws and not by men or women or special-interest groups who would feel free to interpret or make laws to control our lives and take away our freedoms as they see fit.

We are about to enter the October session of the Supreme Court with only eight Justices. Without confirmation of the ninth Judge, we will not have a court that can decide cases with a majority opinion. We might well have split decisions. How would our law enforcement officers act with a split decision from the highest court in the land?

We urge your speedy confirmation of Judge Bork.

[Statement of Mr. Baldwin follows:]

STATEMENT PREPARED FOR

THE UNITED STATES SENATE JUDICIARY COMMITTE

BY

DONALD BALDWIN, EXECUTIVE DIRECTOR
THE NATIONAL LAW ENFORCEMENT COUNCIL

ON BEHALF OF

CIRCUIT COURT JUDGE ROBERT H. BORK

FOR ASSOCIATE JUSTICE OF THE U.S. SUPREME COURT

Thank you, Mr. Chairman.

My name is Donald Baldwin. My offices are in Suite 804, 1140 Connecticut Avenue, N.W., the address for the National Law Enforcement Council.

The Council is an umbrella group representing fifteen national law enforcement/criminal justice organizations. Through the executive heads of these fifteen principal national organizations the Council reaches some 400,000 law enforcement/criminal justice officers throughout the country. I serve as Executive Director of the NLEC.

The following organizations are members of the NLEC: Airborne Law Enforcement Association; Association of Federal Investigators; Federal Criminal Investigators Association; FBI National Academy Associates; Fraternal Order of Police; International Association of Chiefs of Police, International Narcotics Enforcement Officers Association, Inc.; International Union of Police Associations; Law Enforcemtent Assistance Foundation; National Association of Police Organizations; National District Attorneys Association; National Sheriffs' Association; National Troopers Coalition; Society of Former Special Agents of the FBI; and, Victims Assistance Legal Organization.

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Much has been said these past few days by the opponents of Judge Bork's confirmation. It would appear that many of these opponents think a person's own interpretation of our laws, or what some might prefer would be the interpretation of our laws, should be the motivating factor for how Judge Bork, or any judge, might vote on a specific issue.

That view, that one's own personal view of the application of the law should prevail, misses the whole point of our republic form of government. Ours is a government of the people, by the people, and for the people; not a government for any special interest group.

Our founding fathers in writing the Constitution decided, and I believe rightly so, that our government should be a nation governed by co-equal branches of the government; the legislative, executive, and the judiciary. The legislative branch write the laws, the executive carry them out, and the judiciary branch interprets our laws. Our country is, quite clearly, a nation governed by laws, not by man.

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We would not survive as a free nation if we were to give in to some of the critics of Judge Bork who advocate a nation governed by men and not by laws. It is important to remind ourselves that our revolution for independence was fought against rule by man, whether that man is King George or a Justice of the Supreme Court. It is our very laws, our Constitution, that prevents anyone from taking over our government, dictating to us and robbing us of our guaranteed rights spelled out so clearly in our Constitution.

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We are about to enter the October session of the Supreme Court with only eight justices. Without confirmation of the ninth judge we will not have a court that can decide cases with a majority opinion. We might well have split decisions. How would our law enforcement officers act with a split decision from the the highest court in the land?

We urge you to vote Judge Bork favorably from your committee and recommend immediate consideration of the nominee on the floor of the Senate. We would again urge your unanimous approval of Judge Bork's nomination for appointment to the Supreme Court when this nomination reaches the full Senate. It is in the best interest of law enforcement, and the best interests of all Americans.

The **Chairman**. Thank you very much. You are aware that the ABA split on Judge Bork, aren't you?

Mr. **Baldwin**. I'm also aware that it split on a lot of the judges as they have been before them. I am also aware that there are some sitting Supreme Court Justices that did not receive Judge Bork's highest rating.

The **Chairman**. Well, I don't want to argue with you. I think the record shows otherwise. But it's not worth going into now. Why don't we go on with——

Mr. **Baldwin**. National president of the FOP, Mr. Dewey Stokes.

The **Chairman**. Let me yield to Senator Metzenbaum first.

Senator **Metzenbaum**. I just want to welcome all of these officials of the law enforcement agencies, but I am particularly proud of the fact that Dewey Stokes is here, resident of my own State, elected last month to serve as the national president of the Grand Lodge of Fraternal Order of Police, the nation's largest police organization. For the last 9 years he has been president of the largest local FOP lodge in Ohio; for the past 20 years he has served as an active police officer in Columbus, OH, with a wide variety of experience, ranging from the beat officer to service in the organized crime bureau. In addition to serving the community as a police officer, he's been a good citizen in many other ways. He's given freely of his nonprofessional time and energy to the people of Ohio, working with the Boys' Clubs of Columbus, Franklin County Mental Health and Retardation Board, Easter Seals campaign, and numerous other charitable efforts.

I am proud that he is here today to speak, and I want to thank him publicly, and the Fraternal Order of Police, for the support that they have given me and other Members of the Congress in our efforts to pass a waiting-period bill with respect to purchase of guns, and the plastic gun bill as well. I am very proud of you, Mr. Stokes, and delighted to see you here today.

Mr. **Stokes**. Thank you, Senator Metzenbaum.

The **Chairman**. Please go ahead.

TESTIMONY OF DEWEY STOKES

Mr. **Stokes**. Mr. Chairman, members of the committee, I am Dewey Stokes, the national president of the Fraternal Order of Police.

The Fraternal Order of Police is the largest organization of professional law enforcement personnel in the world. I am the president of my local lodge, as the Senator said. And the FOP consists of 200,000 members, including virtually every kind of law enforcement in the United States. Our organization's purpose, as stated in the FOP's constitution, is to support and defend the Constitution of the United States, to promote and foster law enforcement, law and order. Our membership consists of devoted men and women of all races, colors, and national origins who share these common goals. We are very grateful to be afforded this opportunity to appear before this distinguished panel and participate in this historical and constitutional process.

Mr. Chairman, the members of the Fraternal Order of Police strongly support the nomination of Judge Robert H. Bork to become an Associate Justice of the U.S. Supreme Court.

I have submitted for inclusion in the record a copy of the resolution passed at our biannual conference which sets forth our statement of support for Judge Bork. I would like to explain to the committee some of the reasons why we supported Judge Bork. You have questioned Judge Bork at length with respect to many issues except for a few questions about the death penalty. However, Judge Bork's law enforcement record remains unexplored. We do not presume to comment on Judge Bork's record in various or other areas, but insofar as his nomination touches upon the enforcement of criminal laws, we are vitally interested.

Nothing is more frustrating to a law enforcement officer than to spend weeks or months or years investigating a case and apprehending a suspect only to have him released because of a technical defect in the arrest or the evidence.

Not only are such investigations expensive, they have taken a tremendous physical and emotional strain and toll upon our members and their families, especially when personal safety is at risk. To us, law enforcement is not just a job; no, it's a purpose and one that society requires of us.

We become personally committed to law and order in this community in which we work and where we reside. Every time a suspect is set free because of a technicality, allegedly prohibited by a liberal construction of the Constitution, there are both tangible and intangible costs to society.

There is a real danger that a potentially dangerous person will commit future crimes against persons, properties, or law enforcement. Moreover, when a defendant goes free, not because he has been acquitted by——

We do not condone illegal police activity. Although quite rare, we acknowledge the need for the law to address such cases. We believe the Constitution addresses such activities clearly and without the need of twisted inferences drawn upon other inferences.

Judge Bork's record indicates that he is both tough and fair. He interprets the Constitution in such a way that criminal defendants receive the full measure of protection afforded them by that document. He does not reach beyond the Constitution. However, he creates the rights that were not granted by the framers of the Constitution. As Judge Bork has said, "The idea is always to protect the value or the freedom that the framers were trying to protect, and not some new freedom."

Judge Bork's constitutional interpretation translates into common sense decisions on the judiciary. In *United States* v. *James*, officers executing a search warrant went to the defendant's home here in Washington. They knocked on the door several times, received no answer, knocked again very loudly, announced "Police, narcotics" and, hearing someone running down the back stairs and out the back door, they knocked down the door and entered.

Inside they found narcotics, paraphernalia, and the defendant who was, presumably, trying to wash the evidence down the drain. The officers involved in this case were FOP members.

The law requires that officers announce their authority and purpose prior to forcing entry, so that the defendant, based on that, tried to exclude the evidence seized because the police had only announced "Police, narcotics", instead of "Police, narcotics, with a search warrant."

While this may seem absurd, it is just such contentions that have been accepted by judges seeking to expand upon the intent of the framers of our Constitution.

Judge Bork, on the other hand, recognized the uselessness of the officers announcing their purpose when the occupants already knew why the police were there, clearly. Judge Bork's decision allowed officers to react quickly to a situation confronting them. Such decisions do not, however, authorize officers to ignore a criminal suspect's constitutional rights. Judge Bork recognizes the limited purpose of the exclusionary rule.

In Judge Bork's own words, "Where no deterrence of unconstitutional police behavior is possible, a decision to exclude probative evidence with the result that a criminal goes free to prey upon the public should shock the judicial conscience."

We believe that capital punishment does deter criminal behavior. In *Gregg* v. *Georgia,* then Solicitor General Bork successfully argued that a death sentence for the crime of murder is not a per se violation of the 8th and 14th amendments. The Supreme Court found that it is apparent from the text of the Constitution that capital punishment was intended by the framers to be an available form of punishment.

Judge Bork's membership on the Supreme Court would help ensure the continued availability of this important form of criminal deterrence.

We believe, based upon his record as a public servant, that he is and will remain a reasoned, principled, scholarly jurist whose decisions on criminal justice are fair. Further, we find Judge Bork, when his judicial record is carefully examined, to be in the mainstream of contemporary judicial thought.

It is critically important to the almost 200,000 members of the Fraternal Order of Police that the Supreme Court decide cases that facilitate and further effective law enforcement while protecting all our constitutional rights. Judge Bork has achieved such results during his tenure on the D.C. Circuit Court. We believe he would continue to reach these constitutionally sound decisions as a member of the U.S. Supreme Court, and it is for this reason that the Fraternal Order of Police strongly supports the nomination of Judge Bork and urges the citizens and victims of crime to support his nomination. Thank you, Mr. Chairman.

[The prepared statement of Dewey Stokes follows:]

STATEMENT OF DEWEY STOKES
BEFORE THE SENATE JUDICIAL COMMITTEE
ON THE NOMINATION OF ROBERT H. BORK
TO THE SUPREME COURT OF THE UNITED STATES

Good afternoon. Mr. Chairman, members of the Committee, I am Dewey Stokes, National President of the Fraternal Order of Police. The Fraternal Order of Police is the largest member organization of professional law enforcement personnel in the United States. Our organization is comprised of local lodges belonging to State lodges which, in turn, belong to the Grand Lodge, of which I am National President. I am also President of my local lodge (No. 9), Columbus, Ohio. The Fraternal Order of Police consists of almost 200,000 members including municipal police officers, state troopers, sheriff's deputies, federal law enforcement officers, and virtually every other form of law enforcement officers in the United States.

Our organization's purpose, as stated in our Constitution is:

> "To support and defend the Constitution of the United States; to inculcate loyalty and allegiance to the United States of America; [and] to promote and foster the enforcement of law and order . . .

This is consonant with the Preamble to our nation's Constitution in ~~their~~ its reference "to ~~e~~insure domestic tranquility." Our membership consists of devoted men and women of all races, colors and national origins who share these common goals, and we are very grateful to be afforded this opportunity to appear before your distinguished panel to participate in this historic and constitutional process.

Mr. Chairman, the members of the Fraternal Order of Police believe and have resolved that we express our strong support of the nomination of Judge Robert H. Bork to become an Associate Justice of the United States Supreme Court. I have submitted for inclusion in the Record a copy of the Resolution passed in August, 1987, at our Biennial Conference which sets forth our statement of support of Judge Bork.

In what follows, I would like to present to the Committee some of the bases for the Fraternal Order of Police's support of Judge Bork. The Committee has questioned Judge Bork at length with respect to many issues (ranging from Antitrust to privacy issues.) With the exception of a limited exploration of his views on the Constitutional basis of the death penalty, however, Judge Bork's law enforcement record remains unexplored. The Fraternal Order of Police does not presume to comment upon Judge Bork's record in various other areas but, insofar as his nomination touches upon the enforcement of criminal laws, we are vitally interested.

Nothing is more frustrating or discouraging to a professional law enforcement officer than to spend weeks, months or even years investigating a case and apprehending a suspect

ONLY TO HAVE HIM RELEASED OR ACQUITTED BECAUSE OF A TECHNICAL DEFECT IN THE ARREST OR THE EVIDENCE. NOT ONLY ARE SUCH INVESTIGATIONS EXPENSIVE IN TERMS OF TAXPAYERS' MONEY; THEY TAKE A TREMENDOUS PHYSICAL AND EMOTIONAL TOLL UPON OUR MEMBERS AND THEIR FAMILIES, ESPECIALLY WHEN PERSONAL SAFETY IS AT RISK. TO US, LAW ENFORCEMENT IS NOT JUST 'A JOB," IT IS A PURPOSE AND SOCIALLY REQUIRED ONE. WE BECOME PERSONALLY COMMITTED TO AND ASSUME THE MAINTENANCE OF LAW AND ORDER IN THE COMMUNITIES IN WHICH WE RESIDE. EVERY TIME A SUSPECT IS SET FREE BECAUSE OF A TECHNICALITY ALLEGEDLY PROHIBITED BY A LIBERAL CONSTRUCTION OF THE CONSTITUTION, THERE ARE BOTH TANGIBLE AND INTANGIBLE COSTS TO SOCIETY. THERE IS A REAL DANGER THAT A POTENTIALLY DANGEROUS PERSON WILL COMMIT FURTHER CRIMES AGAINST PERSONS, AGAINST PROPERTY AND/OR UPON OTHER LAW ENFORCEMENT OFFICERS.

MOREOVER, WE BELIEVE THERE IS AN INTANGIBLE COST TO SOCIETY AS WELL. WHEN A DEFENDANT GOES FREE NOT BECAUSE HE HAS BEEN ACQUITTED BY A JURY OF HIS PEERS BUT BECAUSE OF A TECHNICALITY, THERE IS AN INTANGIBLE DIMINUTION IN THE RESPECT FOR AND WORTH OF THE INSTITUTION OF LAW ENFORCEMENT.

NEITHER THE FRATERNAL ORDER OF POLICE NOR JUDGE BORK CONDONE ILLEGAL POLICE ACTIVITIES. WE BELIEVE SUCH ACTIVITIES ARE QUITE RARE, BUT ACKNOWLEDGE THE NEED FOR THE LAW TO ADDRESS SUCH CASES. WE BELIEVE THE CONSTITUTION ADDRESSES SUCH ACTIVITIES CLEARLY AND WITHOUT NEED FOR CONVOLUTED INFERENCES DRAWN UPON INFERENCES.

JUDGE BORK'S RECORD INDICATES THAT HE IS BOTH TOUGH AND FAIR. THIS APPROACH TO CRIMINAL JUSTICE REDUCES THE LIKELIHOOD THAT A DEFENDANT WILL WALK AWAY BECAUSE OF A TECHNICALITY. JUDGE BORK INTERPRETS THE CONSTITUTION IN SUCH A WAY THAT CRIMINAL DEFENDANTS RECEIVE THE FULL MEASURE OF PROTECTION AFFORDED THEM BY THAT DOCUMENT. HE DOES NOT REACH BEYOND THE CONSTITUTION, HOWEVER, AND CREATE RIGHTS THAT WERE NOT GRANTED BY THE FRAMERS. AS JUDGE BORK HAS SAID, "(T)HE IDEA IS ALWAYS TO

PROTECT THE VALUE OR THE FREEDOM THAT THE FRAMERS WERE TRYING TO PROTECT -- AND NOT SOME NEW FREEDOM."[1]

JUDGE BORK'S CONSTITUTIONAL INTERPRETATION TRANSLATES INTO COMMON SENSE DECISIONS ON CRIMINAL JUSTICE. FOR EXAMPLE, IN UNITED STATES V. JAMES,[2] JUDGE BORK RECOGNIZED THAT CIRCUMSTANCES DO EXIST WHERE SLAVISH ADHERENCE TO TECHNICAL STATUTORY REQUIREMENTS IS FUTILE. IN THAT CASE, OFFICERS ACTING UPON A SEARCH WARRANT ISSUED UPON OVERWHELMING PROBABLE CAUSE WENT TO THE DEFENDANT'S HOME HERE IN WASHINGTON, D.C. THE OFFICERS KNOCKED ON THE DOOR SEVERAL TIMES, RECEIVED NO ANSWER, KNOCKED AGAIN LOUDLY, ANNOUNCED "POLICE, NARCOTICS" AND, HEARING SOMEONE RUNNING DOWN BACK STAIRS, BROKE DOWN THE DOOR AND ENTERED. INSIDE THEY FOUND NARCOTICS, PARAPHERNALIA AND THE DEFENDANT WHO WAS, PRESUMABLY, TRYING TO WASH THE EVIDENCE DOWN THE DRAIN. IT SHOULD BE NOTED THAT THE DEFENDANT WAS SUBDUED ONLY AFTER HE

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[1] KRAMER, THE BRIEF ON JUDGE BORK, U.S. NEWS & WORLD REP., SEPT. 14, 1987 AT 22.

[2] 764 F.2D 885 (D.C. CIR. 1985)

ATTEMPTED TO GRAB ONE OF THE OFFICER'S GUNS AND A SHOT WAS FIRED. THE OFFICERS INVOLVED ARE FOP MEMBERS.

APPLICABLE LAW REQUIRES THAT OFFICERS FORCE ENTRY ONLY AFTER ANNOUNCING THEIR AUTHORITY AND PURPOSE.[3] THE DEFENDANT IN THIS CASE, OF COURSE, SOUGHT TO EXCLUDE ALL THE EVIDENCE SEIZED BECAUSE THE POLICE HAD ANNOUNCED ONLY "POLICE, NARCOTICS" INSTEAD OF, PRESUMABLY, 'POLICE, NARCOTICS, SEARCH WARRANT.' WHILE THIS CONTENTION MAY APPEAR ABSURD, IT IS JUST SUCH CONTENTIONS THAT HAVE BEEN ACCEPTED BY JUDGES SEEKING TO EXPAND UPON THE INTENT OF THE FRAMERS OF OUR CONSTITUTIONS. JUDGE BORK, ON THE OTHER HAND, RECOGNIZED THE FUTILITY OF OFFICERS ANNOUNCING THEIR PURPOSE WHEN OCCUPANTS WERE WELL AWARE OF THE REASON FOR THE POLICE VISIT AND WERE ATTEMPTING TO DESTROY EVIDENCE.

JUDGE BORK'S PRACTICAL, REASONED DECISIONS HAVE THE EFFECT OF ALLOWING OFFICERS TO REACT QUICKLY TO THE SITUATIONS CONFRONTING THEM. SUCH DECISIONS DO NOT, HOWEVER, AUTHORIZE

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[3] 18 U.S.C. 3109 (1982)

OFFICERS TO IGNORE A CRIMINAL SUSPECT'S CONSTITUTIONAL RIGHTS. JUDGE BORK RECOGNIZES THE PURPOSE OF THE EXCLUSIONARY RULE IS TO DETER UNCONSTITUTIONAL POLICE BEHAVIOR, HOWEVER, WHEN EXCLUDING EVIDENCE CANNOT HAVE A DETERRENT EFFECT, JUDGE BORK WILL NOT APPLY THE RULE.

IN UNITED STATES V. MOUNT,[4] JUDGE BORK'S CONCURRING OPINION EMPHASIZED THE IMPORTANCE OF THE DETERRENT EFFECT. IN THAT CASE, BRITISH AUTHORITIES CONDUCTED A SEARCH OF THE DEFENDANT'S RESIDENCE IN GREAT BRITAIN. WHILE LEGAL UNDER ENGLISH LAW, THE SEARCH MAY HAVE BEEN ILLEGAL UNDER AMERICAN LAW. HOWEVER, NO AMERICAN OFFICIALS WERE INVOLVED IN THE SEARCH. BECAUSE THE EXCLUSION OF EVIDENCE IN A U.S. CRIMINAL PROCEEDING COULD NOT HAVE A DETERRENT EFFECT ON BRITISH POLICE OFFICERS, JUDGE BORK FOUND THE EXCLUSIONARY RULE TO BE INAPPLICABLE. IN JUDGE BORK'S OWN WORDS, "WHERE NO DETERRENCE OF UNCONSTITUTIONAL POLICE BEHAVIOR IS POSSIBLE, A DECISION TO EXCLUDE PROBATIVE EVIDENCE

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[4] 757 F.2D 1315 (D.C. CIR. 1985)

WITH THE RESULT THAT A CRIMINAL GOES FREE TO PREY UPON THE PUBLIC SHOULD SHOCK THE JUDICIAL CONSCIENCE. . . ."[5]

JUDGE BORK'S DECISIONS ARE TOUGH AND THEY ARE ALSO FAIR. HE HAS NOT HESITATED TO ENFORCE A CRIMINAL DEFENDANT'S CONSTITUTIONAL RIGHTS WHEN THOSE RIGHTS HAVE BEEN VIOLATED.[6] JUDGE BORK IS ALSO WILLING TO SET A DEFENDANT FREE WHEN THE GOVERNMENT HAS PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION.[7]

AS LAW ENFORCEMENT OFFICERS, WE ARE ALSO CONCERNED ABOUT THE COURTS PUNISHING CRIMINALS IN A MANNER THAT WILL DETER CRIMINAL BEHAVIOR. WE BELIEVE CAPITAL PUNISHMENT DOES DETER CRIMINAL BEHAVIOR. ALTHOUGH JUDGE BORK HAS NOT HAD THE OPPORTUNITY TO RULE ON CAPITAL PUNISHMENT DURING HIS TENURE ON THE D.C. CIRCUIT, HE DEALT WITH THE ISSUE AS SOLICITOR GENERAL.

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[5] _ID._ AT 1323.

[6] _UNITED STATES V. BROWN_, 823 F.2D 591 (D.C. CIR. 1987) (OVERTURNED A CONVICTION WHERE DEFENDANT'S RIGHT TO A UNANIMOUS JURY WAS VIOLATED)

[7] _UNITED STATES V. FOSTER_, 783 F.2D 1087 (D.C. CIR. 1986) (OVERTURNED A CONVICTION FOR POSSESSION OF AN ILLEGAL FIREARM FOR INSUFFICIENT EVIDENCE)

In Gregg v. Georgia,[8] then Solicitor General Bork, successfully argued that a death sentence for the crime of murder is not a per se violation of the Eighth and Fourteenth Amendments. The Supreme Court reasoned that it is apparent from the text of the Constitution that capital punishment was intended by the framers to be an available form of punishment. Judge Bork's personal views on the constitutionality of capital punishment are in accord with the Supreme Court in Gregg.[9] Just last term, the Supreme Court again held that the death penalty is a constitutional form of punishment.[10] Judge Bork's membership on the Supreme Court would help ensure continued availability of this important form of criminal deterrence.

Judge Bork has been characterized in these hearings and the attendant news and commentary as a conservative and a radical.

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[8] 428 U.S. 153 (1976)

[9] Coyle and Strasser, The Bork Battle Begins, Nat. L.J., Sept. 21, 1987, at 32.

[10] McKlesky v. Kemp, _____ U.S. _____, 107 S. Ct. 1756 (1987).

We believe, based on his record as a public servant, that he is and will remain a reasoned, principled jurist whose decisions on criminal justice are fair. Further, we find Judge Bork, when his judicial record is carefully examined, to be in the mainstream of contemporary judicial thought.

It is of critical importance to the almost 200,000 members of the Fraternal Order of Police that our Supreme Court decide cases in a manner that facilitates and furthers effective law enforcement while protecting all our constitutional rights. Through his efforts to protect the values and freedoms the framers were trying to protect, Judge Bork has achieved such results during his tenure on the District of Columbia Circuit. We believe he would continue to reach these constitutionally sound decisions as a member of the United States Supreme Court and it is for this reason that the Fraternal Order of Police strongly supports the nomination of Judge Robert H. Bork.

Thank you.

FRATERNAL ORDER OF POLICE

Resolution

WHEREAS: A vacancy exists on the Supreme Court of the United States, and

WHEREAS: President Ronald Reagan has nominated the Honorable Robert H. Bork to the position of Justice of the United States Supreme Court, and

WHEREAS: The United States Senate will be voting on the confirmation of Judge Bork, and

WHEREAS: It is in the best interests of the citizens of the United States and all law enforcement officers that Judge Bork be confirmed to the Supreme Court,

NOW, THEREFORE BE IT RESOLVED:

That the delegates to the Forty-Eighth Biennial Conference of the Grand Lodge Fraternal Order of Police endorse the confirmation of Robert H. Bork, and that the members here assembled direct the over 187,000 members of this Order to urge their respective Senators to vote in favor of confirmation.

Dewey R. Stokes
Dewey R. Stokes
National President
Fraternal Order of Police

Charles R. Orms
National Secretary
Fraternal Order of Police

The CHAIRMAN. Thank you.

I understand why we're going over considerably. That little red light means your time is up. It would help matters a bit, if you're willing—the ranking member and I just had a little discussion—that your entire statement will be placed in the record. So if you could summarize them, it would be helpful. But when that little red light goes on, just like I've been having Senators stop, or attempting to have them stop, I would like from here on to have you all wind up, if you could.

Whomever would like to go next, in whatever order you would like to go. If you could summarize, it would be useful.

TESTIMONY OF JERALD R. VAUGHN

Mr. VAUGHN. Thank you very much, Mr. Chairman.

On behalf of the governing body and the membership of the International Association of Chiefs of Police, I would like to express our appreciation for the opportunity to provide testimony on this very important issue.

The International Association of Chiefs of Police is a professional organization, comprised of over 14,500 top law enforcement executives from the United States and 68 nations. IACP members lead and manage several hundred thousand law enforcement officers and civilian employees in international, federal, State and local governments.

Members in the United States direct the nation's largest city police departments, including New York City, Los Angeles, Chicago, Detroit, Houston and others, as well as suburban and rural police departments.

Our members include the top federal law enforcement directors and their staffs, such as the Director of the Secret Service, the FBI, the U.S. Marshals, U.S. Customs and others.

The IACP is pleased to strongly support the nomination of Judge Robert Heron Bork to the Supreme Court of the United States. The IACP Executive Committee, which consists of 52 of the top law enforcement officials in the world, by majority vote at their August meeting in St. Louis, MO pledged their support to Judge Bork. We believe that he is one of the most eminently qualified individuals ever nominated to this nation's highest court.

This committee and, indeed, the entire Senate, is unlikely to face a more important task this year than this confirmation.

Our primary concern focuses on issues impacting on law enforcement. I will speak about our area of expertise and from our own perspective. We assume that those knowledgeable in other areas will similarly so advise the committee. It will then be your responsibility to synthesize and analyze the various positions and likewise render a decision that has the welfare of our citizens and the nation's highest court as its primary goal.

We wish to make one issue perfectly clear: we are not interested in an America in which rogue police break down citizens 'doors in midnight raids. As far as we can tell—and we have researched and debated Judge Bork's record intensively—neither is he. We are interested in a governing system that respects the idea that some issues are to be decided by the States.

We certainly support the notion of judicial review, but we do not think that courts have been vested with the power to sit as supervisory agencies over acts of duly-constituted legislative bodies and set aside their laws because of the court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious, or irrational. We do believe that it is the court's function to overturn laws passed by State legislatures when the law violates a clear constitutional provision. Again, our research shows that Judge Bork shares this interpretation.

We believe that law enforcement officers whose willful misconduct results in the deprivation of the constitutional rights of an individual should be disciplined. We hold that belief, but we are cognizant of the fact that invoking the exclusionary rule frequently precludes judicial determination of guilt or innocence and punishes the law-abiding majority by returning a criminal defendant to society without the opportunity for correctional rehabilitation.

In 1974, the IACP passed a resolution to this effect, and we urged the nation's legislatures to restrict, not abolish, but restrict the application of the exclusionary rule to cases where the violation itself is the result of willful and flagrant police misconduct resulting in a serious deprivation of an individual's constitutional rights.

Judge Bork, similarly, feels that this doctrine should be reexamined. The reason for this rule is deterrence of police misconduct. Judge Bork feels that ". . . it's time we examine how much deterrence we are getting, and at what cost." We agree with him.

Our legal system quite frequently demands that we either reconcile or choose between competing interests. This is difficult but must be done. Judge Bork expressed our sentiments quite succinctly when he said, "It seems that the conscience of the court ought to be at least equally shaken by the idea of turning a criminal loose upon society."

Capital punishment is another issue that concerns us. The IACP went on record in 1922 as favoring capital punishment following speedy trials. In 1973, we reiterated and expanded on that position by stating our opinion that capital punishment does, in fact, deter certain crimes. We went on record as favoring the death penalty for premeditated murder, murder committed during the perpetration of a felony, and the killing of law enforcement officers and prison guards while performing their duties. We have always officially noted, though not shared, the questions of the constitutionality of capital punishment. We agree with Judge Bork, that it is "a little hard to understand how a penalty that the Framers explicitly assumed to be available can somehow become unavailable because of the very Constitution the Framers wrote."

In respect for the little red light, I will just conclude by indicating that not only has the executive committee, by majority vote, supported this nomination, but, in fact, as of this morning, the Maryland State Police Chiefs Association, who are meeting in Ocean City, by majority vote passed a resolution in support of Judge Bork; this past week the New York State Police Chiefs Association passed a similar resolution; and throughout the country, the message is the same: law enforcement supports the confirmation of Judge Bork to the U.S. Supreme Court. Thank you.

[The statement of Jerald R. Vaughn follows:]

TESTIMONY BY

THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE

CONCERNING CONFIRMATION OF

JUDGE ROBERT HERON BORK

TO THE SUMPREME COURT OF THE UNITED STATES

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

The International Association of Chiefs of Police is a professional organization comprised of over 14,500 top law enforcement executives from the United States and 68 nations. IACP members lead and manage several hundred thousand law enforcement officers and civilian employees in international, federal, state and local governments. Members in the United States direct the nation's largest city police departments including New York City, Los Angeles, Chicago, Detroit, Houston and others, as well as suburban and rural departments throughout the country.

Since 1893, the IACP has facilitated the exchange of important information among police administrators and promoted the highest possible standards of performance and conduct within the police profession. This work is carried out by functionally oriented committees consisting of police practitioners with a high degree of expertise that provide contemporary information on trends, issues and experiences in policing for development of cooperative strategies, new and innovative programs and positions for adoption through resolution by the association.

Throughout its existence, the IACP has been devoted to the cause of crime prevention and the fair and impartial enforcement of laws with respect for constitutional and fundamental human rights.

Jerald R. Vaughn was appointed Executive Director of the 14,000 member International Association of Chiefs of Police on September 10, 1985. IACP is the world's largest association of police executives with members in the United States and sixty-seven overseas nations.

Director Vaughn is a native of Denver, Colorado, and received his Bachelors of Science Degree in the Administration of Justice from Metropolitan State College and Masters Degree in Public Administration from the University of Northern Colorado.

Director Vaughn began his law enforcement career in February 1968 with the Englewood, Colorado Police Department. He worked assignments in radio car and foot patrol, as a Field Training Officer, a Traffic Officer in the Traffic Bureau, and served fourteen months as an undercover agent in a federally funded multi-jurisdictional drug task force where he received a citation for service above and beyond the call of duty from the Governor of the State of Colorado. Director Vaughn was promoted to the rank of Sergeant, where he held assignments as a Field Supervisor, Tactical Team Leader, Internal Affairs Supervisor, and as the Administrative Assistant to the Chief of Police. Director Vaughn was promoted to the rank of Lieutenant and held assignments in the Patrol and Administration Division, and was serving as Commander of the Support Service Unit when he was appointed Chief of Police of the sixty-eight member Garden City, Kansas Police Department. Director Vaughn was then appointed to the position of Chief of Police of the 173 member Largo, Florida Police Department in May 1983.

THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE IS PLEASED TO STRONGLY SUPPORT THE NOMINATION OF JUDGE ROBERT HERON BORK TO THE SUPREME COURT OF THE UNITED STATES. THE IACP EXECUTIVE COMMITTEE, BY MAJORITY VOTE AT THEIR AUGUST MEETING IN ST. LOUIS, MISSOURI, PLEDGED THEIR SUPPORT TO JUDGE BORK. WE BELIEVE THAT HE IS ONE OF THE MOST EMINENTLY QUALIFIED INDIVIDUALS EVER NOMINATED TO THIS NATION'S HIGHEST COURT.

THIS COMMITTEE, AND INDEED THE ENTIRE SENATE, IS UNLIKELY TO FACE A MORE IMPORTANT TASK THIS YEAR THAN THIS CONFIRMATION. CHAIRMAN BIDEN AND COMMITTEE MEMBERS HAVE SPENT VAST AMOUNTS OF TIME RESEARCHING JUDGE BORK. THE MEMBERS ARE TO BE COMMENDED FOR THEIR DILIGENCE; THE SERIOUSNESS OF THIS TASK CERTAINLY MERITS SUCH EFFORTS. YOU HAVE HEARD, AND CONTINUE TO HEAR FROM, A MYRIAD OF WITNESSES WHOSE INFORMATION YOU MUST ALSO TAKE INTO CONSIDERATION. TODAY, I SPEAK ON BEHALF OF THE IACP AND THE LAW ENFORCEMENT COMMUNITY. I WILL CONFINE MY REMARKS TO JUDGE BORK'S VIEWS AND JUDICIAL OPINIONS ON CRIMINAL MATTERS. THIS DOES NOT IMPLY THAT WE ARE UNAWARE OF OR INSENSITIVE TO SOME OF THE BROADER PHILOSOPHICAL ISSUES WITH WHICH THIS COMMITTEE MUST CONTEND. WE ARE. HOWEVER, OUR PRIMARY CONCERN FOCUSES ON ISSUES IMPACTING ON LAW ENFORCMENT. I WILL SPEAK ABOUT OUR AREA OF EXPERTISE AND FROM OUR OWN PERSPECTIVE. WE ASSUME THAT THOSE KNOWLEDGEABLE IN OTHER AREAS WILL, SIMILARLY, SO ADVISE THE COMMITTEE. IT WILL THEN BE YOUR RESPONSIBILITY TO SYNTHESIZE AND ANALYZE THE VARIOUS POSITIONS AND LIKEWISE RENDER A DECISION THAT HAS THE WELFARE OF OUR CITIZENS AND THE NATION'S HIGHEST COURT AS ITS PRIMARY GOAL. WE BELIEVE THAT THIS PROCESS WILL LEAD YOU TO CONCLUDE THAT JUDGE BORK'S NOMINATION SHOULD BE CONFIRMED.

THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE IS A VOLUNTARY PROFESSIONAL ORGANIZATION ESTABLISHED IN 1893, REPRESENTING OVER 14,500 TOP

LAW ENFORCEMENT COMMAND OFFICERS. IACP MEMBERS LEAD AND MANAGE SEVERAL HUNDRED THOUSAND LAW ENFORCEMENT OFFICERS AND CIVILIAN EMPLOYEES IN INTERNATIONAL, FEDERAL, STATE AND LOCAL GOVERNMENTS. MEMBERS IN THE UNITED STATES DIRECT THE NATION'S LARGEST CITY POLICE DEPARTMENTS, INCLUDING NEW YORK CITY, LOS ANGELES, CHICAGO, DETROIT, HOUSTON, AND OTHERS, AS WELL AS SUBURBAN AND RURAL DEPARTMENTS THROUGHOUT THE COUNTRY. THROUGHOUT ITS EXISTENCE, THE IACP HAS STRIVEN TO ACHIEVE PROPER, CONSCIENTIOUS, AND RESOLUTE LAW ENFORCEMENT. IN ALL OF ITS ACTIVITIES, THE IACP HAS BEEN CONSTANTLY DEVOTED TO THE STEADY ADVANCEMENT OF THE NATION'S BEST WELFARE AND WELL-BEING. IT IS FOR THAT REASON THAT I APPEAR BEFORE YOU TODAY TO VOICE NOT ONLY MY OPINION BUT THOSE OF OUR MEMBERSHIP.

WE WISH TO MAKE ONE ISSUE PERFECTLY CLEAR: WE ARE NOT INTERESTED IN AN AMERICA IN WHICH "ROGUE POLICE....BREAK DOWN CITIZENS' DOORS IN MIDNIGHT RAIDS." AS FAR AS WE CAN TELL--AND WE HAVE RESEARCHED AND DEBATED JUDGE BORK'S RECORD INTENSIVELY--NEITHER IS HE. WE ARE INTERESTED IN A GOVERNING SYSTEM THAT RESPECTS THE IDEA THAT SOME ISSUES ARE TO BE DECIDED BY THE STATES. WE CERTAINLY SUPPORT THE NOTION OF JUDICIAL REVIEW, BUT WE DO NOT THINK THAT COURTS HAVE BEEN VESTED WITH THE POWER TO SIT AS SUPERVISORY AGENCIES OVER ACTS OF DULY-CONSTITUTED LEGISLATIVE BODIES AND SET ASIDE THEIR LAWS BECAUSE OF THE COURT'S BELIEF THAT THE LEGISLATIVE POLICIES ADOPTED ARE UNREASONABLE, UNWISE, ARBITRARY, CAPRICIOUS, OR IRRATIONAL. WE DO BELIEVE THAT IT IS THE COURT'S FUNCTION TO OVERTURN LAWS PASSED BY STATE LEGISLATURES WHEN THE LAW VIOLATES A CLEAR CONSTITUTIONAL PROVISION. AGAIN, OUR RESEARCH SHOWS THAT JUDGE BORK SHARES THIS INTERPRETATION.

WE BELIEVE THAT LAW ENFORCEMENT OFFICERS WHOSE WILLFUL MISCONDUCT RESULTS IN THE DEPRIVATION OF THE CONSTITUTIONAL RIGHTS OF AN INDIVIDUAL

SHOULD BE DISCIPLINED. WE HOLD THAT BELIEF, BUT WE ARE COGNIZANT OF THE FACT THAT INVOKING THE EXCLUSIONARY RULE FREQUENTLY PRECLUDES JUDICIAL DETERMINATION OF GUILT OR INNOCENCE, AND PUNISHES THE LAW-ABIDING MAJORITY BY RETURNING A CRIMINAL DEFENDANT TO SOCIETY WITHOUT THE OPPORTUNITY FOR CORRECTIONAL REHABILITATION. IN 1974, THE IACP PASSED A RESOLUTION TO THIS EFFECT, AND WE URGED THE NATION'S LEGISLATURES TO **RESTRICT**--NOT ABOLISH, BUT RESTRICT--THE APPLICATION OF THE EXCLUSIONARY RULE TO CASES WHERE THE VIOLATION ITSELF IS THE RESULT OF WILLFUL AND FLAGRANT POLICE MISCONDUCT RESULTING IN A SERIOUS DEPRIVATION OF AN INDIVIDUAL'S CONSTITUTIONAL RIGHTS. JUDGE BORK, SIMILARLY, FEELS THAT THIS DOCTRINE SHOULD BE RE-EXAMINED. THE REASON FOR THIS RULE IS DETERRENCE OF POLICE MISCONDUCT. JUDGE BORK FEELS THAT "...IT'S TIME WE EXAMINE HOW MUCH DETERRENCE WE ARE GETTING, AND AT WHAT COST." WE AGREE WITH HIM. OUR LEGAL SYSTEM QUITE FREQUENTLY DEMANDS THAT WE EITHER RECONCILE OR CHOOSE BETWEEN COMPETING INTERESTS. THIS IS DIFFICULT, BUT MUST BE DONE. JUDGE BORK EXPRESSED OUR SENTIMENTS QUITE SUCCINCTLY WHEN HE SAID, "IT SEEMS THE CONSCIENCE OF THE COURT OUGHT TO BE AT LEAST EQUALLY SHAKEN BY THE IDEA OF TURNING A CRIMINAL LOOSE UPON SOCIETY."

CAPITAL PUNISHMENT IS ANOTHER ISSUE THAT CONCERNS US. THE IACP WENT ON RECORD IN 1922 AS FAVORING CAPITAL PUNISHMENT FOLLOWING SPEEDY TRIALS. IN 1973, WE REITERATED AND EXPANDED ON THAT POSITION BY STATING OUR OPINION THAT CAPITAL PUNISHMENT DETERS **CERTAIN CRIMES**. WE WENT ON RECORD AS FAVORING THE DEATH PENALTY FOR PREMEDITATED MURDER, MURDER COMMITTED DURING THE PERPETRATION OF A FELONY, AND THE KILLING OF LAW ENFORCEMENT OFFICERS AND PRISON GUARDS WHILE PERFORMING THEIR DUTIES. WE HAVE ALWAYS OFFICIALLY NOTED, THOUGH NOT SHARED, THE QUESTIONS OF THE CONSTITUTIONALITY OF CAPITAL PUNISHMENT. WE AGREE WITH JUDGE BORK THAT IT IS "... A LITTLE HARD TO

UNDERSTAND HOW A PENALTY THAT THE FRAMERS EXPLICITLY ASSUMED TO BE AVAILABLE CAN SOMEHOW BECOME UNAVAILABLE BECAUSE OF THE VERY CONSTITUTION THE FRAMERS WROTE."

WE BELIEVE THAT IT TAKES CONFIDENCE TO PUNISH CRIME AND TO ENFORCE COMMUNITY STANDARDS ON MATTERS SUCH AS PORNOGRAPHY. WE FEEL THIS CAN BE DONE WITHOUT THE INDISCRIMINATE VIOLATION OF OUR CITIZEN'S CONSTITUTIONAL RIGHTS, BUT IT TAKES CONFIDENCE IN AND COMMITMENT TO OUR VALUES. WE THINK THAT THE AMERICAN PEOPLE HAVE BOTH THIS CONFIDENCE AND THIS COMMITMENT. WE THINK JUDGE BORK HAS IT TOO.

THE IACP SUPPORTS JUDGE BORK'S NOMINATION FOR THE REASONS WE HAVE STATED. THROUGHOUT HIS CAREER, WHEN FACED WITH CRIMINAL JUSTICE ISSUES, JUDGE BORK HAS DEMONSTRATED A REAL CONCERN FOR THE PROBLEM OF LAWLESSNESS IN OUR SOCIETY, AND A MARKED SENSITIVITY TO THE PROBLEMS FACING TODAY'S LAW ENFORCEMENT OFFICERS. HIS POSITION ON ISSUES SUCH AS SEARCH AND SEIZURE, CAPITAL PUNISHMENT, PORNOGRAPHY, AND SWIFT AND SURE PUNISHMENT FOR CRIMINALS, DEMONSTRATES THE COURAGE NECESSARY TO EFFECTIVELY HELP US DEAL WITH OUR INCREASING RATE OF CRIME. WE AT IACP FEEL THAT JUDGE BORK'S CONFIRMATION WILL BENEFIT NOT ONLY THE LAW ENFORCEMENT COMMUNITY, BUT LAW-ABIDING CITIZENS OF OUR NATION AS WELL.

THIS PROCESS HAS BEEN LONG AND ARDUOUS, AND IT CONTINUES. HOWEVER, IN THIS YEAR OF OUR CONSTITUTION'S BICENTENNIEL, WE MUST TAKE OUR CONSTITUTIONAL RESPONSIBIITIES SERIOUSLY. WE COMMEND THIS COMMITTEE FOR HAVING DONE SO. WE BELIEVE THAT AFTER CAREFUL CONSIDERATION AND WEIGHING OF ALL THE EVIDENCE BEFORE YOU, YOU WILL VOTE TO CONFIRM JUDGE BORK'S NOMINATION TO THE SUPREME COURT. THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE STRONGLY SUPPORTS JUDGE BORK.

The **Chairman**. Thank you very much, Jerry.

Who would like to go next?

TESTIMONY OF ROBERT FUESEL

Mr. **Fuesel**. Thank you, Mr. Chairman, and members of the committee. My name is Robert Fuesel. I am the national president of the Federal Criminal Investigators Association and a member of the National Law Enforcement Council.

The FCIA is made up of agents representing more than 50 federal law enforcement agencies throughout the United States, those of us who are charged with the power of arrest, execution of search warrants, and the authority to carry firearms in the discharge of our duties.

The primary goal of our association is to present federal law enforcement as a true and honorable profession. The FCIA supports the efforts of those jurists who by their decisions support the efforts of Federal law enforcement agents in their fight against the criminal element.

It is with that goal in mind that the executive board, acting on behalf of the general membership of the FCIA, wishes to place on the record its hearty and unqualified endorsement of Judge Robert H. Bork to be an Associate Justice of the Supreme Court of the United States. We sincerely feel that our association's goal for law enforcement will be advanced substantially by the confirmation of Judge Bork as an Associate Justice of the Supreme Court, for the following reasons:

One, his personal honor and integrity which he possesses to the highest degree, and has demonstrated consistency in public and private life.

Two, his dedication to vigorous enforcement, within constitutional boundaries, of the criminal laws of the United States, as evidenced by his exemplary record as a federal judge.

Three, like others, we believe that throughout his career Judge Bork has demonstrated a real concern for the problems of lawlessness and violence in our society, and a marked sensitivity to the concerns facing today's law enforcement professionals.

Four, his strong assertion that punishment is a deterrent to crime, a position which, in our opinion, is supported by a vast majority of our citizens in our country who are the actual victims of violent crimes.

And five, his views that it takes confidence to punish crimes and enforce community standards on issues, such as pornography, because the community demands that their high standards be enacted into law.

We respectfully suggest that Judge Bork will bring to the Supreme Court his extensive knowledge and legal experience. He is known to have balanced views on criminal justice and a commitment to the rule of law. Judge Bork's views on criminal justice issues are, beyond any question, in accordance with the views of our general membership, as were the opinions of Justice Lewis F. Powell.

This endorsement is based upon the collective experience of those criminal investigators who are charged with the responsibility for enforcing our Nation's laws. You here today all know the type of dedicated criminal investigators of whom I speak. We in the profession most commonly refer to them, with a certain degree of self-pride, as "those in the field". They are the men and women who spend their entire working days and nights in the streets of our great country. They are the front line troops in a day-to-day battle on behalf of the people of this country against those who are bent on criminal activities.

We know that all of you here today support the daily enforcement efforts of those agents. Lest there be any doubt, we are here now before you to state unequivocally that those field agents support fully the nomination of Judge Bork.

Mr. Chairman and members of the committee, we do not make this endorsement lightly. Our collective conscience will not permit a light decision in this regard. We are making this endorsement because we sincerely believe, based on our experience, and on Judge Bork's record, that his confirmation to the Supreme Court would be a benefit not only to federal law enforcement but to the entire law enforcement community of the United States.

Thank you.

[Prepared statement follows:]

Federal Criminal Investigators Association
Office of National President
Post Office Box A3867
Chicago, Illinois 60690

Robert R. Fuesel
National President

TESTIMONY OF ROBERT R. FUESEL, NATIONAL PRESIDENT,
FEDERAL CRIMINAL INVESTIGATORS ASSOCIATION
BEFORE THE SENATE JUDICIARY COMMITTEE
REGARDING THE CONFIRMATION OF JUDGE ROBERT H. BORK
TO THE UNITED STATES SUPREME COURT

"Dedicated to Recognition of Criminal Investigation as a Profession"

THANK YOU MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE; MY NAME IS ROBERT FUESEL. I AM THE NATIONAL PRESIDENT OF THE FEDERAL CRIMINAL INVESTIGATORS ASSOCIATION AND A MEMBER OF THE NATIONAL LAW ENFORCEMENT COUNCIL.

THE FCIA IS MADE UP OF AGENTS REPRESENTING MORE THAN 50 FEDERAL ENFORCEMENT AGENCIES THROUGHOUT THE UNITED STATES; THOSE OF US WHO ARE CHARGED WITH THE POWER OF ARREST, EXECUTION OF SEARCH WARRANTS AND THE AUTHORITY TO CARRY FIREARMS IN THE DISCHARGE OF OUR DUTIES. THE PRIMARY GOAL OF THE ASSOCIATION IS TO PRESENT FEDERAL LAW ENFORCEMENT AS A TRUE AND HONORABLE PROFESSION. THE FCIA SUPPORTS THE EFFORTS OF THOSE JURISTS WHO BY THEIR DECISIONS, SUPPORT THE EFFORTS OF FEDERAL LAW ENFORCEMENT AGENTS IN THEIR FIGHT AGAINST THE CRIMINAL ELEMENT. IT IS WITH THAT GOAL IN MIND THAT THE EXECUTIVE BOARD, ACTING ON BEHALF OF THE GENERAL MEMBERSHIP OF THE FCIA, WISHES TO PLACE ON THE RECORD ITS HEARTY AND UNQUALIFIED ENDORSEMENT OF JUDGE ROBERT H. BORK TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES.

WE SINCERELY FEEL THAT OUR ASSOCIATION'S GOALS FOR LAW ENFORCEMENT WILL BE ADVANCED SUBSTANTIALLY BY THE CONFIRMATION OF JUDGE BORK AS AN ASSOCIATE JUSTICE OF THE SUPREME COURT FOR THE FOLLOWING REASONS:

1. HIS PERSONAL HONOR AND INTEGRITY, WHICH HE POSSESSES TO THE HIGHEST DEGREE, AND HAS DEMONSTRATED CONSISTENTLY IN PUBLIC AND PRIVATE LIFE;

2. HIS DEDICATION TO VIGOROUS ENFORCEMENT, WITHIN CONSTITUTIONAL BOUNDARIES, OF THE CRIMINAL LAWS OF THE UNITED STATES, AS EVIDENCED BY HIS EXEMPLARY RECORD AS FEDERAL JUDGE;

3. LIKE OTHERS WE BELIEVE THAT THROUGHOUT HIS CAREER, JUDGE BORK HAS DEMONSTRATED A REAL CONCERN FOR THE PROBLEMS OF LAWLESSNESS AND VIOLENCE IN OUR SOCIETY, AND A MARKED SENSITIVITY TO THE CONCERNS FACING TODAY'S LAW ENFORCEMENT PROFESSIONALS;

4. HIS STRONG ASSERTION THAT PUNISHMENT IS A DETERRENT TO CRIME; A POSITION WHICH, IN OUR OPINION, IS SUPPORTED BY A VAST MAJORITY OF OUR CITIZENS, WHO ARE THE

ACTUAL VICTIMS OF VIOLENT CRIMES;

5. HIS VIEWS THAT IT TAKES CONFIDENCE TO PUNISH CRIMES AND ENFORCE COMMUNITY STANDARDS ON ISSUES SUCH AS PORNOGRAPHY BECAUSE THE COMMUNITY DEMANDS THAT THEIR HIGH STANDARDS BE ENACTED INTO LAW.

WE RESPECTFULLY SUGGEST THAT JUDGE BORK WILL BRING TO THE SUPREME COURT HIS EXTENSIVE KNOWLEDGE AND LEGAL EXPERIENCE. HE IS KNOWN TO HAVE BALANCED VIEWS ON CRIMINAL JUSTICE AND A COMMITMENT TO THE RULE OF THE LAW. JUDGE BORK'S VIEWS ON CRIMINAL JUSTICE ISSUES ARE, BEYOND ANY QUESTION, IN ACCORD WITH THE VIEWS OF OUR GENERAL MEMBERSHIP, AS WERE THE OPINIONS OF JUSTICE LEWIS F. POWELL.

THIS ENDORSEMENT IS BASED UPON THE COLLECTIVE EXPERIENCE OF THOSE CRIMINAL INVESTIGATORS WHO ARE CHARGED WITH THE RESPONSIBILITY FOR ENFORCING OUR NATION'S LAWS. YOU HERE TODAY ALL KNOW THE TYPE OF DEDICATED CRIMINAL INVESTIGATORS OF WHOM I SPEAK. WE IN THE PROFESSION MOST COMMONLY REFER TO THEM, WITH A CERTAIN DEGREE OF SELF-PRIDE, AS THOSE IN "THE FIELD". THEY ARE THE MEN AND WOMEN WHO SPEND THEIR ENTIRE WORKING DAYS AND NIGHTS IN THE STREETS OF OUR GREAT COUNTRY; THEY ARE THE FRONT LINE TROOPS IN THE DAY-TO-DAY BATTLE ON BEHALF OF THE PEOPLE OF THIS COUNTRY AGAINST THOSE WHO ARE BENT ON CRIMINAL ACTIVITIES. WE KNOW THAT ALL OF YOU HERE TODAY SUPPORT THE DAILY ENFORCEMENT EFFORTS OF THESE AGENTS. LEST THERE BE ANY DOUBT, WE ARE BEFORE YOU NOW TO STATE UNEQUIVOCALLY THAT THOSE FIELD AGENTS SUPPORT FULLY THE NOMINATION OF JUDGE BORK.

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, WE DO NOT MAKE THIS ENDORSEMENT LIGHTLY; OUR COLLECTIVE CONSCIENCE WILL NOT PERMIT A LIGHT DECISION IN THIS REGARD. WE ARE MAKING THIS ENDORSEMENT BECAUSE WE SINCERELY BELIEVE, BASED ON OUR EXPERIENCE AND JUDGE BORK'S RECORD, THAT HIS CONFIRMATION TO THE SUPREME COURT WOULD BE OF BENEFIT NOT ONLY TO THE FEDERAL ENFORCEMENT EFFORT, BUT TO THE ENTIRE LAW ENFORCEMENT COMMUNITY OF THE UNITED STATES. THANK YOU.

Senator **Leahy** [presiding]. Thank you. And who will go next? Mr. Bellizzi.

TESTIMONY OF JOHN J. BELLIZZI

Mr. **Bellizzi**. Thank you.

At the outset I want to say that my name is John Bellizzi and currently I serve as Executive Director of the International Narcotic Enforcement Officers Association, which is an organization composed basically of narcotic enforcement officers from all levels of government and from throughout the United States and about 50 other countries.

I appear here today on behalf of 10,000 members and thousands of other drug enforcement officials throughout the United States.

Recently, drug traffickers have suffered some serious setbacks as a result of an intensified and concentrated effort by law enforcement. The impact of the multitude of seizures of drugs, money and other assets brought about by successful investigations, arrests and prosecutions has put such a dent in the illegal trafficking operations that by furious retaliation the traffickers are committing assaults, violence and murder on our drug agents and other officials responsible for drug enforcement.

The Drug Enforcement Administration reports 144 assaults on agents during the past 2 years, compared with 50 in 1983 and 1984. During 1986, 96 law enforcement officers were killed in the line of duty; 66 died as a result of gunshot wounds. Since December 31 of 1986, three federal agents have been killed during drug investigations.

Narcotic law enforcement agents have always operated under high risk conditions, but recent events have created a situation where their lives are at stake constantly, and these men and women deserve to be recognized for their dedicated service.

Each year at its annual conference, our organization determined to give credit to those drug enforcement officers for outstanding performance of duty and presents these courageous and dedicated officers with appropriate awards of recognition.

This year, the 28th Annual International Drug Conference sponsored by our association was held in Orlando, FL, during the week of August 24. One hundred and forty-four narcotic officers were honored during this meeting.

Fourteen Medals of Valor, the highest recognition awarded to narcotic officers by INEOA, were presented. Five of these awards were presented posthumously to the widows or members of the officers' families. One such posthumous Medal of Valor was presented to Mrs. William Ramos, widow of Special Agent, DEA, William Ramos.

Special Agent William Ramos, 30, of the Federal Drug Enforcement Administration, was shot to death in Pharr, TX during a drug arrest which turned out to be a shootout. The killing of DEA Agent Ramos marked another incident of violence which drug enforcement officers have encountered in recent months involving the wounding or killing of drug agents. I wish you could have been present to witness the presentation of the Medal of Valor to Mrs. William Ramos, the widow of Agent William Ramos.

Thelma Ramos, a frail young widow, stood before about 1,000 officers and family members holding her two children, a 3-year-old and a 5-year-old in her arms, and in a soft spoken voice paid tribute to her husband and appealed to the audience to continue the enforcement efforts against drug trafficking, an effort her husband lived for and an effort her husband died for, in an attempt to prevent the spread of the ravages of drugs, especially among our young people. You could have heard a pin drop, and as you looked around the room, there was not a single dry eye in the audience.

The thousands of drug enforcement agents who risk their lives each time they set out on a drug investigation are dedicated. Notwithstanding the imminent risk they face, they are not the least dissuaded from performance of duty.

These officers and their family members are very much concerned that they receive the same equal protection, the same constitutional rights, the same constitutional protection afforded to any suspect, defendant or prisoner charged with the commission of a crime.

The matter of Judge Bork's nomination and record was reviewed by the members of INEOA at the meeting held recently in Florida. After careful consideration, INEOA voted unanimously to endorse and support the nomination of Judge Robert H. Bork.

I wish to make it clear that by this endorsement we do not seek to ingratiate ourselves with Judge Bork or the court. We seek no favor and we seek no special privileges. What we do seek is protection of the constitutional rights of the accused and we also seek protection of the constitutional rights of our law-abiding citizens and of our law enforcement agents.

I submit that, by his record, Judge Bork has demonstrated that he is capable and, indeed, willing to do just that—ensure equal protection to all, regardless of race, color, sex, religious or social background.

I have been following these hearings very carefully. Based on what I have heard, I am convinced that Judge Bork is an exceptional jurist who merits approval of his nomination.

I was shocked to hear that Hollywood and Madison Avenue have joined in what appears to be a conspiracy to block the nomination of Judge Bork. This scandalous attack on Judge Bork's record and character is in poor taste and only serves to reflect the low character of those who instigated the verbal attack.

You are all honorable, honest, prudent, and reasonable men. I urge each of you to examine your conscience. Somewhere, some time in your career, each of you have in all probability espoused some principle or committed some act that you have lived to regret. That fact that you may have found yourself in such a position does in no way diminish your ability to serve as a U.S. Senator.

If you are looking for the perfect man to fill the vacancy on the Supreme Court, you will not find him, not in Judge Bork, not in any other nominee that comes before you, no more than you can find a perfect Senator to serve in the U.S. Senate.

Judge the man not on a minute segment of his life or career, but judge him on his life, his record and career as a whole.

If I may borrow a phrase from the Scriptures, "Let he among you who is without sin cast the first stone."

Thank you very much.

[The statement of John J. Bellizzi follows:]

TESTIMONY PRESENTED BY

JOHN J. BELLIZZI
EXECUTIVE DIRECTOR
INTERNATIONAL NARCOTIC ENFORCEMENT OFFICERS ASSOCIATION

BEFORE THE SENATE JUDICIARY COMMITTEE
CONSIDERING THE NOMINATION OF
JUDGE ROBERT H. BORK
AS JUSTICE OF THE SUPREME COURT

At the outset, I wish to express my appreciation for granting me the opportunity to appear before you today to testify in these important hearings.

My name is John J. Bellizzi. Currently I serve as the Executive Director of the International Narcotic Enforcement Officers Association (INEOA) which is an organization composed basically of narcotic enforcement officers from all levels of government and from throughout the United States and about 50 other countries.

I appear here today on behalf of 10,000 members and thousands of other drug enforcement officials throughout the United States and other countries.

Recently drug traffickers have suffered some serious setbacks as a result of an intensified and concentrated effort by law enforcement. The U.S. Department of Justice, Drug Enforcement Administration, U.S. Customs, U.S. Border Patrol, U.S. Coast Guard, the O.S.I. of the U.S. Air Force and other military units, the FBI and several state and municipal law enforcement agencies have succeeded in making serious inroads in combatting the drug traffickers here in the United States and abroad, especially in Mexico, Columbia, the European area, the Far East and other source countries.

The impact of the multitude of seizures of drugs, money and other assets brought about by successful investigations, arrests and prosecutions has put such a dent in the illegal trafficking operations that by furious retaliation the traffickers are committing assaults, violence and murder on our drug agents and other officials responsible for drug enforcement.

The DEA reports 144 assaults on agents during the past two years compared with 50 in 1983 and 1984. During 1986, 96 law enforcement officers were killed in the line of duty, 66 died as a result of gunshot wounds. Since 12/31/86, three federal agents have been killed during drug investigations. Seized last year were 400 automatic weapons including sub-machine guns. According to John C. Lawn, Administrator of DEA, the situation is considered a very dangerous trend.

A recent extradition by the United States from Columbia of the top Columbian drug dealer, Carlos Lehder Rivas, who has been identified as one of the most dangerous and successful drug traffickers, has magnified the high risk imposed on our drug law enforcement agents. Fearing reprisals from the arrests of Lehder, DEA's administrator, John C. Lawn, has notified all DEA agents in the United States and in the 43 DEA offices around the world to exercise an advanced state of readiness for themselves and their families. Lehder is alleged to have threatened to kill a federal judge each week until he is freed. The "Medallian Cartel", allegedly headed by Lehder, has pledged to kill five Americans for every extradition by Columbia.

Narcotic law enforcement agents have always operated under high risk conditions, but recent events have created a situation where their lives are at stake constantly and these men and women deserve to be recognized for their dedicated service.

Each year at its annual conference, INEOA determined to give credit to those drug enforcement officers for outstanding performance of duty, presents these courageous and dedicated officers with appropriate awards of recognition.

This year, the 28th Annual International Drug Conference sponsored by INEOA was held in Orlando, Florida, during the week of August 24-28. One hundred forty-four narcotic officers were honored during this meeting.

Fourteen Medals of Valor, the highest recognition awarded to narcotic officers by INEOA, were presented, five of these awards were presented posthumously to the widows or members of the officers families. One such posthumous medal of valor was presented to Mrs. William Ramos, widow of Special Agent, DEA, William Ramos.

Special Agent William Ramos, 30, of the Federal Drug Enforcement Administration, was shot to death in Pharr, Texas, during a drug arrest which turned out to be a shoot out. Agent Ramos was shot in the chest while trying to make the arrest of a drug trafficking suspect, Felipe Molina-Uribe of McAllen, Texas, in a supermarket parking lot. Molina was arrested at the scene and charged with the death of DEA agent Ramos. A van belonging to him was confiscated by DEA agents when it was discovered it contained over 300 pounds of marijuana worth $150,000.

The killing of DEA agent Ramos marked another incident of violence which drug enforcement officers have encountered in recent months involving the wounding or killing of drug agents. I wish you could have been present to witness the presentation of the Medal of Valor to Mrs. William Ramos, widow of Agent William Ramos.

Thelma Ramos, a frail young widow, stood before about 1,000 officers and family members holding her two children, a three year old and a five year old in her arms and in a soft spoken voice paid tribute to her husband and appealed to the audience to continue the enforcement efforts against drug trafficking, an effort her husband lived for and an effort her husband died for, in an attempt to prevent the spread of the ravages of drugs especially among our young people. You could have heard a pin drop and as you looked around the room, there was not a single dry eye in the audience.

The thousands of drug enforcement agents who risk their lives each time they set out on a drug investigation are dedicated. Notwithstanding the imminent risk they face, they are not the least dissuaded from performance of duty.

These officers and their family members are very much concerned that they receive the same equal protection, the same constitutional rights, the same constitutional protection afforded to any suspect, defendant or prisoner charged with the commission of the crime.

The matter of Judge Bork's nomination and record was reviewed by the members of INEOA at meetings held in Orlando, Florida, August 23rd and 27th. After careful consideration, INEOA voted unanimously to endorse and support the nomination of Judge Robert H. Bork as Justice to the United States Supreme Court.

President Reagan has described Judge Bork as a judge who has demonstrated a clear understanding of the problems facing today's law enforcement professionals, as a "tough clear-eyed" justice whose goal is "to assure real justice for all citizens, not to foster never-ending sparring matches between lawyers".

"It's time we reassert the fundamental principle that the purpose of criminal justice is to find the truth--not coddle criminals", President Reagan has said. "The constitutional rights of the accused must be protected, but so must the rights of law-abiding citizens."

I wish to make it clear that by this endorsement we do not seek to ingratiate ourselves with Judge Bork or the court. We seek no favor, we seek no special privileges. What we do seek is protection of the constitutional rights of the accused and we also seek protection of the constitutional rights of our law-abiding citizens and of our law enforcement agents.

I submit that by his record Judge Bork has demonstrated that he is capable and indeed willing to do just that - ensure equal protection to all regardless of race, color, sex, religious or social background.

During his tenure as Solicitor General, Judge Bork has supported 17 of 19 civil rights cases involving minority or female plaintiffs and in the two that he did not support, the minority plaintiff, the court agreed with him. As a member of the Court of Appeals, not one of his more than 100 majority opinions has been reversed by the Supreme Court.

-The Supreme Court has never reversed any of the over 400 majority opinions in which Judge Bork has joined.

-The New York Times had this to say about Judge Bork, "Mr. Bork is a legal scholar of distinction and principle".

-Judge Bork was unanimously confirmed by the Senate for the D.C. Circuit in 1982 after receiving the American Bar Association's highest rating -- "exceptionally well qualified" which was given to only a handful of judicial nominees each year. I could go on and on, but I know the record includes many of Judge Bork's other outstanding accomplishments and recommendations.

I have been following these hearings very carefully. Based on what I have heard, I am convinced that Judge Bork is an exceptional jurist who merits approval of his nomination. I was shocked to hear that Hollywood and Madison Avenue have joined in what appears to be a conspiracy to block the nomination of Judge Bork. This scandalous attack on Judge Bork's record and character is in poor taste and only serves to reflect the low character of those who instigated the verbal attack.

You are all honorable, honest, prudent, reasonable men. I urge each of you to examine your conscience. Somewhere, sometime in your career each of you have in all probability espoused some principle or committed some act that you have lived to regret. That fact that you may have found yourself in such a position, does in no way diminish your ability to serve as a United States senator.

If you are looking for the "perfect man" to fill the vacancy on the Supreme Court - you will not find him, not in Judge Bork, not in any other nominee that comes before you - no more than we can find the perfect senator to serve in U.S. Senate.

Judge the man not on a minute segment of his life or career but judge him on his life, his record and career as a whole. If I may borrow a phrase from the scriptures - "let he among you who is without sin - cast the first stone."

Thank you

John J. Bellizzi of Delmar, New York retired from the position of Director of the New York Bureau of Narcotic Enforcement and has assumed the position of Executive Director of the International Narcotic Enforcement Officers Association on a full-time basis.

Bellizzi retired after 40 years of service in law enforcement having worked under six governors and numerous commissioners and other state officials. He began his law enforcement career as a police officer with the New York City Police Department with assignments in the "Fort Apache" section of the Bronx, the "Harlem" area of Manhattan and the "Bedford-Stuyvesant" area of Brooklyn. During the war, he served with the Division of National Defense as an undercover agent investigating communist activities. Prior to entering the field of law enforcement, he served as a licensed Pharmacist in retail and hospital pharmacies.

Bellizzi holds degrees from St. John's University, College of Pharmacy, Ph.G.; Albany Law School, LL.B., Doctor in Jurisprudence, JD., Union University; an Honorary Doctorate of Laws LL.D., St. John's Univeristy; and has done graduate study in U.S. Food and Drug Law at New York University Law School and Fordham University. The author of many articles on pharmacy, narcotics and law, he has served on several faculties including Albany Medical School and the University of Southern California. He was Professor of Pharmaceutical Law at St. John's University for 14 years. In addition, he has served as consultant to the White House on Narcotics and Drug Abuse, as a member of New York City Mayor Wagner's and Mayor Lindsay's Narcotic Commission; on Los Angeles Mayor Yorty's Narcotic Commission, and as a member of Governor Brown's Narcotic Task Committee for the State of California. He has served as the Executive Director of the New York State Drug Abuse Advisory Committee of the New York State Department of Health and the Division of Substance Abuse. He is currently serving as a member of the New York State Drug Abuse Advisory Committee.

Mr. Bellizzi was the founder and First President of INEOA. He is a recipient of many awards including the Honor Legion Medal from the N.Y.C. Police Department and the Papal Medal from Pope Paul IV. He received the first Anslinger Award given to an active narcotic officer for outstanding dedication, achievement, and contribution in combatting international drug trafficking.

Senator **Leahy**. Thank you, Mr. Bellizzi.

Having spent a third of my adult life as a chief law enforcement officer of my home county, I know that you never do find perfection in humans, and probably that's just as well.

Who is next, please. Okay, Lieutenant Hughes.

We have run over time on the last three speakers. I am really going to have to enforce the 5-minute rule. I am sorry to land on you, Lieutenant, and I know you have waited here a long time. But these hearings have been going very late at night and starting very early in the morning, and while the Senators can go in and out, there are an awful lot of people along here on both sides of the aisle who still have hours or work to do even tonight.

Mr. **Hughes**. I understand, sir.

Senator **Leahy**. Thank you. We are delighted you're here.

TESTIMONY OF JOHN L. HUGHES

Mr. **Hughes**. Mr. Chairman, honorable members of this distinguished committee, I would like to thank the committee for giving me the opportunity to speak on this matter of great public interest.

I am John L. Hughes, testifying on behalf of the National Troopers Coalition, an organization composed of troopers from State police and highway patrol agencies throughout the United States. Our organization represents all ranks of law enforcement and consists of approximately 45,000 members.

The National Troopers Coalition membership meets on a regular basis with prominent leaders in the legislative and executive branches of the federal government, as well as with leading law enforcement and criminal justice officials. The coalition keeps informed on issues affecting its membership and law enforcement and, in general, takes action to support or oppose legislation that it thinks is of particular concern. We stand united in support of the nomination of Robert H. Bork for Associate Justice of the United States Supreme Court. Few offices in our government demand the integrity and intellectual skills and dedication to the principle of equal justice as does that of the Associate Justice of the United States Supreme Court.

This office requires an unswerving and courageous dedication to principle, basic fairness, human decency, and justice under law. The Justices are the guardians of our Constitution and, for that reason, it is essential that only the most qualified be appointed.

The record of Robert H. Bork impressively demonstrates these qualities, from his days of teaching at Yale Law School, to his term as Solicitor General of the United States, and most recently as a member of the U.S. Court of Appeals for the District of Columbia. He is fair, principled, and respected by the members of the law enforcement community.

Law enforcement officers, like the vast majority of citizens throughout this country, are particularly interested in a nominee's qualifications in the area of criminal law. Our organization believes that in this area, which occupies a large percentage of cases that reach the Supreme Court, Judge Bork has demonstrated throughout his career a clear understanding of the challenges facing police officers in combating crime.

Judge Bork has, we believe, struck the appropriate balance between protecting the rights of society to enforce its laws, on the one hand, and upholding the constitutional rights of an accused on the other hand.

We could not support a nominee who would sacrifice either of these interests for the sake of the other.

I would like to take only a few minutes to refer to a couple of decisions of Judge Bork as a member of the U. S. court of appeals which notably demonstrate his understanding of the proper balance to be arrived at in this area.

For example, in *United States* v. *Mount,* Judge Bork, in a concurring opinion, rejected the defendant's argument that the exclusionary rule should be applied to suppress evidence seized as a result of an allegedly illegal search in Great Britain by British police.

Because no action by a U.S. court could possibly deter the actions of foreign police, Judge Bork, with great insight for the purpose of the exclusionary rule, wrote that "Where no deterrence of unconstitutional behavior is possible, a decision to exclude probative evidence with the result that a criminal goes free to prey upon the public should shock the judicial conscience even more than admitting the evidence."

In *United States* v. *James,* Judge Bork upheld a conviction for possession of illegal drugs, ruling that the "knock and announce" statute allowed police to enter a dwelling pursuant to a search warrant to prevent the destruction of evidence, where the accused is well aware of the purpose of the police presence.

In *United States* v. *Hartley,* Judge Bork, in affirming a conviction for possession of a controlled dangerous substance, held that the government had properly invoked a qualified privilege not to reveal the surveillance location at trial.

In these and other opinions, Judge Bork has demonstrated his recognition of the difficulties facing police officers in their efforts to enforce the criminal laws.

In closing, while members of the National Troopers Coalition are police officers, they are also citizens with a keen interest in the protection of constitutional rights for themselves, their families, and all citizens of this nation. We would not support Judge Bork if we had any reason to believe that he would not faithfully carry out his responsibilities to uphold the Constitution of the United States. We urge the Senate Judiciary Committee membership to endorse the nomination and the earliest possible confirmation by the U.S. Senate.

Thank you.

Senator Thurmond, it's good to see you again, sir.

[The statement of Lt. John L. Hughes follows:]

NATIONAL TROOPERS COALITION
[illegible] STATE STREET SUITE [illegible] ALBANY N.Y. [illegible]

CHAIRMAN
[illegible]

VICE CHAIRMAN
[illegible]
AZ [illegible]

[illegible] CHAIRMAN
[illegible]
MARYLAND [illegible]

RECORDING SECRETARY
[illegible]

CORRESPONDING SECRETARY
[illegible]
MASS [illegible]

TREASURER
[illegible]
CONN [illegible]

[illegible]
[illegible] AVENUE
[illegible] N.Y. [illegible]

BEFORE

THE UNITED STATES SENATE

JUDICIARY COMMITTEE

CONFORMATION HEARING

FOR

THE HONORABLE ROBERT H. BORK

AS

ASSOCIATE JUSTICE

OF THE UNITED STATES SUPREME COURT

SPEAKING IN FAVOR OF THE NOMINATION

THE NATIONAL TROOPERS COALITION

JOHNNY L. HUGHES
DIRECTOR, LEGISLATIVE AND
CONGRESSIONAL AFFAIRS

PARTICIPATING MEMBER, NATIONAL LAW
ENFORCEMENT COUNCIL

THE UNITED STATES SENATE JUDICIARY COMMITTEE

SEPTEMBER 22, 1987

CONFIRMATION HEARING
ROBERT H. BORK
FOR ASSOCIATE JUSTICE OF THE
UNITED STATES SUPREME COURT

TESTIFYING: 1/LT. JOHNNY L. HUGHES
MARYLAND STATE POLICE
1201 REISTERSTOWN ROAD
PIKESVILLE, MARYLAND 21208
(301) 653-4343 (301) 679-6276

LIEUTENANT HUGHES IS A TWENTY YEAR VETERAN OF THE MARYLAND STATE POLICE. HE IS DIRECTOR OF LEGISLATIVE AND CONGRESSIONAL AFFAIRS FOR THE NATIONAL TROOPERS COALITION. THE NATIONAL TROOPERS COALITION IS COMPOSED OF STATE POLICE AND HIGHWAY PATROL AGENCIES THROUGHOUT THE UNITED STATES AND HAS A MEMBERSHIP OF APPROXIMATELY 45,000 TROOPERS.

MR. CHAIRMAN, HONORABLE MEMBERS OF THIS DISTINGUISHED COMMITTEE. I WOULD LIKE TO THANK THE COMMITTEE FOR GIVING ME THE OPPORTUNITY TO SPEAK ON THIS MATTER OF GREAT PUBLIC INTEREST.

I AM JOHNNY L. HUGHES, TESTIFYING ON BEHALF OF THE NATIONAL TROOPERS COALITION, AN ORGANIZATION COMPOSED OF TROOPERS FROM STATE POLICE AND HIGHWAY PATROL AGENCIES THROUGHOUT THE UNITED STATES. OUR ORGANIZATION REPRESENTS ALL RANKS OF LAW ENFORCEMENT AND CONSISTS OF APPROXIMATELY 45,000 MEMBERS.

THE NATIONAL TROOPERS COALITION MEMBERSHIP MEETS ON A REGULAR BASIS WITH PROMINENT LEADERS IN THE LEGISLATIVE AND EXECUTIVE BRANCHES OF OUR FEDERAL GOVERNMENT, AS WELL AS WITH LEADING LAW ENFORCEMENT AND CRIMINAL JUSTICE OFFICIALS. THE COALITION KEEPS INFORMED ON ISSUES AFFECTING ITS MEMBERSHIP AND

LAW ENFORCEMENT IN GENERAL AND TAKES ACTION TO SUPPORT OR OPPOSE LEGISLATION IT THINKS IS OF PARTICULAR CONCERN TO LAW ENFORCEMENT.

WE STAND UNITED IN SUPPORT OF THE NOMINATION OF ROBERT H. BORK FOR ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT.

FEW OFFICES IN OUR GOVERNMENT DEMAND THE INTEGRITY, INTELLECTUAL SKILLS AND DEDICATION TO THE PRINCIPLE OF EQUAL JUSTICE AS DOES THAT OF ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT. THIS OFFICE REQUIRES AN UNSWERVING AND COURAGEOUS DEDICATION TO PRINCIPLE, BASIC FAIRNESS, HUMAN DECENCY, AND JUSTICE UNDER LAW. THE JUSTICES ARE THE GUARDIANS OF OUR CONSTITUTION, AND FOR THAT REASON IT IS ESSENTIAL THAT ONLY THE MOST QUALIFIED BE APPOINTED.

THE RECORD OF ROBERT H. BORK IMPRESSIVELY DEMONSTRATES THESE QUALITIES, FROM HIS DAYS TEACHING AT YALE LAW SCHOOL, TO HIS TERM AS SOLICITOR GENERAL OF THE UNITED STATES, AND MOST RECENTLY, AS A MEMBER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA. HE IS FAIR, PRINCIPLED AND RESPECTED BY THE MEMBERS OF THE LAW ENFORCEMENT COMMUNITY.

LAW ENFORCEMENT OFFICERS, LIKE THE VAST MAJORITY OF CITIZENS THROUGHOUT THIS COUNTRY, ARE PARTICULARLY INTERESTED IN A NOMINEE'S QUALIFICATIONS IN THE AREA OF CRIMINAL LAW. OUR ORGANIZATION BELIEVES THAT IN THIS AREA, WHICH OCCUPIES A LARGE PERCENTAGE OF CASES THAT REACH THE SUPREME COURT, JUDGE BORK HAS DEMONSTRATED THROUGHOUT HIS CAREER A CLEAR UNDERSTANDING OF THE CHALLENGES FACING POLICE OFFICERS IN COMBATING CRIME. JUDGE BORK HAS, WE BELIEVE, STRUCK THE APPROPRIATE BALANCE BETWEEN

PROTECTING THE RIGHTS OF SOCIETY TO ENFORCE ITS LAWS ON THE ONE HAND, AND UPHOLDING THE CONSTITUTIONAL RIGHTS OF AN ACCUSED ON THE OTHER. WE COULD NOT SUPPORT A NOMINEE WHO WOULD SACRIFICE EITHER OF THESE INTERESTS FOR THE SAKE OF THE OTHER.

I WOULD LIKE TO TAKE ONLY A FEW MINUTES TO REFER TO SEVERAL DECISIONS OF JUDGE BORK AS A MEMBER OF THE UNITED STATES COURT OF APPEALS WHICH NOTABLY DEMONSTRATE HIS UNDERSTANDING OF THE PROPER BALANCE TO BE ARRIVED AT IN THIS AREA. FOR EXAMPLE, IN UNITED STATES V. MOUNT, JUDGE BORK, IN A CONCURRING OPINION, REJECTED A DEFENDANT'S ARGUMENT THAT THE "EXCLUSIONARY RULE" SHOULD BE APPLIED TO SUPPRESS EVIDENCE SEIZED AS A RESULT OF AN ALLEGEDLY ILLEGAL SEARCH IN GREAT BRITAIN BY BRITISH POLICE. BECAUSE NO ACTION BY A UNITED STATES COURT COULD POSSIBLY DETER THE ACTIONS OF FOREIGN POLICE, JUDGE BORK, WITH GREAT INSIGHT FOR THE PURPOSE OF THE "EXCLUSIONARY RULE", WROTE THAT: "WHERE NO DETERRENCE OF UNCONSTITUTIONAL BEHAVIOR IS POSSIBLE, A DECISION TO EXCLUDE PROBATIVE EVIDENCE WITH THE RESULT THAT A CRIMINAL GOES FREE TO PREY UPON THE PUBLIC SHOULD SHOCK THE JUDICIAL CONSCIENCE EVEN MORE THAN ADMITTING THE EVIDENCE."

IN UNITED STATES V. JAMES, JUDGE BORK UPHELD A CONVICTION FOR POSSESSION OF ILLEGAL DRUGS RULING THAT THE "KNOCK AND ANNOUNCE" STATUTE ALLOWED POLICE TO ENTER A DWELLING PURSUANT TO A SEARCH WARRANT TO PREVENT THE DESTRUCTION OF EVIDENCE WHERE THE ACCUSED WERE WELL AWARE OF THE PURPOSE OF THE POLICE PRESENCE. IN UNITED STATES V. HARLEY, JUDGE BORK, IN AFFIRMING A CONVICTION FOR POSSESSION OF A CONTROLLED SUBSTANCE, HELD THAT THE GOVERNMENT HAD PROPERLY INVOKED A QUALIFIED PRIVILEGE NOT TO REVEAL A SURVEILLANCE LOCATION AT TRIAL.

IN THESE AND OTHER OPINIONS, JUDGE BORK HAS DEMONSTRATED HIS RECOGNITION OF THE DIFFICULTIES FACING POLICE OFFICERS IN THEIR EFFORTS TO ENFORCE THE CRIMINAL LAWS. HE HAS AVOIDED LEGAL GYMNASTICS AND INTERPRETED APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES ACCORDING TO THEIR INTENT AND PURPOSE.

YET, JUDGE BORK HAS ALWAYS EXERCISED INDEPENDENCE AND A WILLINGNESS TO ENFORCE THE CONSTITUTIONAL RIGHTS OF ANY DEFENDANT. FOR EXAMPLE, BELIEVING THAT AN ERROR HAD BEEN COMMITTED BY THE TRIAL COURT WHICH VIOLATED THE CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY, JUDGE BORK JOINED IN A DECISION TO OVERTURN NEARLY 400 SEPARATE VERDICTS AGAINST DEFENDANTS IN UNITED STATES V. BROWN.

WHILE MEMBERS OF THE NATIONAL TROOPERS COALITION ARE POLICE OFFICERS, THEY ARE ALSO CITIZENS WITH A KEEN INTEREST IN THE PROTECTION OF CONSTITUTIONAL RIGHTS FOR THEMSELVES, THEIR FAMILIES AND ALL CITIZENS OF THIS NATION. WE WOULD NOT SUPPORT JUDGE BORK IF WE HAD ANY REASON TO BELIEVE THAT HE WOULD NOT FAITHFULLY CARRY OUT HIS RESPONSIBILITIES TO UPHOLD THE CONSTITUTION OF THE UNTIED STATES. WE URGE THE SENATE JUDICIARY COMMITTEE MEMBERSHIP TO ENDORSE THE NOMINATION AND THE EARLIEST POSSIBLE CONFIRMATION BY THE UNITED STATES SENATE.

THANK YOU.

Senator **Thurmond**. It's good to see you, sir.

Senator **Leahy**. Thank you, Lieutenant.

Who's next?

TESTIMONY OF FRANK CARRINGTON

Mr. **Carrington**. Mr. Chairman, my name is Frank Carrington. I'm an attorney at law in Virginia Beach, VA.

Senator **Leahy**. Welcome.

Mr. **Carrington**. I am here today purporting to speak for the victims of crime. My credentials, so to speak, are having been a member of President Reagan's Task Force on Victims of Crime, and having been former chairperson of the American Bar Association's victims of crime, and, frankly, having consulted with victims of crime for the past 15 years.

I have a rather lengthy statement here, which since it's going into the record anyway, I would prefer to summarize very briefly for the committee.

Senator **Leahy**. Certainly. Without objection, your full statement will be made a part of the record.

Mr. **Carrington**. Thank you very much, sir.

Basically, what you have heard here is from the law enforcement community. As I said, I'm an attorney now, but I used to be a law enforcement officer. But everything that has been said by these distinguished gentlemen, the bottom line is the victims of crime. If we did not have victims, we would not need law enforcement officers, obviously, or the criminal justice system. So here purporting to speak for the victims of crime, I feel that Judge Bork's legal philosophy would be accepted certainly by 90 or more percent of the victims I have ever talked to.

I think Judge Bork really summed things up when he was responding to Senator Humphrey on Friday and was asked about his criminal justice philosophy. He said "I think a defendant is entitled, absolutely, to a fair trial." But he said "I don't know that we should invent rights for defendants that are not in the Constitution."

I think that is the basic philosophy that the victims of crime would agree with. And I certainly support Judge Bork and I think the victims of crime would support Judge Bork.

Very briefly, Mr. Chairman, in my testimony I mentioned the testimony by Prof. Joseph D. Grano of Wayne State University, a distinguished professor of law. I thought he would be with me today but he was not on the witness list. He has submitted his testimony to Mr. Short of Senator Thurmond's staff and I would hope that his testimony be made part of the record.

Thank you very much, sir.

Senator **Leahy**. It will be.

[The statement of Frank Carrington follows:]

STATEMENT
OF
FRANK CARRINGTON,
ATTORNEY AT LAW,
IN SUPPORT OF
THE NOMINATION OF JUDGE ROBERT H. BORK
FOR THE OFFICE OF ASSOCIATE JUSTICE
OF
THE SUPREME COURT OF THE UNITED STATES,
BEFORE THE
COMMITTEE ON THE JUDICIARY,
UNITED STATES SENATE.

SEPTEMBER, 1987

Mr. Chairman: My name is Frank Carrington; I am an Attorney at Law; I reside, and practice, at 4530 Oceanfront, Virginia Beach, Virginia, 23451; office telephone: (804) 422-2692; home telephone (804) 428-1825.

I appear, herein, as a private citizen, to urge that this Committee, and the Senate as a whole, Advise and Consent to the nomination of Judge Robert H. Bork as Associate Justice of the Supreme Court of the United States.

My frame of reference is the record of Judge Bork on certain criminal justice issues, with particular emphasis on the rights and needs of the victims of crime in America.

My credentials to speak on these issues can be summarized as follows: I received an Ll.B. degree from the University of Michigan Law School in 1960, and a Master of Laws degree in Criminal Law, from Northwestern University Law School in 1970.

The first ten years of my career were spent in active law enforcement work on the federal and local levels, the next ten years were spent in work in the private sector in support of professional law enforcement and in support of the rights of the victims of crime; the past seven years have been devoted almost exclusively, through my practice of law, private sector work, and government service, to the rights of victims of crime.

I have served in the following capacities:

- Member, President Reagan's Task Force on Victims of Crime.
- Member, Attorney General's Task Force on Violent Crime.

- Member, and Vice Chairman, Advisory Board, National Institute of Justice, United States Department of Justice.
- Member, Vice Chairperson and Chairperson, Victims Committee, Criminal Justice Section, American Bar Association.
- Member, Board of Directors, National Organization for Victim Assistance.
- Assistant Director for Criminal Justice Policy Coordination, Reagan/Bush Transition Team (1980).
- Member, National Law Enforcement Council.
- Consultant on Victims Issues, National Judicial College, Reno, Nevada (1983).

I have authored, or co-authored, two books on the rights of crime victims;[1] one book on capital punishment;[2] one book on evidence law for the police.[3] I have written four law review articles and a number of articles for professional journals on victims,[4] and criminal justice issues, particularly on the exclusionary rule.[5]

I have spoken, as a guest lecturer on criminal justice and crime victims issues at, inter alia, the University of Michigan Law School, the University of Richmond Law School, the National College of District Attorneys at the University of Houston Law School, Suffolk University Law School and the FBI National Academy at Quantico, Virginia.

I am currently Legal Consultant and Director of the Crime Victims Litigation Project of the Sunny von Bulow National Victim Advocacy Center, Fort Worth, Texas,[6] and Executive Director of the Victims Assistance Legal Organization, Virginia Beach, Virginia.

The plight of crime victims in this country is a constant, pervasive problem that should be addressed at the highest policy making levels every time that a national issue which is relevant to the rights and needs of victims of crime comes to the fore. The instant proceedings: Hearings on the nomination of Judge Bork for confirmation as Associate Justice of the Supreme Court, is clearly such an issue.

It belabors the obvious to state that, if we did not have crime, we would not have victims, and, as a consequence, we would not need a criminal justice system. Unfortunately, the converse is true: we do have crime; we do have victims; hence, the record and views of a Supreme Court nominee on criminal justice issues becomes, a fortiori, an issue of major concern to the victims of crime, and to those who represent them.

The current situation of the "victims of crime", which term includes all of us, actual or potential victims, was described in the Final Report of the President's Task Force on Victims of Crime:

> Something insidious has happened in America: crime has made victims of us all. Awareness of the danger affects the way we think, where we live, were we go, what we buy, how we raise our children, and the quality of life as we age. The specter of violent crime and the knowledge that, without warning, any person can be attacked or crippled, robbed, or killed lurks at the fringes of consciousness. Every citizen of this country is more impoverished, less free, more fearful and less safe because of the ever-present threat of the criminal. Rather than altering a system that has proved itself incapable of dealing with crime, society has altered itself. 7

Indeed, even Justices of the Supreme Court, to which Judge Bork has been nominated, have commented on the victims' perspective in criminal justice issues. Justice Antonin Scalia, writing for himself, Chief Justice Rehnquist, Justice White and Justice O'Connor, in his dissenting opinion in Booth v. Maryland,[8] stated:

> Recent years have seen an outpouring of popular concern for what has come to be known as "victims rights" - a phrase that describes what its proponents feel is the failure of courts of justice to take into account in their sentencing decisions not only the factors mitigating the defendant's guilt, but also the amount of harm he has caused to innocent members of society. (Emphasis supplied.) . 9

Justice Scalia was speaking in the context of criminal sentencing; however, from the perspective of the actual and potential victims of crime, I submit that he could have been speaking about most of the other important criminal justice issues confronting this country today; and the same "outpouring of public concern" would be applicable to all of them.

Finally, on the question of criminal justice issues, and, by implication, victims' rights issues, consider the aspect of public opinion about these issues in the context of the Supreme Court itself.

The September 14, 1987 issue of Newsweek contained a cover story; "The Bork Battle".[10] Newsweek and the Gallup Organization had taken a national poll on "The Court and the Issues". On the issue pertinent to this testimony, the survey asked the question:

> Some people say that the Supreme Court has gone too far in certain areas. For each of the following, do you agree that the Court has gone too far? (Only those saying "not too far" are shown.)
> 38% Protecting the rights of defendants in criminal cases.[11]

From this rather convoluted manner of reporting, one can conclude that 62% of the respondents (two-thirds) may have believed that the Supreme Court has indeed gone too far in protecting the rights of criminal suspects and defendants, which, again, indicates, albeit indirectly, the concern of our citizens about the criminal justice issue.

The foregoing has been submitted in order to heighten the importance of Judge Bork's views on criminal justice issues which are, of necessity, of primary concern to the victims of crime.

With me today is my colleague, Joseph D. Grano, Distinguished Professor of Law, Wayne State University School of Law, Detroit, Michigan. Professor Grano has analysed all of Judge Bork's criminal justice opinions and has refuted the criticism made against Judge Bork's criminal justice philosophy by the Public Citizen Litigation Group in its report called, "The Judicial Record of Judge Bork". Professor Grano's analysis, submitted as a part of this record, is so incisive that I will defer to him on the overall analysis of Judge Bork's criminal justice decisionsd. I will close this testimony by commenting on two areas of criminal justice that, in my opinion, most directly affect the victims of crime.

These two areas are the Exclusionary Rule and the death penalty. Just as Professor Grano's analysis refutes the Public Citizen Litigation Group's report, I will attempt to refute the claims against Judge Bork made in another report, this one by the American Civil Liberties Union (ACLU) entitled "Report on the Civil Liberties Record of Judge Robert H. Bork". (Report)[12] The ACLU, in its Report, comments primarily on two areas of Judge Bork's criminal justice jurisprudence. These are the Exclusionary Rule and the death penalty. Since, as noted, these are coincidentally, the two substantive criminal justice issues that I consider to be of the most importance to victims of crime, I start out in agreement with the ACLU, insofar as the framing of issues is concerned.

Any agreement ends at this point. The ACLU report begins by accusing Judge Bork of "extremism", apparently because he believes in the rule of the majority in a democratic society.[13] This leaves me puzzled. If the majority does not rule, why should not Walter Mondale have shown up on the steps of the United States Capitol, in 1985 to be sworn in as President of the United States? Why should not every candidate who has been defeated for public office claim the seat, won by majority vote by his opponent? The more that I read the ACLU's position on this, the more confused I become, so I will proceed to less ephemeral issues.

The ACLU report castigates Judge Bork for his position on the Exclusionary

Rule. The ACLU report begins, on this issue, with the statement:

> It is well-settled, for example, that the Fourth Amendment provides people suspected of crime with a series of protections against unreasonable searches including the exclusion of evidence seized in violation of the procedures mandated by the amendment.[14]

The ACLU report then attacks Judge Bork for suggesting that the Exclusionary Rule be abandoned. This charge is sophomoric. First, there is *nothing* in words of the Fourth Amendment about the exclusion of evidence. Second, although the Supreme Court imposed the Exclusionary Rule on the federal government[15] and the Several States,[16] the same Supreme Court, *without the assistance of Judge Bork*, has recently been narrowing the scope of the Exclusionary Rule rather precipitously.[17] To imply that Judge Bork, by himself, would evicerate the Fourth Amendment to the Constitution of the United States is to imply that, when he is confirmed to replace Justice Powell, he will be also replacing the Chief Justice, Justice White, Justice O'Connor, Justice Scalia, and (on occasion) Justices Blackman and Stevens.

Hyperbole is expected and, to a certain extent, condoned in a fray of the scope of proceedings as volatile as the instant Confirmation Hearings. Shoddy draftsmanship should not be. The next statement in the ACLU report falls into the latter category:

> [Judge Bork] takes this position in the face of *overwhelming evidence* that the exclusionary rule has *virtually no negative effect* on law enforcement or crime rates, and would not, if *abolished*, enhance public safety. (Emphasis supplied.) [18]

The ACLU report contains 158 footnotes purporting to support the points made therein. However, the above-quoted statement about "overwhelming evidence" of the non-impact of the Exclusionary Rule is singularly without citation of authority. One would suppose that if the evidence supporting the ACLU's position was so "overwhelming" it would have been easy enough for the ACLU scholars to find one or two authorities to cite. They did not.

Senator Robert Dole (R-Kan.) had no such trouble finding authority for the opposing principle: that the Exclusionary Rule has, indeed, had an adverse impact on the safety of society. In a speech to the Fraternal Order of Police, he cited a report of the Bureau of Justice Statistics of the United States Department of Justice, to the effect that 2.35% felony arrests in the United States, out of 1.5 million total felony arrests, were thrown out because of the Exclusionary Rule; roughly 35,250 felony cases were dropped when the rule was applied.[19]

The Bureau of Justice Statistics report was released on August 23, 1987; the ACLU report, stating that the Rule had "virtually no negative effect" on the system was released on August 31, 1987. The Bureau's report was as available to the ACLU as it was to Senator Dole.

Now, to the ACLU, perhaps, the release of 35,000-plus arrested felons, (not because they were innocent but because the police somehow ran afoul of the intracacies of judge-made search and seizure rules) may be negligible. To the actual victims of those released felons, and, given the rates of recidivism in in this country, to their predictible future victims, the numbers of those released because of the Exclusionary Rule may not be negligible.[20]

In any event, the Bureau of Justice Statistics study proves that the American Civil Liberties Union's assertion that evidence of the fact that the application of the Exclusionary Rule has no adverse effect on the criminal justice system, is "overwhelming" is, at best, specious, at worst, trifling with the truth.

The victims of crime will be well-served if Judge Bork's principled objections to the Exclusionary Rule become a part of his judicial philosophy on the Supreme Court.

If the ACLU's assault on Judge Bork and his views about the Exclusionary Rule might properly raise some eyebrows as to the quality of its legal scholarship, or lack of it, the ACLU's following paragraph about Judge Bork and the death penalty takes on a sort of "Alice in Wonderland" aspect:

> ...Judge Bork endorses the death penalty without any effort to justify its deterrent effect, relying on the references in the Fifth and Fourteenth Amendments to "capital offenses" and the deprivation of life". He does not believe that the Eighth Amendment, which bars "cruel and unusual punishment", provides any limitations on those clauses, disputing that the standard of what is cruel and unusual should evolve over time. [21]

The first sentence of the quote is irrelevant. Judge Bork is properly before this Committee to present his judicial philosophy so that the Senate can Advise and Consent on his nomination to the Supreme Court. He has no more obligation to "justify" the deterrent effect of the death penalty than he would to justify the Tennessee Valley Project's effect on the life of the Snail Darter.

The next sentence, accuses Judge Bork of nothing more than going along with what seven of nine Supreme Court Justices held in Gregg v. Georgia, in 1976, [22] when the Court reinstated the death penalty in this country.

The last clause in the above-quoted paragraph accuses Judge Bork of "...disputing that the standard of what is cruel and unusual should evolve with time". Unlike the ACLU's Exclusionary Rule assault on Judge Bork, discussed above, there is a footnote to this statement, number 119. The footnote turns out to be totally irrevelant also. It concerns ACLU criticism of some of Judge Bork's decisions (which criticism is refuted by Professor Grano, see above) in non-death penalty cases having to do with access to the courts, and which have absolutely nothing to do with "cruel and unusual" standards, evolving or otherwise.

The issue of capital punishment is one of abiding concern to the survivors of homicide victims, as it is to most Americans. A large majority of our citizens support the death penalty, according to a recent poll.[23] As noted, a majority of the Court on which Judge Bork has been nominated to serve, has held that the "cruel and unusual punishment" clause of the Eighth Amendment to the Constitution of the United States does not preclude capital punishment. Indeed, Justice Lewis F. Powell, whom Judge Bork is to replace, in one of his last opinions, wrote for a majority of the Court in a decision holding that it had not been proven that the death penalty has been applied in a racially discriminating manner.[24]

If anyone's judicial philosophy can be said to be in the "mainstream" of the views of the Supreme Court, and of public opinion, one the two criminal justice issues of most importance to the victims of crime - the Exclusionary Rule and the death penalty - Judge Bork's views certainly fit into such a categorization.

The ACLU report has set up "straw men" on these issues, and then purported to knock them down, in an attempt to picture Judge Bork as an isolated "extremist" on the issues.

The facts refute this. Judge Bork is not in any way an "extremist" on the criminal justice/crime victims issues. His judicial philosophy about these critical questions reflects the tenor of the Supreme Court and of the public. No more and no less. The actual and potential victims of crime (which, as noted, includes all of us) will undoubtedly benefit by the confirmation of Judge Bork as Associate Justice of the Supreme Court of the United States.

I urge this Committee favorably to recommend the nomination of Judge Bork to the Senate as a whole, and I urge the Senate to Advise and Consent on his nomination.

Respectfully submitted,

Frank Carrington
Attorney & Counsellor at Law

NOTES: Statement of Frank Carrington, Attorney at Law, relative to the Confirmation of Judge Robert H. Bork for the office of Associate Justice of the Supreme Court of the United States, before the Committee on the Judiciary, United States Senate, September, 1987.

1. See: Rapp, Carrington and Nicholson, School Crime and Violence: Victims' Rights, Malibu, CA, Pepperdine University (1986); Carrington, The Victims, New rochelle, NY, Arlington House (1975).

2. See: Carrington, Neither Cruel Nor Unusual: The Case for Capital Punishment, New Rochelle, NY, Arlington House (1978).

3. See: Inbau, Aspen, and Carrington, Evidence Law for the Police, Philadelphia, Chilton Books (1970).

4. See: Carrington and Nicholson, Victims' Rights: An Idea Whose Time Has Come, 11 Pepperdine L. Rev. 1 (1984); Carrington, Victims Rights: A New Tort?- Five Years Later, 19 Trial 50 (1983); Carrington, Death, Deterrence and the Victims of Crime, 35 Vanderbilt L. Rev. 587 (1982); Carrington, Victims' Rights: A New Tort?, 13 Trial 39 (1978); Carrington, Victims' Rights Litigation: A Wave of the Future, 11 U. Rich. L. Rev. 447 (1977).

5. See, e.g. Carrington, Good Faith Mistakes and the Exclusionary Rule, 1 Criminal Justice Ethics 35, (1982); Carrington, Chimel v. California: A Police Response, 45 Notre Dame Lawyer 559 (1970).

6. See: Paul Marcotte, Project to Aid Crime Victims, A.B.A.L.J., September 1, 1987, p.20, col.1.

7. Final Report, President's Task Force on Victims of Crime, The White House, Washington, D.C., December, 1982, p.vi, col.1.

8. __U.S.__, 41 Cr.L. 3282 (1987). In Booth the Court held, 5 to 4, that "victim impact statements" by the survivors of homicide victims could not be used during the penalty in the trial of the person accused of the homicide.

9. __U.S.__, at__, 41 Cr.L. 3282, at 3288.

10. Aric Press and Ann McDaniel, "The Bork Battle", Newsweek, Sept. 14, 1987, p. 22, col. 1.

11. id., at 26.

12. "Report on the Civil Liberties Record of Judge Robert H. Bork", published by the American Civil Liberties Union, 132, W. 43rd St., New York, NY, August 31, 1987.

13. id., at 1-2.

14. id., at 31.

15. Weeks v. United States, 269 U.S. 20 (1925).

16. Mapp v. Ohio, 367 U.S. 643 (1961).

17. See, e.g., U.S. v. Leon, 468 U.S. 897 (1984); Massachusetts v. Sheppard, 468 U.S. 981 (1984); O'Connor v. Ortega, __U.S.__, 41 Cr.L. 3001 (1987); Griffin v. Wisconsin, __U.S.__, 41 Cr.L. 3424 (1987; New York v. Burger, __U.S.__, 41 Cr.L. 3299 (1987); Illinois v. Krull, __U.S.__, 40 Cr.L. 3327 (1987); Colorado v. Bertine, 40 Cr.L. 3175 (1987).

18. ibid. note 13.

19. Betty B. Bosarge, "Sen. Dole Tells FOP Members Judge Bork Is a Foe of The Exclusionary Rule", Crime Control Digest, April 31, 19897, p.1, col.1.

20. The American Civils Union does not, nor could it, profess to be a victim-oriented organization. An instructive insight into the attitude of the ACLU concerning victims is to be found in a colloquy between Ms. Barbara Palmer of the Washington Star-News and a certain Alan Goldstein, a staffer of the Maryland affiliate of the ACLU. Ms. Palmer asked Mr. Goldstein, rather pointedly:

> You have been outspoken in your opposition to strengthen the rights of victims. You have stated that "victims don't have rights. Could you explain this?

Mr. Goldstein replied:

> Well, I don't mean that victims don't have rights in a general sense. But what they really are in the criminal justice process, are witnesses for the prosecution and in that sense they do not have constitutional rights that are guaranteed to the defendants.

Barbara Palmer, "The Rights of Victims: A Differing View", Washington Star-News, July 8, 1975, p.1.

I would be reluctant to cite the words of an obscure ACLU staffer, made over twenty years ago, as an example of the ACLU's attitude towards victims, except for the fact that ever since Mr. Goldstein uttered his little homily, I have published it in any number of books and articles, and I have confronted not-so-obscure ACLU personnel with it on radio and TV talk shows, and in private conversations with them. Not once has any ACLU representative disclaimed what Mr. Goldstein had to say; (some told me that they agreed with him whole-heartedly). I can only conclude that this is, in fact, the position of the ACLU with regard to crime victims.

21. ibid, note 13, at 32.

22. 428 U.S. 153 (1976).

23. For example, a Media General/Assoc. Press poll taken Nov. 7-14, 1986 reported that 84% of those polled supported the death penalty.

24. McCleskey v. Kemp, __U.S.__, 41 Cr.L. 3047 (1987).

Senator **Leahy**. Thank you very much.

Mr. **Bittick**.

TESTIMONY OF CARY BITTICK

Mr. **Bittick**. Thank you, sir, for allowing us to testify here today.

My name is Cary Bittick. I'm the executive director of the National Sheriffs Association, a 35,000-member organization from every State in the Union. I have submitted a written report and a recommendation and would ask that you accept that. Then I do have a couple of comments I would like to make.

Senator **Leahy**. Go ahead, please.

Mr. **Bittick**. As I see our job in law enforcement, we walk a thin line between the victims and the suspects. That is the reason that we're so interested in who finally sits on the Supreme Court and who decides how our profession will be judged in the future. We are a profession that, after we have done our work, has somebody review our work, and then tell us what the rules of the game are. So we're in a precarious position from the very beginning, I feel. That is another reason that I think it is so important to us who sits on the Supreme Court.

We have resolutions from some of our State organizations that have been submitted, also, for the record, and I appreciate the opportunity to appear here today.

Thank you.

[The statement of Cary Bittick follows:]

TESTIMONY

OF

L. CARY BITTICK
EXECUTIVE DIRECTOR
NATIONAL SHERIFFS' ASSOCIATION

before the

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

on

THE NOMINATION OF JUDGE BORK
FOR ASSOCIATE JUSTICE OF THE
UNITED STATES SUPREME COURT

September 22, 1987

Chairman Biden and Members of the Committee:

Thank you for inviting the National Sheriffs' Association to address you on the nomination of Judge Bork to be an Associate Justice of the United States Supreme Court.

I know the media would have you believe that everyone in the United States is opposed to this nomination. That is frankly not the case. I am here to let you know that there are many of us who strongly support Judge Bork's nomination and I hope the media gives us as much attention as they have to those who oppose him.

Let me provide you with some background information about myself and about the National Sheriffs' Association, before outlining the reasons we recommend that you confirm Judge Bork to this important position.

My name is L. Cary Bittick. I am the Executive Director of the National Sheriffs' Association. Prior to this appointment, I was the Sheriff of Monroe County, Georgia for 22 years.

I am here today to represent the National Sheriffs' Association and its 35,000 members. Our membership includes the nations 3,100 sheriffs, their deputies and other criminal justice practitioners. The National Sheriffs' Association was first incorporated in 1940 as a nonprofit organization. We actively work to increase the professionalism of law enforcement and corrections officers, to seek new ways to reduce crime, and to increase crime prevention efforts.

As you know, the job of sheriff is multi-faceted. In most counties, sheriffs have several responsibilities in the criminal justice system--including law enforcement and the administration of our jails. Because of the sheriff's role in enforcing state and local laws and administering the jails, there are many occasions where the sheriff's job is directly impacted by the actions of the United States Supreme Court. All of us in law enforcement can recite a string of examples from our communities where criminals go free because of the courts. In our view, an overriding problem for law enforcement throughout the United States has been the courts -- on the federal, state and local level. Supreme Court rulings on such issues as the death penalty and the exclusionary rule are critical to the proper functioning of our criminal justice system.

Because of the impact that the Court has on our criminal justice system, I have requested to speak to you about Judge Bork.

I am pleased to tell you that everything I have heard about Judge Bork from our members is positive and the National Sheriffs' Association urges you to confirm his nomination.

The National Sheriffs' Association supports Judge Bork for a variety of reasons which I will outline for you:

1. His educational and professional background eminently qualify him for this position. For example, Judge Bork:

- earned a Bachelor of Arts and Juris Doctor degrees from the University of Chicago; he was a Phi Beta Kappa; an honors graduate from the law school and managing editor of its law review.

- served in the United States Marine Corps for two tours of duty.

- in private practice for nearly ten years and a partner at Kirkland & Ellis.

- Solicitor General of the United States Department of Justice from 1973-77; represented the United States before the Supreme Court in hundreds of cases.

- Professor at Yale Law School for 15 years; holder of two endowed chairs. Authored numerous scholarly works, including The Antitrust Paradox, a leading work on antitrust law. He is one of the nation's foremost authorities on constitutional law.

- United States Circuit Judge for the District of Columbia; 1982 to the present.

In our opinion, Judge Bork's various professional positions and achievements make him superbly well qualified to serve on the United States Supreme Court. He has been in private practice, the educational field, and served in the executive and judicial branches of government. In each position he has served with distinction.

2. We believe that Judge Bork's judicial philosophy is sound and we support his philosophy of "original intent" or "judicial restraint" in interpreting the United States Constitution. He argues that the Court has intervened without authority to make what are essentially legislative or political decisions. Believing that judges should restrain themselves from imposing their own morality and upsurp the legislature's function, Judge Bork has said:

> "to the degree that constitutional intention is somewhat intermittent or unclear, to some extent the judge participates in making policy... that's

> inevitable in any application of written words to modern circumstances. [So] the important question is whether the judge is self-conscious about that and tries to reduce to a minimum the imposition of his own views."

In our view, this less intrusive approach is an appropriate one. As locally elected officials, sheriffs agree with Judge Bork's support for a clear separation of judicial and legislative powers as intended in the Constitution. We find it ironic that some legislators themselves are critical of Judge Bork's philosophy of keeping the judiciary out of the legislative arena.

3. We believe that law enforcement could be more effective if Judge Bork's clear thinking approach was adopted by other judges handling criminal cases.

For example, in the case of United States v. Mount, a criminal defendant claimed that evidence against him obtained by British police officers in a search of his British residence should not be used against him in an American criminal proceeding. The defendant had argued that using such evidence "shocked the conscious." Judge Bork responded:

> "Where no deterrence of unconstitutional police behavior is possible, a decision to exclude probative evidence with the result that a criminal goes free should shock the conscious even more than admitting the evidence."

At the National Sheriffs' Association, we agree with Judge Bork that common sense should play a role in these decisions.

4. The National Sheriffs' Association has a long history of support for the death penalty. We are encouraged that Judge Bork, as Solicitor General, argued and won several major death penalty cases before the United States Supreme Court. He has expressed the view that the death penalty is constitutionally permissible. We look to Judge Bork's support to insure that the

death penalty is a viable means of punishment in our criminal justice system.

5. We feel it is important not to overlook the fact that the Senate unanimously supported Judge Bork's appointment as a United States Circuit Judge for the District of Columbia in 1982. Absent new information to suggest unfitness, of which we have heard none, we cannot understand why this Committee is having such a difficult time with the same nominee who appeared before you only five years ago. From our perspective, he is even more qualified now for this appointment because of his additional judicial experience.

Mr. Chairman, Members of the Committee:

In conclusion, I would like to quote President Reagan when he stated, "It's time we reassert that the fundamental principle and purpose of criminal justice is to find the truth and not to coddle criminals." We believe that President Reagan's desire to put some justice back in the justice system would be best served by the appointment of Judge Bork to the United States Supreme Court.

Again, thank you for the opportunity to speak to you.

Senator **Leahy**. Thank you very much.

I think it is most appropriate that the law enforcement panel does appear here. As I said, I spent a period of my adult life as the chief law enforcement officer of my county.

Mr. Baldwin.

Mr. **Baldwin**. Mr. Chairman, I wonder if I might ask the permission of the chairman to insert the resolution and a statement by two organizations who could not be here. One is a statement by Mr. Ordway P. Burden, president of the Law Enforcement Assistance Foundation, and the other is a resolution that was attached to a letter that was sent to Chairman Biden by the president of the Association of Federal Investigators. They could not be here but submitted a letter and a resolution.

I would ask permission that these two statements be included in the record at this point.

The Chairman [presiding.] They will be both included in the record.

[The documents follow:]

STATEMENT PREPARED FOR
THE UNITED STATES SENATE JUDICIARY COMMITTE

BY

ORDWAY P. BURDEN, PRESIDENT
LAW ENFORCEMENT ASSISTANCE FOUNDATION

ON BEHALF OF

CIRCUIT COURT JUDGE ROBERT H. BORK

FOR ASSOCIATE JUSTICE OF THE U.S. SUPREME COURT

Mr. Chairman and members of the Senate Judiciary Committee, my name is Ordway P. Burden. I reside at 250 East 87th Street, New York City. As president and founder of the Law Enforcement Assistance Foundation I also have offices in Westwood, New Jersey and Washington, D.C.

The Law Enforcement Assistance Foundation was organized to assist law enforcement and criminal justice associations in our country in their efforts to fight crime in our streets; to assist in promoting public faith in law enforcement; and to honor those brave men and women who are actively engaged in protecting the lives of our citizens and the streets of our country.

My interests and the interests of my family foundation, The Florence V. Burden Foundation, also located in New York City, stems largely from my early days as an undergraduate student at Harvard, and continued through my graduate student days as I became more active in assisting local law enforcement. I was an honorary member of the Cambridge, Massachusetts Sheriffs' Department as a law student at Harvard, and for several years volunteered to work with the New York City police department on weekends and holidays during my college years at Harvard. I was one of the founding members of the 100 Clubs of New York and Massachusetts. As many of you know, the 100 Clubs were the forerunners of the present policeman's benevolent funds, now more available in the big cities. These organizations, the 100 Clubs and the policeman's benevolent funds, provide financial assistance for the widows and children of slain law enforcement officers.

Some ten years ago I became active in assisting the law enforcement organizations in their efforts to pass a bill to provide the same financial asistance through the federal government. Since most jurisdictions do not have a 100 Club or a policeman's benevolent fund, and its police officers are not eligible for liability insurance against the loss of life because of the hazardous daily life of the law enforcement officer, this seemed the logical approach. This situation has been largely resolved through the passage of the Police Officer's Benefit Act.

We met often in our successful efforts to gain the strong support that did develop for the POBA. It was through this effort and my life-long association with law enforcement officers that I have come to know first hand the desperate need of our law enforcement and criminal justice officials for support from the general public and our law makers. Left to their own devices our law enforcement officers can not do their jobs as effectively as they would like, or if they have to withstand the abuses that they had to endure during the sixties when the word "pig" was often used in reference to these brave men and women patrolling the streets of our communities for our safety.

It was during this period of time, in 1978, that I assisted in founding the National Law Enforcement Council, an umbrella group for fifteen of the principal national law enforcement/criminal justice organizations. Through the executives of these 15 national organizations, by far the largest national law enforcement organization, the Council reaches well over 300,000 law enforcement/criminal justice officers.

As a private citizen I have devoted much of my time and interests, and my family's as well as my own private resources, to aid law enforcement. It is for this reason that I am motivated to speak in favor of the President's nominee for Associate Justice of the United States Supreme Court. I feel compelled to come before you on behalf of this outstanding nominee — Judge Robert H. Bork of the Circuit Court of Appeals for the District of Columbia.

There is no question that Judge Bork will be an outstanding Justice of our Supreme Court. His qualifications have been cited to you over and over these past few days; a man of high intellect; a distinguished Yale Law School professor of Law; partner of several prestigious law firms; Solicitor General of the United States; and for the past five years a distinguished judge of the U.S. Circuit Court of Appeals for the District of Columbia.

I have heard no one say that Judge Bork is not qualified, that he does not deserve the American Bar Association's highest rating, which the ABA has awarded him. Not all successful nominees to the Supreme Court have received this high award from the ABA.

Recognizing all this it is hard for me to understand how the various special interest groups can justify their opposition to him except for the fact that some may look upon Judge Boark as a judge who will interpret the laws of our land and the Constitution as they were written. Judge Bork has said in various interviews, and even when he came before this committee five years ago for confirmation to his present circuit judgeship, that he does not believe our laws should be applied differently for different segments of our population. He has clearly stated, and I quote from his confirmation hearings before this committee in 1982, in giving his feeling about "judicial activism":

> "I think what we are driving at is something that I perfer to call judicial imperialism ... a court should be active in protecting those rights which the Constitution spells out. Judicial imperialism (or activism) is really activism that has gone too far and has lost its roots in the Constitution or in the statutes being interpreted. When a court becomes that active or that imperialistic then I think that it engages in judicial legislation, and that seems to me inconsistent with the democratic form of government we have."

You gentlemen of this committee will remember that it was after this statement the you gave him an unanimous vote of approval. Also, by voice vote without a single dissenting vote in the full Senate, Judge Bork was confirmed for his present judgeship. Now, five years later, some of you have publicly stated that you disagree with this statement by Judge Bork when he came before you in 1982 for confirmation to the U.S. Circuit Court of Appeals for the District of Columbia. In everything I have read it seems to me that that is the basis of most of the objections I have heard. It is certainly not because of Judge Bork's lack of qualifications.

Conversely, it is for this very reason that we in law enforcement, and I feel confident that I express the views of the overwhelming majority of the law enforcement/criminal justice community, fully endorse Judge Bork for the Supreme Court without any reservations. Those of us in law enforcement and those of us supporting law enforcement, know that this man would interpret the laws of our land evenly and equally for all citizens. He would thereby provide the law enforcement officer with the understanding that the laws mean what they say and not what an "activist" judge might, personally, decide just to accomodate his or her personal philosophy of social justice or government policy.

I urge confirmation of Judge Bork and hope that you will not delay your approval so that our court is one Justice short when the Supreme Court meets for their October session.

Thank you, gentlemen, for the opportunity to share these views with you.

The Honorable Joseph R. Biden
Chairman, Judiciary Committee
United States Senate
Washington, D. C. 20510

Re: Nomination of Judge Robert H. Bork
to the U. S. Supreme Court

Dear Mr. Chairman:

On behalf of the National Association of Federal Investigators, I am pleased to join the many other law enforcement organizations throughout the United States in supporting the confirmation of Judge Robert Bork as a member of the United States Supreme Court. AFI is an organization consisting of 1,897 members representing all of the Federal law enforcement agencies and Inspector General offices.

The following resolution has been adopted by the Board of Directors of the National Association of Federal Investigators.

> "That this Association urges the U. S. Senate to hold immediate open and fair hearings into the qualifications of the President's nominee and this Association requests the opportunity to testify before the Senate Judiciary Committee on the known qualifications of Judge Bork. The Board of Directors of the Association of Federal Investigators, acting on behalf of its members, strongly endorse the nomination of Judge Bork. The Committee is requested to recommend to the Senate at large that it vote favorably on the nomination of Circuit Court Judge Bork by the President of the United States to be a Justice of the U. S. Supreme Court."

AFI respectfully requests that you include the above resolution in the hearing record before your Committee. As indicated, the Association likewise requests the opportunity to testify before the Judiciary Committee in support of Judge Bork's nomination.

Respectfully,

Alan C. Nelson
President

bcc: Don Baldwin
Leigh Stewart

September 10, 1987

RESOLUTION

- WHEREAS the President of the United States has the right and duty to select and nominate to the U. S. Senate for consent qualified individuals to be members of the Supreme Court.

- WHEREAS the Senate is charged with the responsibility to question and verify the qualifications of all such nominees.

- WHEREAS Judge Robert H. Bork enjoys the reputation of being a distinguished jurist, a supporter of law enforcement, and a defender of the criminal justice system and the Constitution.

RESOLVED: That this Association urges the U. S. Senate to hold immediate open and fair hearings into the qualifications of the President's nominee and this Association requests the opportunity to testify before the Senate Judiciary Committee on the known qualifications of Judge Bork. The Board of Directors of the Association of Federal Investigators, acting on behalf of its members, strongly endorse the nomination of Judge Bork. The Committee is requested to recommend to the Senate at large that it vote favorably on the nomination of Circuit Court Judge Bork by the President of the United States to be a Justice of the U. S. Supreme Court.

The **Chairman**. I yield to the Senator from South Carolina.

Senator **Thurmond**. I am looking at a group of people today who I think represent my best friends. I just want to commend you gentlemen and the members of your organizations who have done such a great job for America.

The primary purpose of government is to protect its citizens. The Defense Department protects us against external enemies. You, the law enforcement people, protect us against the internal enemy, who is the criminal. You put your lives at stake to do it. You risk your lives almost every day.

I just want you to know that, as one member of this committee, I greatly appreciate what you have done for the country and I want to thank you. I feel very honored to be a member of the Maryland Troopers, Johnny, and I thank you very much. I am so glad to see all of you and want you to know I am interested in you.

Now, Donald, would you introduce the other members back there who didn't speak?

Mr. **Baldwin**. These are members of the Fraternal Order of Police.

Senator **Thurmond**. Are there any others in the second row who represent organizations?

Mr. **Baldwin**. This is the National Fraternal Order of Police legal counsel, Jim Phillips. This is Tim Malainy from Delaware; Rob East is from down in New Jersey; and that's Harry Cunningham from the great city of Philadelphia, the founder of the Constitution. And Gil Giaghos, our vice president of the National Fraternal Order of Police from New Mexico. And Mr. Cahill, chairman of our National Legislative Committee in Washington, DC.

Senator, we certainly appreciate your acknowledging those people.

Senator **Thurmond**. We are delighted to have all of you here.

I want to ask you one question, and when you answer, I would like for you to give your name and organization and then answer it yes or no.

You are here on behalf of Judge Bork and I just want this to be on the record. Do you feel that Judge Bork has the qualifications to be a great Supreme Court Justice; that includes integrity, judicial temperament, and it includes professional competence. Those are the qualities used by the American Bar Association and they're about as good qualities as I guess could be considered.

If you feel that way, would you start up here and give your name and organization and answer "Yes or "No."

Mr. **Fuesel**. Robert Fuesel, Federal Criminal Investigators Association. Yes.

Mr. **Billizzi**. John Bellizzi, International Narcotic Enforcement Officers Association. No question in my mind, yes.

Mr. **Vaughn**. Jerry Vaughn, executive director, International Association of Chiefs of Police. Absolutely.

Mr. **Stokes**. Dewey Stokes, president of the National Fraternal Order of Police, representing 200,000 police officers. Unequivocally, yes.

Mr. **Baldwin**. Donald Baldwin, executive director of the National Law Enforcement Council. Absolutely, yes.

Mr. HUGHES. Johnny Hughes, director of legislative affairs, and chairman, National Troopers Coalition. Yes, sir.

Mr. CARRINGTON. Frank Carrington, attorney at law, speaking on behalf of victims of crime. Unquestionably, yes.

Mr. BITTICK. Cary Bittick, executive director of the National Sheriffs Association. Yes, sir.

Senator THURMOND. Well, I believe it's unanimous on the part of all you officers who are here. That's the way it appears to me.

These witnesses, I believe, represent about 90 percent of all the national organized law enforcement associations, is that about right?

Mr. BALDWIN. That's what we figure.

Senator THURMOND. Therefore, they represent about 600,000 law enforcement officers from the standpoint of crime.

Mr. BALDWIN. Probably closer to 400,000, I think, of the—that are organized, that are in national organizations. There are local and community organizations, special groups and small groups. But of those that have national membership, I would say it's in the neighborhood of 90 percent of all law enforcement.

Senator THURMOND. That's about as many people as you will find in a congressional district, almost.

I just want to tell you again that we're delighted to have you here. We are proud of you and we appreciate the great service you render our country.

Mr. BALDWIN. Thank you, sir.

Senator THURMOND. Thank you very much.

The CHAIRMAN. Senator Simpson.

Senator SIMPSON. Mr. Chairman, I thank you.

These are your best friends, Strom, and you're their best friend. You have supported this aspect of society all of your life, and what an extraordinary record, as a judge, a military person, and as a lawyer. Yours is a life to be followed by many. But law enforcement has been a very important part of that.

Senator THURMOND. Thank you very kindly for those words.

Senator SIMPSON. I really don't have any questions. I just want to commend you for being here. If we hadn't gone to about 11:15 last night we would have been—there would be more of us here. The fog is beginning to roll in and the chairman has been very fair in trying to give everyone an opportunity.

I commend you. I'm a former city attorney and I had a very close relationship with the law enforcement people in my community. That's a very important part of that. You are a very special group saying some very special things, and I hope that people are listening.

There is a reality here with regard to the confirmation of Judge Bork, and you are bringing that to full scope. We are not just talking about these things we've heard about; we're talking about everything from traffic tickets to first degree murder that will eventually find their way to the U.S. Supreme Court. That is why we need a man of balance and judgment and a man who believes that the law says what it says. He is going to prove out to be a remarkable member of that Court.

After we go through another couple of weeks of this stuff, and some heavy lifting on the floor and all the rest of it, when we're finished we're going to have a new Supreme Court Associate Justice named Robert Bork. Thanks to you, that will come to pass.

Mr. STOKES. Senator, I think sometimes people get confused on law enforcement issues. But one-third of the cases decided by the Supreme Court of the United States affect the criminal law and us, as law enforcement representatives. So I can only urge you and your colleagues in the Senate, and the citizens, to get behind Judge Bork and give us another tool to combat the criminal element of this society, if we are to turn the tide of the rising crime rate in this country.

The CHAIRMAN. Thank you.

Gentlemen, just two brief points and then I'll let you go. First of all, Judge Bork is indeed fortunate to have your support. Anyone would be. I have had your support on other occasions, and I hope I will have it again. You are a powerful force in the community and a powerful moral force in the community.

But one thing I would like to point out, one of the few areas that Judge Bork has not, to the best of my knowledge, been criticized on or questioned on very much, and probably of all the areas of the law that we've spent the least amount of time discussing, is the law enforcement side. So I think probably that the vast majority of the committee, those for and against, are in agreement with you as joining Judge Bork as it relates to law enforcement. But it is very worthwhile and important that you be heard on these important subjects.

The second point I would like to make, I would like to thank you, as I always do publicly when you're here, for all the help you have given me as chairman, and Senator Thurmond when he was Chair of this committee. We would not have a crime bill were it not for all of you. We would not have had the drug bill were it not for your organizations. We would not have passed much of what I think this committee can be very proud of having been the initiator of over the last 8 or 10 years were it not for all of you.

Last, I want to thank you for being here at 6:45 at night, away from your homes. As has been pointed out, as we talked about the ABA earlier, to the best of my knowledge, no one is getting overtime for being here. It's a reflection of your dedication, not only to law enforcement but to the community and to the country as a whole. It's always a pleasure to have you with us.

Thank you all. Without any further comment, the hearings will recess until tomorrow at 10 o'clock.

[The committee recessed at 6:46 p.m., to reconvene at 10 o'clock a.m. the following day.]

NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

WEDNESDAY, SEPTEMBER 23, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:05 a.m., in room SR-325, Russell Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Also present: Senators Thurmond, Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Hatch, Simpson, Grassley, Specter, and Humphrey.

Senator KENNEDY [presiding]. Our first witness this morning will be the former Chief Justice, Warren E. Burger.

Justice Burger has served our country well as the Chief Justice of the United States and also now as the Chairman of the Bicentennial Commission on the Constitution, on which I have the great honor of serving.

We look forward to your testimony, and you are very welcome to our committee. Chief Justice Burger, as we have in the past, we are going to ask you to be kind enough to take an oath. We swear all of our witnesses in.

Do you swear that you shall give the truth, the whole truth, and nothing but the truth, so help you God?

Mr. BURGER. I do.

TESTIMONY OF WARREN E. BURGER

Mr. BURGER. Senator, I have no prepared statement this morning.

I want to emphasize several things. One, I am here as a volunteer. When the nomination was first made, frankly, it did not occur to me that there would be any occasion to be here. But when the opposition mounted, I sent a message, without talking to Judge Bork, through a common friend that I would be available if there was any occasion for it.

I think, also, that I want to make it clear I am not here to give a lecture on constitutional law. You have had an abundance of that in the last few days. Although I was fully occupied in Philadelphia and have only seen glimpses of the hearings—I have relied on the print press for what little information I have about it—I must be perfectly candid about one thing. I have watched these processes since I was a student in Minnesota. As all of you know, being members of the bar, law students are very interested in these processes. I do not think there has ever been one with more hype and more disinformation on a nominee than I have observed in recent days.

It reminds me of what Walt Whitman said in one of his great Civil War poems that—it is in free verse, and I cannot remember poetry unless it has a cadence to it. He said substantially that all the confusion, all the controversy observed in American political life is good to behold. And in his poem, he underlined "good" and went on to explain the poem that it was good to behold because it was a manifestation of free people exercising their rights and the democratic system at work.

I do want to say also—and I think at least three members of your committee will certainly agree—that is, Senator Thurmond, Senator Kennedy and Senator DeConcini—that this whole process is going to be some help our Commission's 5-year plan or program of a history and civics lesson for the country, for ourselves, because for better or worse it shows the process at work.

So, although I have heard some criticism of the operation, I do not share all the criticism. I think this is, on the whole, when we take the net result, it is good for the country.

I said I had been observing these things since I was a law student. My first observation was with respect to the nomination of Charles Evans Hughes. Most of you on this committee are too young to remember that episode, but Hughes had certainly been a political figure very much so. After a very lucrative practice in New York, he became Governor of New York, I think, for three terms and then was appointed to the Supreme Court early in this century. In 1916 he was drafted by the Republican Party to run against Woodrow Wilson. He lost, as I recall it, by one State and then went back into practice. And with that background of his great abilities and being widely known, he was representing great corporate clients.

When he came up for nomination for Chief Justice in 1930 none other than Hugo Black was the leader of the battle against him. Hugo Black was then the young Senator from Alabama, and I had many conversations with him about it in later years, when we became close friends. There was a very bitter controversy on the confirmation of Hughes.

I can hardly believe that anyone in this room or in the Senate or anywhere else who then observed the great performance of Charles Evans Hughes as Chief Justice, both in terms of being a splendid jurist and working for improvements in the administration of justice, I cannot believe there would be anybody who would now, or after he had served, vote against his confirmation. But that is the way things work in this country.

That has happened more recently in the memory of all of us when Judge Clement Haynsworth came here. I am told that the key people in Clement Haynsworth's nomination and in that of John J. Parker who preceded him, when Parker was nominated for this Court, later conceded that they regretted their positions and that if they had it to do over, they would have voted differently.

This country lost two splendid public servants and great leaders of the judiciary when those men were not confirmed.

But again, I repeat, that is the way our system works and it should work.

I have heard just glimpses, as I told you, of these hearings, and I noticed the probing into past statements, which certainly is appropriate. But I am glad that 18 years ago, when I was before this committee, that one of my former law students did not come in and say that I was against the contract clause of the Constitution, because very frequently in lectures, I would put the question to the class: Why do we need a contract clause; and I would pursue that further: Why do we need all of this complex law of contracts on offer and acceptance and consideration and that sort of thing? And of course, that was to make them think, and I think it succeeded, but none of them were called in to say that I was against the contract clause, even though my rhetorical question may have suggested that to some of them.

Also, on positions that someone has taken previously—this goes back to a very early day in this country. John Marshall argued only one case in the Supreme Court of the United States, and in that day, an argument was longer than a Senate hearing on a confirmation. John Marshall argued for 6 days in Philadelphia in 1796, and he argued—not effectively, because he lost—but he argued very, very vigorously that a State law preceding the treaty settling the war with England prevailed over the treaty clause of the U.S. Constitution. That was the famous case of *Ware* v. *Hylton*. He lost that case.

Had he been a judge at that time, he would have decided it just the way the Court decided it. And so what positions people have taken previously as teachers or advocates is no guide to the positions they will take as a judge, in my view.

That happened with Robert Jackson when he was a Justice on the Supreme Court. All of you will certainly recall that he was Attorney General and Solicitor General and had been in the Department of Justice for quite a while. One day, a lawyer was arguing a case before him and opened a book and read from it and said the author of this statement was Mr. Justice Jackson.

Jackson immediately said, "What was the date when I made that statement?" and the man gave the date, and Jackson said, "What was my position then?"

"You were Solicitor General of the United States."

And Jackson's answer was, "Now I am a Justice of the Supreme Court."

Now, as I say, I have only heard these glimpses of these hearings but the notion that positions one has taken as an advocate or as a teacher is hardly a guide. I think that if they had been, as I suggested, I might not have been confirmed in the first place. And who knows, maybe the country would have been better off.

I said I had no prepared statement. I am prepared to respond if anyone has any challenge or questions to my views. But I repeat for the benefit of the Senators who came late, that I think this process will advance and help our 5-year plan of the Bicentennial Commission because it will focus public attention on the subject, as the events yesterday in the Persian Gulf will focus when we come to examining the functioning of the executive branch under article II, and all of the grey zones between the constitutionally separated powers. And we know, of course, that there are not very many bright lines, and there are grey zones.

And let me add one thing more, that of course, this is the business of this committee and of the Senate, and not mine, and no one in the judiciary. The examination of a nominee, in my view as a citizen and as a member of the bar, ought to be on the whole person and the totality of the record. On that score, for example, Mr. Justice Black might not today be confirmed. As it developed, you recall, notwithstanding the tradition of courtesy of the Senate toward its members there was evidence that he had been a member of an odious organization, the Klan, and yet if anyone could find any trace, any trace, in Hugo Black's work as a Justice that he had once been a member of the Klan, if that were the case, I would be astonished. And there is no better example of that kind of a problem than the case of Hugo Black, before whom I argued when he sat as a Justice, and then became a close and warm friend when we were colleagues on the Supreme Court.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Chief Justice. It is a pleasure to have you here.

I apologize for being a few minutes late. I drove down this morning, and I got tied up in Baltimore.

But welcome.

Mr. BURGER. I got caught that way in Philadelphia last week.

The CHAIRMAN. That is about almost where I came from, Mr. Chief Justice.

Mr. Chief Justice, we truly appreciate your being here. It is a great honor for this committee to have you before us, and it is a great testament to Judge Bork that you would be here on his behalf.

Men of your stature have great influence not only in the body politic, but upon those of us who sit here in this committee.

One thing I want to state at the outset, Mr. Chief Justice, is those of us—and I am one—who have difficulty with the notion of Judge Bork becoming Justice Bork do not have that difficulty because we believe he lacks intellectual capability, nor because we believe he is wrong on a single, or even a series of, individual decisions.

But I for one have great difficulty with him going on the Court because of his view of the Constitution, how it is to be interpreted, and what is found within the Constitution.

And I do not say what I am about to say for any other reason than to try to express in as clear terms as I can why I am concerned. And with your indulgence, I would like to read an extended passage from one of your opinions, because I think the words offer clarity and insight into the thing that troubles me the most.

I quote: "The State argues that the Constitution nowhere spells out a guarantee for the right of the public to attend trials and that, accordingly, no such right is protected. But arguments such as the State makes have not precluded recognition of important rights not enumerated. Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees. For example, the rights of association and the right of privacy, as well as the right of travel, appear nowhere in the Constitution or Bill of Rights; yet these important, unenumerated and unarticulated rights have nonetheless been found to share Constitutional protection with explicit guarantees."

"The concerns expressed by Madison and others have thus been resolved. Fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights specifically defined."

Mr. Justice, that is what this debate is all about, at least with Judge Bork and I. And I wonder if you could speak with us a little bit, educate us a little bit, about these unenumerated rights—the right of privacy?

Mr. **Burger**. I said before you came in, Mr. Chairman, that I did not come up here to give a lecture on constitutional law; you have had quite a lot of that in the last few days, I understand, even though I heard very little of it. I see no problem about that statement, and I would be astonished if Judge Bork would not subscribe to it.

I have no thought that he would disagree with what I said in those first amendment cases. Of course, the Constitution was not intended to be a code of laws. We see the constitutions of other countries—the Soviet Union, for example, it is about as big as the District of Columbia telephone book. This Constitution is just something over 5,000 words, and there has never been any question from the beginning that it does have limits, but within those limits there is considerable flexibility. That does not mean judges should go around, inventing something that has never been even touched on here, but it does mean that they must take the first amendment, as the example you were raising, and give it meaning.

That was not a difficult case, the one that you mentioned about having courtrooms be open, but it also, in later parts in the opinion, points out that there might be circumstances where a court could be closed to the public; that we put a very heavy burden on anyone asking that a court be closed.

The CHAIRMAN. Mr. Chief Justice, your dicta in that case speaks about larger rights, rights of association, rights of privacy, that did not have to do with that particular case. You were making a point, I thought, in a very articulate manner.

Let me ask you this, Mr. Chief Justice. Does the ninth amendment mean anything?

Mr. BURGER. Well, I will follow the habit that Hugo Black had. Whenever he wanted to talk about an amendment, he wanted to look right at it and not try to remember exactly what its words were. So let us take a look at the ninth amendment here—and of course, it is one of the very, very important parts. "Persons" is the key word, probably, in that amendment. And that reminds me of the fact that long before the *Dred Scott* case, John Marshall had written an opinion which had to be rejected when the *Dred Scott* case was decided, because there was a claim by some man who had put his slaves onboard a steamer and sent them upriver or downriver somewhere, and the steamer was wrecked, and they were either lost or hurt, and he was suing as though they were freight.

John Marshall wrote an opinion that has been often overlooked, and said that they were not freight, not property, that they were persons—but then, that got lost in the shuffle, and I think it was not even cited in the *Dred Scott* case.

It is hard to say which amendment is more important than any other amendment, but surely, this matter of "persons" becomes terribly important.

The CHAIRMAN. I appreciate that answer. My time is up. I, even much more than you, Your Honor, have to look at this to make sure I have got the amendments right. And let me just read it into the record.

"Amendment Number Nine. The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Thank you very much.

I yield to my colleague from South Carolina, Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Chief Justice, I want to say we are delighted to have you with us. You have made a distinguished record as Chief Justice of the United States, and you are now making a distinguished record as Chairman of the Commission to celebrate the 200th anniversary of the Constitution. I frankly think you will go down in history as one of the greatest, and we are very proud of you and honored to have you before us.

Mr. BURGER. Thank you.

Senator THURMOND. Mr. Chief Justice, there seems to be disagreement over what we are to make of the fact that none of the majority opinions joined in by Judge Bork has been overruled by the Supreme Court. Some have implied that the only inference to be drawn is that the Court is too busy to hear these cases; that the Court has not specifically reviewed these cases, and therefore these cases say nothing about whether or not Judge Bork is in the mainstream of judicial thinking.

I have never found that the Supreme Court has a problem in granting certiorari for a case they want to consider. Would you tell us what inference on Judge Bork's thinking can be drawn from the fact that none of these hundreds of cases have been overturned by the Supreme Court. Is it merely because the Court is too busy to correct on these opinions, or just what is your opinion about it?

Mr. BURGER. Senator, if the question were addressed to one case, and the question was what is the meaning of the Court's denial of cert in one case, then it has very little meaning, because the Court does not explain why it denies review. But when you look at a whole block of cases over the 6 or 7 years that Judge Bork has been on the bench, or any other judge for that long—I can think of another judge in that category, the late Judge Tamm—then, the failure to grant review of his work has real significance, that over that period of time and that number of cases, that nothing was found worthy of review; then, it has real meaning.

I repeat, on a particular, single case, it would have no great meaning.

Senator THURMOND. Judge Bork has written opinions since he has been on the Circuit Court—I believe he has written 150 opinions himself. He has participated in over 400. And these have not been overruled by the Supreme Court.

Now, they claim he is not in the mainstream. It seems to me that if he has not been overruled in those cases, and he has been sustained in those he has participated in, that they cannot say he is an extremist of any kind whatsoever.

Mr. BURGER. It would astonish me to think that he is an extremist any more than I am an extremist.

Senator THURMOND. Mr. Chief Justice, in your opinion, does Judge Bork have the integrity, the judicial temperament, and the professional competence to be a member of the Supreme Court of the United States?

Mr. BURGER. I think I have already said in my earlier statement that the important things for examination are first, integrity—if you do not pass the integrity test, you are finished—and then training, and then experience, and then temperament.

Now, we all remember that the Constitution does not require that a Justice of the Supreme Court be trained in the law, but all of them have been. I have said at the American Bar Association meeting, and have no hesitation in repeating here, that in the half century since I was a law student, following these things, I know of no nominee who meets those qualifications better than he does.

Senator THURMOND. Some have charged him with being a right-wing ideologue. In your opinion, from your experience with him, do you consider him to be a sound lawyer and a fair judge?

Mr. BURGER. A very sound lawyer and a very fair judge, on the whole record. I think I said before you came in, Senator, that my acquaintance with Judge Bork is purely professional, the acquaintance of a professional colleague. I have never been in his home, nor he in mine. I have observed his work necessarily, sitting where I was, as I observed the work of hundreds of other judges. And I have no hesitation in saying he is well—very well-qualified.

Senator THURMOND. As Chief Justice of the Supreme Court of the United States, you have known many lawyers who have come before the Court, I am sure, and you have had Judge Bork to come before the Supreme Court and argue cases. And as you say, you have no personal interest; you are merely acting in a professional manner.

Do you know of any reason whatsoever, any behavior, anything he said, any decision he has handed down, that should disqualify him from being an Associate Justice of the Supreme Court of the United States?

Mr. BURGER. I have not heard any.

Senator THURMOND. Now, Mr. Chief Justice, I want to take just a minute. You are Chairman of the Commission to Celebrate the Constitution, and I wonder if you would care to describe your 5-year plan in just a minute?

Mr. BURGER. When we began, nearly 2 years ago—and it was about 2 years later than we should have really gotten started, as it turns out—we urged the Congress, and the Congress responded by extending the life of the Commission to cover the Bill of Rights so that we could have a more orderly approach to our programs.

The Commission then agreed in general terms that our program would be that for 1987 we would focus, not with limits, but generally put the emphasis on the history of the development of the Constitution, what led to it, what conditions demanded it, and then after that focus on the ratification process, which is so—it is just simply not well-known by even well-educated people; how close we came not to getting a Constitution at all with four of the major States—Massachusetts, New York, New Hampshire and Virginia—barely ratifying the Constitution. And without them, there could not have been a new nation.

Then our focus, particularly beginning in 1988, would be on article I; what does article I provide, and then how has it worked?

There were 26 Senators in 1789, and I think 65 House Members. I suppose the Congress had a half dozen employees. That was enough for a country of less than 4 million people, and the kind of society and economy that we had.

The executive branch was not much bigger. It was mostly made up of, besides the military, the Customs collectors and postmasters and postal workers. Well, look at it now. I do not know the figure, but it is around 3 million. The staffs have grown, and the whole subject needs examination.

That is why I said these hearings will contribute to this process, as other recent controversial hearings in the Congress will contribute to the enlightenment of the people, ultimately.

Then, in 1990, the anniversary of the first federal courts, we want to take a look at the fact that we had 13 federal judges in the beginning—6 on the Supreme Court and one district judge in each State. Now we have over 1,000, and we need them, as the other branches need their staffs.

The numbers are not alone important, but the functioning of them—are we working in the way the founders wanted to work? In each of those years, we hope to examine very carefully, in conferences, forums at colleges and universities, and debates on television and elsewhere, how this machinery is working, and then devote

1991 to all of the amendments, with special emphasis, of course, on the Bill of Rights and on the Civil War amendments and those that followed.

Senator THURMOND. Mr. Chief Justice, my time is up. I just want to say that Senator DeConcini and Senator Kennedy and I serve on this Commission with you, and it is a great honor for us to serve with you.

Mr. BURGER. Thank you.

Senator THURMOND. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator Kennedy.

Senator KENNEDY. Just one question. We know you are a strong believer in the checks and balances which have been described in the Constitution. Do you think it is appropriate for the Senate of the United States to take into consideration the views of a nominee on great Constitutional issues and questions?

Mr. BURGER. Senator, I think the only answer I can give to that is that, as with each member of the judiciary, each Senator much make that kind of a decision, himself or herself. There would be nothing remarkably new about that, as shown by the very near rejection of Charles Evans Hughes as Chief Justice—52 votes affirmative, and the rest of the 96 Senators were either against him or abstaining, which is the same as being against.

I think, never having been a Senator and never any prospect that I will be, I think I would leave the answer that way.

Senator KENNEDY. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Hatch.

Senator HATCH. Mr. Chief Justice, welcome to the committee. I am very happy to see you again, and we appreciate all you have done.

I wanted to ask just a few questions, but I would rather take just a few minutes here and not let this occasion pass without saying a few words commending you for your extraordinary service to this country as Chief Justice.

We are all familiar with some of your very important decisions, for instance, the *Chaddha* decision, with regard to dealing with legislative vetoes; the *Boucher* decision, reaffirming the separation of powers, a very important case; the *Miller* decision, concerning the use of community standards in determining what is or is not obscenity or pornography; and many more.

But I think your greatest service is even more than that, as great as the writing of opinions has been. Chief Justice McKusik, of Maine, stated it succinctly when he said that you have done, quote, "more than any other single person in history to improve the operation of all our Nation's courts."

I wish to add my voice to those of your colleagues and the entire judicial system, and to thank you publicly for your contributions to a fair and efficient system of justice. I do not think anybody looking at that would conclude otherwise. And it is only fitting that, after nearly three decades of judicial service, that you should continue to serve as Chairman of our Bicentennial Commission for the commemoration of the Constitution. So we still follow your lead with a great deal of admiration, and I just want you to know that. So thank you.

Mr. BURGER. Thank you.

Senator HATCH. Now, Chief Justice Burger, the charge has been repeatedly made that Judge Bork is out of the mainstream of constitutional thinking, and that his views on the issues surrounding liberty, for instance, would not be shared by any one of the 105 Justices who preceded him.

Now, you have written a number of very important constitutional opinions over the last two decades. You have watched lawyers from all parts of the country come in, advancing Constitutional arguments in nearly three decades on the Bench.

What is your opinion with regard to whether or not Judge Bork is in or out of the mainstream of American judicial thought?

Mr. BURGER. Senator, if Judge Bork is not in the mainstream, neither am I, and neither have I been.

Senator HATCH. And neither would a whole lot of others be.

Mr. BURGER. I simply do not understand the suggestion that he is not in the mainstream of American constitutional doctrine. There is nothing on the record during the past 7 years. It is almost 7 years since he has been on the court.

I go back to what I said about the difference between being an advocate and being a judge. Jackson's episode illustrated that. He had one position when he was an advocate, and he had another one when he was a judge. I had positions when I was on the faculty of my law school for 12 years, while I was also practicing law, that I might or might not adopt if I were a judge. You start all over when you begin sitting on the bench. Of course, your total experience enters into it; the observations of a lifetime. But what you do is what all of us try to do, is look at this small book.

I, for example, when I have gone to law schools for lectures, have been asked many times by law students, "Have you ever decided a case or written an opinion that you did not agree with, personally?" And I said yes, of course, a great many of them. Here in this constitution is what you follow.

The *Snail Darter* case, for example, is one—an inadvertent statute adopted by the Congress, in a hurry, with untoward results that would have wasted about $150 million. And it was urged upon us by no less than the distinguished Attorney General of the United States, Griffin Bell, one of the ablest lawyers in this country, that we—the Justices—had to use a little common sense; but in the opinion in the *Snail Darter* case, we made it clear that common sense is not our business, it is yours, and that there is no prohibition in the Constitution that forecloses Congress from passing unwise laws.

I suspect that maybe in an earlier draft of the opinion, I might have used a stronger word than "unwise", but when it came out in print, we made it clear, that the wisdom of a statute is not our business. That is your business. And within weeks—within weeks—after the opinion came down, the statute was amended, and a $130 or $140 million dam was not wasted.

Senator HATCH. I appreciate that. Over the past 2 weeks, we have heard arguments by some of Judge Bork's opponents that he should not be confirmed because he will vote the wrong way, they put it, in a number of very crucial issues, they think, or in any particular case.

Now, I for one am really concerned about the implications of that approach by the Senate to the confirmation process. Could you comment on how this political vote-counting approach to confirmation might affect the independence of the national judiciary?

Mr. BURGER. Senator, I do not think I am wise enough to really respond to that fully. There are things which happen outside of the courts which have a negative impact on the judicial process. Sometimes the court acts in a way that produces negative results. Cases like *Dred Scott,* for example, and there are others, that had to be overruled. Those were wounds that were self-inflicted by the court.

I am not sure that in the long run, I know what the impact of this controversial process has on the court system.

Senator HATCH. Thank you. I notice my time is up. Thank you for being here. I appreciate seeing you here.

Mr. BURGER. Mr. Chairman, may I make one suggestion?

The CHAIRMAN. Surely.

Mr. BURGER. One of the prices I pay for being able to read without glasses after nearly 100 years is that I have eyes that are very sensitive to light, and I have difficulty reading. And I used the words "persons" before; in the ninth amendment, of course, the word is "people." I think there is no difference, but when I thought I was reading that word, it was "people."

The CHAIRMAN. Thank you, Mr. Chief Justice.

Senator Metzenbaum.

Senator METZENBAUM. Mr. Justice, it is a pleasure to see you here again, and I welcome you here this morning.

Mr. BURGER. Thank you.

Senator METZENBAUM. I have only one question. You have had many, many years of experience with the American Bar Association, both as Chief Justice and prior to that, I know, a career in which you were much involved with the American Bar Association.

I must confess this Senator was somewhat upset when the fact that the Bar Association gave Judge Bork a "well-qualified" rating, but that the vote was only 10 to 4, with 1 not voting, as I understand it.

What bothered me was not the vote, but that the integrity of those who had voted contrary to his recommendation was impugned and that questions were raised about their political involvement.

And I just want to ask you, in all of the years that you have been involved with the ABA, do you have any recollection of any other instance in which the members of the committee personally have been put to the test of what their political views are, or their activities have been?

Frankly, I think it would cause some to be reluctant to serve on an ABA committee of that kind in the future, and also, I think it is not becoming. I just would like to get your reaction.

Mr. BURGER. You are quite right, Senator, that I was quite active for a period in the American Bar Association. It was almost entirely confined to the project of the American Bar reviewing the standards of criminal justice. It was first the Committee on Minimum

Standards of Criminal Justice, chaired by Judge Lumbard of the second circuit, and then I succeeded him for 3 years.

So my total involvement was about 9 years, but as a member of the bar and a member of the judiciary I have watched it.

I doubt that this is the only occasion when suggestions like that were made either in private conversation or otherwise. It is not a wholesome thing, but 15 years ago or even 10 years ago the height resulting from intense media coverage was not as great as it is now. A person can hardly drop his pen without having stories in the newspaper about the fact that he could not hold his pen.

So I would not think that the matter was as serious as you think it is. These four members of the committee had the right to take their positions but no right to publicize them. I think Chief Justice Hughes, were he around, would say a 10 to 4 vote was a lot better than he did with only 52 votes getting confirmed as Chief Justice.

Senator METZENBAUM. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Senator from Wyoming.

Senator SIMPSON. Well, Justice Burger, it is always a pleasure to see you over here. I know those lights—I know how you are with those——

Mr. BURGER. I think I see you now, Senator.

Senator SIMPSON. It is good to see you. Maybe it is just the glancing light off my head that is really getting to you. That does happen. They are always trying to powder it and I refuse to allow them to do that.

Well, sir, let me commend you on your activities on behalf of our Constitution, and how great it is and ironic and good that these hearings are taking place while we are talking so much about our Constitution. And people all over the United States are talking about our Constitution because of this hearing, more than ever before.

And that is not just because of this. It is because of your work as Chairman of the Commission. You have done a splendid job, and the celebration on the west front of the Capitol the other day was superb, a goose-pimply kind of a thing. I loved it. It was hot, but it was a marvelous day.

So you have done the same job with the Commission you did on the Supreme Court of the United States, a very thorough and impressive and detailed job well done, and you did that as our Chief Justice.

I guess I have maybe a more unique feeling about you because it had been my deep personal privilege to share some private times with you in the past in your chambers. We did always observe the separation of powers in those visits. We did talk about baseball and antiques, and things like that. So we did observe the separation of powers.

It has been a really delightful personal part of my life to get to know you and Mrs. Burger. You bring great grace and charm to this city and to the nation.

Well, Mr. Chief Justice, you have maybe observed these proceedings. We have heard a lot about the Constitution. We have heard more however about the Indiana Law Review article of 1971. Is not that curious? A tentative and probing document called "Ranging Shots," and yet not one person yet—I am still waiting—has come in here to challenge the quality of this man's work product while he served on the Circuit Court of Appeals of the Federal Circuit of the District of Columbia, the, quote, "second most important court in the land."

Not one, not one yet has come in to challenge that work product of that judge for 5½ years. That is really a unique thing. It seems to be just skipped over in the babble about this particular process.

I am waiting for that. I do not think it will come. And certainly the Supreme Court never even challenged or decided to hear any of those cases of this judge, the 106 he wrote; they never went up. They were not appealed or the Supreme Court determined not to hear them. The other 100, 200, 300—the dissents that he did present later became the law of the United States, six of them. Six of his dissents became the law through the majority of the U.S. Supreme Court.

We have heard a little more discussion about the American Bar Association. I think they have to go rework their operation there a little. We do not get the luxury of voting in secret, and I would like to see those four people who voted against him and smoke them out, and find out why they did that. I am sure it was not because of ideological bent or political belief, because of course that is off the record. You see, you cannot do that in the ABA and do not tell me they did not get in it with both feet.

So the next time they do their operation with ABA, we hope they will not do it in secret. That is just my view.

But your words and your recommendations mean a great deal to us because of who you are. Your advice and counsel is very important to our advice and consent in my mind. And so you have said publicly that this man, Judge Robert Bork, is one of the finest nominees to come before the nation in 50 years. You have said that publicly.

And my question to you is: Why?

Mr. BURGER. That is not an exact quote, Senator, if you will forgive me for saying so. I said there never was one that I thought had better qualifications. There have been some splendid men and now one woman brought before the court whose work I knew well before she came to the court as a state judge.

There are hundreds of others out there who would be well qualified, judges on the state courts and judges on the other federal courts. I do not know that I could answer the question any more fully than I have. This man is thoroughly qualified on every count that I would consider relevant if I were sitting as a Senator. And each Senator, of course, has to make those decisions on his own. I do not think my counsel or advise is as valuable as you have intimated, but I thank you for the intimation anyway.

Senator SIMPSON. Well, I thank you, Mr. Chief Justice, and thank you, Mr. Chairman.

The CHAIRMAN. Senator from Arizona.

Senator DECONCINI. Thank you, Mr. Chairman.

Mr. Chief Justice, I join in thanking you for being here, and your leadership on the court and certainly on the Bicentennial Commission. And I quite frankly thank you for your remark about perhaps some very positive things that are coming out of these hearings. We have had a lot of criticism on both sides here. Anyone who asks

Judge Bork or one of his supporters a question that somebody feels is unfair, they are termed bashing Judge Bork, and anyone who comes forward praising him with exuberant statements is indicative of being biased and not being objective.

But I agree with you that however this comes out and however this Senator votes, it is I think helpful to promote the Constitution, which you have devoted so much of your time and leadership in doing. And I have enjoyed working with you.

Mr. Chief Justice, can you give me any idea of your own views of sitting judges, and that excludes judges who have retired and gone senior status, as to their expressing views on nominees, whether they are sitting Supreme Court Justices or U.S. district court or circuit court judges? Do you feel that it is proper for a judge to make public statements or if not, is there a proper way for them to express their views?

Mr. BURGER. Senator DeConcini, I think I would have to answer that question as I did the one with reference to Senators' position. This is something each person has got to decide for himself or herself.

I am out of the judicial business now, although under the Constitution I hold the office and the basic judicial power for life. I do not ever intend to sit again. That has been something of a tradition that former Chief Justices do not sit on the other courts.

I think it would be inappropriate for me to try to——

Senator DECONCINI. I just wondered—what I am interested in, and I do not have any quarrel with this, I just wondered if there was any thought of some standards, some guidelines within the Judiciary to help members of the bench to know how far they should go, or should they make any statements at all in support of nominees. Because in my judgment they are indeed very influential, and I do not have an objection to them *per se,* but it seems to me that they could go too far, and I do not have any examples of anyone doing that, lobbying and what have you, or making critical remarks or comments about a nominee.

But I take it there is no concern that you have or that you know of within the Judiciary that there should be anything other than the total individual judgment of each sitting judge whether or not they should comment on appointments.

Mr. BURGER. I think it is up to each judge, Senator.

Senator DECONCINI. Thank you, Mr. Chairman. Thank you, Mr. Chief Justice.

The CHAIRMAN. Senator Grassley.

Senator GRASSLEY. Mr. Chairman, Mr. Chief Justice, I would like to take 1 minute of my 5 minutes to make note of the fact that—and I want to do this just for the record—that a constituent of mine, Mary Jane O'Dell, was scheduled to testify yesterday, but because of time problems that we have been having on the committee, she was unable to do this.

Mr. Chairman, I regret this, but I do want to note that she came to Washington. It is my understanding she did this at her own expense as a private citizen, and not on behalf of any group. She came just as a concerned citizen.

And I might add too that I believe that she would have had a different view on the nominee than I do have, but that is not important. What is important is that she took the time out of her busy schedule to come.

I want the record to reflect that she was here yesterday and I hope, Mr. Chairman, that you will see fit to include in the record any prepared statement that she may have had.

The **CHAIRMAN**. I assure you we will, and I too apologize for her not being able to testify yesterday.

Senator **GRASSLEY**. Mr. Chief Justice, first of all, I want to do like many of my colleagues on this committee have done already, to take the opportunity to thank you for appearing before our committee on behalf of the nomination of Judge Bork. It has been a pleasure for me to see you again and to hear your views, but more importantly to hear your response to these specific questions that have been presented already.

May I also say that you are to be congratulated for your service to your country as the Chief Justice and everybody knows, that you have distinguished yourself as one of the most influential jurists in our court's history.

Let me ask about the effect that becoming a member of the Court has upon someone who becomes a member of this coequal branch of our government. Can a President count on a nominee to carry out a particular agenda once the nominee becomes a sitting Justice?

Mr. **BURGER**. No, categorically no.

Senator **GRASSLEY**. And I agree with that, but——

Mr. **BURGER**. History shows that very, very clearly.

Senator **GRASSLEY**. Yes.

Mr. **BURGER**. I am not sure if Presidents have that kind of an agenda. I remember at the time of my nomination, only afterwards, some time later since it did not involve any conversation with the President himself, he said I might be interested in knowing that he pointedly failed to have any conversation with me or visit with me because he wanted it clear there was no agenda.

Senator **GRASSLEY**. And that was the President who appointed you?

Mr. **BURGER**. That is correct. President Nixon.

Senator **GRASSLEY**. Well, I expected an answer like that, but I think that we ought to hear it from somebody like you because I think it has been an issue in this appointment of this person.

Mr. Chief Justice, next I would like to ask whether you believe that the Supreme Court is some kind of super-legislative body that should step in and make laws whenever some in society believe the legislature is moving too slowly or not at all on some given agenda.

Mr. **BURGER**. There are several cases, one of which I have mentioned, the so-called *Snail Darter* case, that a statute and its workings that did not make any sense, and the Court was divided on that, some of the members of the Court dissented. My very distinguished colleagues thought we should step in and, as it seemed to me, to correct the errors of the Congress.

And the majority of the Court said no, it is not our business to correct the errors of Congress unless the error is an error in terms of being contrary to this Constitution.

Then there was another one even more recently. The name and citation eludes me, but it involved the Federal Reserve in these nonbank banks. The Federal Reserve Board and the banking industry was getting very disturbed about these institutions that were arising doing things, virtually all the things banks do. And that is where the phrase "nonbank banks" came.

So the Federal Reserve adopted some regulations, putting them under their control. Our examination of the whole history of the statute and the structure was that Congress had not given the Federal Reserve that authority, even though there were some very good reasons why they should have it. And as a Member of the Congress, had I ever been one, I surely would have voted to give the Federal Reserve that kind of power. But Congress did not do it and we said, no, it is back in your court—the Congress.

And there are dozens of cases that you will find that way.

Senator GRASSLEY. During the period of 1973 to 1977 when Robert Bork was Solicitor General of the United States, I would take for granted—by your answer to the question—that you had occasion to observe him closely in Supreme Court litigation. Is that correct?

Mr. BURGER. Yes, just a little less distance than between myself and the chairman, that closely. And I suppose he argued from half a dozen to a dozen cases every year, which no other member of the bar does.

Senator GRASSLEY. Okay. Then my last question: During that period or at any other time, have you ever known Judge Bork to advance a position contrary to the legitimate interests of females or minority parties in a case?

Mr. BURGER. Not that I am aware of, not that I am aware of. To be precise, I would have to go back and read some of the oral arguments, but I think it would stick in my mind if I had ever heard it.

Senator GRASSLEY. Thank you, Mr. Chairman.

The CHAIRMAN. The Senator from Vermont.

Senator LEAHY. Thank you, Mr. Chairman.

Mr. Chief Justice, it is good to see you again, sir.

Mr. BURGER. It is good to see you.

Senator LEAHY. And I am delighted to see you here. I think it has been most impressive in these hearings when we have seen a former Chief Justice testify, a former President of the United States, and others. And, in fact, I think it does exactly what you stated at the outset this morning. It is probably doing as much of a history lesson on the Constitution as anything we can do.

In fact, I have urged schools in Vermont and others, if they really want to see how the whole Constitution comes together, to watch these hearings. We have got the Executive, the President who has made an appointment to the judiciary with the Congress, in this case the Senate stepping in under advise and consent, all three branches coming together for a decision that could affect, certainly affect this country well into the next century.

And I think you bring that out, and I am not surprised that you referred to that first, especially if one looks at the work you have done on trying to make the Constitution a reality to a lot of us who either have not studied it enough or take it too much for granted, a failing that could have serious consequences in either case.

I also have to contrast it with some of the lobbying that has gone on in this, and I do not put you in the case of a lobbyist. I put you in a case of one who is trying to bring an instructive dialogue and debate here.

But, as some who have been lobbying this, I have had certainly by more telephone calls in my office in this matter than anything else, and they range from some who call and say how deeply committed they are to the confirmation of Bjorn Bork, which was one of them, to those who have told me that how I vote will show whether my allegiance is to the Communists or to a Divinity. I am not going to say which vote falls into which category.

In that cacophony of sound, though, there have been voices like yours and voices like Laurence Tribe's, and voices on both sides that have brought us back to reality and put it to the kind of debate that it should be. And for that, sir, I compliment you.

I might say—just really one question I have. I have another one that I will submit, if I might, just for the record in writing to you.

Just to follow up on a question that Senator DeConcini asked, and I realize each one of us has to make personal choices. If you were a sitting member of the Court, I mean an active member, not on senior status, would you have made a statement as to your preference on the Supreme Court nominee?

Mr. **Burger**. Having been only Chief Justice and never an Associate Justice, I think I would not while I was Chief Justice. Some Chief Justices have in the past. I did not at any time. I speak only from having occupied the center seat. As to the others, the situation is somewhat different.

Senator **Leahy**. I might say I know that is your position. I know what your answer would be. The one thing I remember from my years as a trial lawyer, you do not ask the question unless you know the answer.

But I might say I also admire that position. I think it is an appropriate one. I think I would find it a very difficult one to follow, but it is a most appropriate one.

Thank you, Mr. Chairman.

Senator **Kennedy**. Senator from Pennsylvania.

Senator **Specter**. Thank you, Mr. Chairman.

Mr. Chief Justice, I join my colleagues in thanking you for being here. I believe these proceedings have been very unique, more so now with your presence and very worthwhile.

Mr. Chief Justice, you commented that you had seen only a bit of the reports on the proceedings as to Judge Bork in the press, and were wondering what the concerns were. And I would like to raise one, and that relates to the comments that Judge Bork had made about the lack of legitimacy of Supreme Court opinion in *Griswold* on the privacy issue, and had raised that in his opinion on the court of appeals in *Dronenburg*, involving the issue of a discharge by the Navy of a homosexual.

And I would like to pick up for just a moment on your opinion, which has already been referred to in the *Richmond Newspaper* case, where you said that the court has acknowledged that certain inarticulate rights are implicit, and you particularized one of them as the right of privacy, which is not specified.

Judge Bork has criticized the finding of the right of privacy in *Griswold*, which is the underpinning course of *Roe* v. *Wade*. And the question that I have for you, Mr. Chief Justice, is: Do you consider an interpretation of original intent which excludes rights, like the right of privacy, unduly restrictive in terms of the tradition of U.S. Constitutional interpretation?

Mr. Burger. Senator, there are really two questions, two issues that are raised by your question. In that *Richmond Newspaper* case and in at least three or four others that I authored for a majority of the court, we were in effect impinging on the right of privacy to some extent.

It is impinging when you say to a person you must appear in the court with the media and the public present, to a degree it can be suggested that you have denied that person some right of privacy.

My predecessor, my distinguished predecessor Earl Warren in the *Billy Sol Estes* case—that must be 20 years ago—would have come down that no person, no person should be required to testify in an open court under television lights and cameras unless he consented. There was not a majority for that. It was about four-and-a-half to four-and-a-half in that case.

So to a degree, there is some impingement on privacy when you have that broad view of the right of the media and of the public to be present in a courtroom.

Now as to the right of privacy under the cases of the kind you suggest, more law professors and law school deans than I could count have criticized the analytical and juridical basis for those opinions. They would have reached the same or similar result but by a different route.

I sat in on a number of Bar Association meetings in this country and in Europe where the analysis of the cases you mentioned was very vigorously criticized by law professors.

That is the business of law professors to take the Supreme Court opinions apart and tell the Court how they could have written them better even with the same result. And that has been going on for years and increasingly so as the Law Review publications have enlarged and as we have had more law schools. I see no serious problem about it.

Senator Specter. Mr. Chief Justice——

Mr. Burger. I think I would disagree with the analysis of a number of cases where I agreed with the result. Sometimes on the Court a Justice will say, "I concur in the judgments" and then write a separate opinion, or in between doing that and joining the opinion, write a separate concurring opinion, explaining his own approach to it. That is a very common practice.

So Justices, as well as law professors, have been criticizing Supreme Court opinions for a long time, and that is a healthy thing.

Senator Specter. Mr. Chief Justice, you commented that you disagreed with the wisdom in the *Snail Darter* case. And I would like to ask you a somewhat different question, which is posed by Judge Bork's testimony. We had a very extended discussion as to the Holmes clear and present danger test on freedom of speech, and Judge Bork has criticized that line over the years as a law professor.

And in these hearings he said that he philosophically disagrees with the *Brandenburg* decision, holding the Holmes clear and present danger test, but as a Justice, if confirmed, he would apply settled law.

And my question to you, Mr. Chief Justice, is: Is it realistic to expect a sitting Justice to interpret fairly a decision, settled law, where he disagrees fundamentally with the underlying philosophy, considering the various factual situations which come before the Court? And, of course, there can never be another one precisely on the facts of *Brandenburg*.

Mr. **Burger**. There were a number of opinions that the Supreme Court decided while I was in the bar and while I was on the court of appeals that I did not agree with, but when I got to the Court I followed them. I do not see the difficulty that some others do with that. It goes back to Justice Jackson's statement. He was Solicitor General when he said that, and now he was on the Court.

I had, of course, many conversations and conferences which are always kept in complete secrecy in the courts. Many times when it was perfectly clear that half of the Court did not agree, but felt bound by the precedents. That is so common in the judiciary that it is taken for granted.

Senator **Specter**. Thank you very much, Mr. Chief Justice. Thank you, Mr. Chairman.

The **Chairman**. Senator Heflin.

Senator **Heflin**. Chief Justice, we are particularly pleased that you could be here, and I want to join in all the words of congratulation on your fine performance as Chairman of the Commission to commemorate the Bicentennial of the Constitution. I also appreciate your words about the lights.

Someone told me I had caucus room blues, and I said, no, because the lights have got the caucus room stares. So I appreciate somebody pointing it out. I want the television people to get behind me and have to look at these lights a little bit, and they would come up with a different form of lighting. I think that would be very helpful.

But after saying all of that, let me ask you this. This is a matter that I am sure there are all sorts of answers to. But one of the concerns we have is whether a person follows what you might say predictability when a person goes on the Court. And we have had, for example, under President Eisenhower his appointments of Chief Justice Warren, Justice Brennan and Justice Stewart.

And according to some observers, they did not live up to their predictability. Already we have seen writings after 1 year of Justice Scalia, indicating that he is not following what was predicted. Then we have had some writings and commentaries pertaining to Justice O'Connor.

Would you give us your observation of whether or not predictability from a person's background is subject to change as they get on the Court? Are there growth factors or change factors that are present in the consideration of cases that perhaps may affect an overall philosophy of members of the Court?

Mr. **Burger**. Senator, I am not so sure that it is a matter of either growth or change. Human beings are not totally predictable, whether they are Members of the House or the Senate or the Judiciary or the executive branch. You, of course, are influenced by your own lifetime experience. And yet I have sat with judges now for a long, long time and as a visiting judge I sat in, I think, seven of the circuits of the country when I was on the court of appeals, and in literally thousands of conferences where we were trying to find out what was the core issue and how to decide a case.

I cannot think of a single instance in the 30 years now where I had any thoughts that a person was taking into account the source of his appointment or her appointment. That is one of these things that gets multiplied and multiplied, part of the hype of the 20th century. I am not sure of the source of it.

But I think there is nothing to the idea that a person feels bound by what the appointing authority may have thought. As I have suggested, the appointments for the most part are made on the basis of people's records, and that is why there is a tendency frequently to appoint sitting judges of the district court to the courts of appeals, and in turn courts of appeals to the Supreme Court because there is a judicial record available.

And the growth factor may be some of it, but I would say that any idea that someone can predict these things has no basis.

Senator HEFLIN. Thank you.

Senator KENNEDY. The Senator from New Hampshire.

Senator HUMPHREY. Mr. Chief Justice, thank you for coming today. You have greatly honored the Senate by your presence today, and I cannot help but observe that this has been the most pleasant interlude so far at least in these hearings. You have been calm in a largely partisan storm.

And certainly no one can accuse you or suspect that you have any axes to grind, that you have any agenda you wish to carry out. You have gathered all of the laurels that anyone in your profession could ever hope to gather.

And I find it remarkable that a retired Chief Justice would even involve himself in such a controversy. I do not know if there is precedent for that, but it is certainly a remarkable thing.

Mr. BURGER. I do not feel as though I am involved in a controversy, Senator, if I may interrupt you. I feel I am simply expressing views as a citizen. Now if that draws me into a controversy, so be it.

Senator HUMPHREY. Senator Simpson referred to your now famous statement to the effect that Robert Bork—that no candidate for the Supreme Court, no nominee in the last 50 years was better qualified than Robert Bork. What was the occasion of your making that remark?

Mr. BURGER. Since I became Chairman of the Bicentennial Commission, I have had to change my position about press conferences. I have had a considerable amount of hostility on the part of the media and television particularly that developed because as a sitting judge I would not give press conferences and would not talk to reporters.

As Chairman of the Commission, I do have an agenda now, an agenda that was handed by the Congress and the President of the United States, and so I had a press conference there at the ABA. And after two or three polite questions about the bicentennial on which the reporters really were not very much interested, the question of Bork came up.

And I, of course, had some reason to anticipate this because lately that is about all some people want to talk about. And I could either decline any comments but I had already decided before that since I do not intend to sit on any court ever, even though I have the authority to sit on the court of appeals or the district court, but I am in a different position now.

And by that time, as I said in my opening statement, I was so concerned about the disinformation in some of these full page ads that I glanced at, that I felt as a member of the bar, as a citizen, I had an obligation really to say what I believe.

Senator **Humphrey**. You were moved then by what you saw as a campaign of disinformation?

Mr. **Burger**. It is a campaign of disinformation as far as these ads are concerned. I am not talking about anything that is going on in these hearings.

Senator **Humphrey**. Yes.

Mr. **Burger**. But the outside activities are unfortunate. That, I think, has a negative effect on the whole system.

Senator **Humphrey**. Indeed it does. Mr. Chief Justice, these ads and the critics, the harsher critics say that Robert Bork would turn back the clock. Do you agree with that?

Mr. **Burger**. No, not at all. In the first place, he could not if he wanted to. No single judge can turn back the clock, even if he or she tries. There are nine people there, and all of them listen to each other.

When President Jackson appointed Joseph Story long before any of us, except I guess myself, were around, he thought he was going to put a check on John Marshall. And Joseph Story became probably one of the strongest supporters of Marshall's position and remained so all the time he was on the Court.

I should not say Marshall's position, that was his position but he joined Marshall.

Senator **Humphrey**. When you started out, you made two points. The first point is that there are nine members on the Court. My question is, irrespective of that safeguard, would Robert Bork turn back the clock?

Mr. **Burger**. Not on anything that I know about his opinions or his work or his writings as a whole.

When I was teaching in law school for 12 years, I was practicing law fulltime. At that stage the slogan, "Publish or perish," for law school professors had not emerged. There were not all that many law reviews in the country.

Now, the law reviews are churning out thousands and thousands of pages, and it is a good thing. This is debate. This is give and take. Just as I said when I would challenge the students in the course on contracts I was teaching, why do we need a contract clause, that was not because I thought we did not need one. I wanted to stir them up.

Senator **Humphrey**. Yes. Mr. Chief Justice, is Robert Bork someone whom black citizens and minorities and women need to fear?

Mr. **Burger**. If they need to fear him, they should have been fearful of me. I can see nothing in his record that would suggest that or support it.

Senator **Humphrey**. Thank you. I am afraid my time has expired.

Senator **Kennedy**. Mr. Chief Justice, we want to again express our very deep sense of appreciation for your presence and for your responses to the questions that have been put to you. In response to one of the questioners, you mentioned President Hoover's nomination of Charles Evans Hughes to be Chief Justice. I think the record should show the vote by the Senate to confirm Chief Justice Hughes was 52 to 26. So although there was significant controversy, he did have broad support overall in the Senate.

As you know very well, many of us who have differences in terms of political philosophy have considered it an honor to support many of those who are on the Court at the present time. I welcomed the honor to vote for your elevation to the Supreme Court, and I know that was a view that was held with, I think, two exceptions in the U.S. Senate. That has also been true of Justice Scalia and Justice O'Connor.

I think that as we are putting this into some perspective, the range of differences seems to be a good bit greater with regards to Judge Bork. But I think your support for him and the reasons for it have been well appreciated by the members of this committee. All of us are very appreciative of your presence here and the time that you have taken to speak to the committee and respond to its questions.

We know, again, what a pleasure it is for a number of us to work closely with you on the Bicentennial Commission. This is an extraordinary act of public service, and we know the energy and the talent and commitment which you bring to that cause which is so important for our country.

I see our chairman back here.

Mr. **Burger**. There is another historic episode that is of interest. You remember, or at least we have all read, that Theodore Roosevelt appointed Oliver Wendell Holmes. On the *Northern Securities* case, Holmes went wrong from Theodore Roosevelt's point of view, and his statement was, "I could have made a Justice with a better backbone out of a piece of wet straw," or something like that. Very critical of his own appointee. And, of course, as with Hughes, Oliver Wendell Holmes is one of the revered members of the Court.

The **Chairman**. Thank you very much, Mr. Chief Justice. It is a pleasure having you.

Mr. **Burger**. Thank you for permitting me to be here, Senator and members of the committee.

Senator **Thurmond**. Thank you very much.

The **Chairman**. Our next panel will be made up of three persons, and I would like to ask them to come forward: Prof. John Hope Franklin, William Leuchtenburg, and Walter Dellinger. Would you all remain standing to be sworn?

Gentlemen, welcome. Raise your right hands. Do you swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Mr. **Leuchtenburg**. I do.

Mr. **Franklin**. I do.

Mr. **Dellinger**. I do.

The **Chairman**. It is a great pleasure to have such a distinguished panel, and we are delighted to have as our next witness in the panel of three John Hope Franklin. Professor Franklin is professor emeritus of history and professor of legal history at Duke University, recipient of many awards and over 70 honorary degrees, president of numerous professional associations, including the American Historical Association, Phi Beta Kappa, and author of a number of books and innumerable articles, books and essays. His most recent book was "George Washington Williams," a biography, a classic study from slavery to freedom, a history of Negro Americans. It is just out in the sixth edition.

Next to Professor Franklin is Mr. William Leuchtenburg, professor of history at the University of North Carolina, Chapel Hill. He has taught in numerous institutions, including Columbia Law School, Columbia University, Harvard, Smith and Oxford. He has written or contributed to nearly 40 books. He is an expert on the presidency of Franklin Roosevelt and wrote the introduction to Senator Byrd's "History of the United States Senate."

Finally, Walter Dellinger. Professor Dellinger is a professor of law at Duke University. He clerked for Justice Hugo Black and testified before numerous Senate and House committees, lectured throughout the world on various aspects of American constitutional law.

Gentlemen, welcome all. I would like to suggest that we have all of your statements before we have any questions, and I suggest that we start in the order that I recognized you, beginning with you, Dr. Franklin.

TESTIMONY OF PANEL CONSISTING OF JOHN HOPE FRANKLIN, WILLIAM LEUCHTENBURG, AND WALTER DELLINGER

Mr. FRANKLIN. Thank you, Mr. Chairman and members of the committee.

I am deeply grateful to you for this opportunity to make a statement, and I will be brief. Through the use of personal experiences, I wish to illustrate how segregation and discrimination have operated in such a way as to degrade a whole race of people who have as much right to constitutional protection as any other Americans, and how the Supreme Court viewing such degrading practices as violations of the Constitution has effectively moved to eliminate them.

Thus, black Americans have an unusual stake in the future of the Supreme Court of the United States. That is why, as one of them, I am so concerned about any appointment to that Court and especially about this one that is under consideration by this committee and the U.S. Senate.

It was in 1922 in Rentiesville, OK, the village in which I was born, that my mother flagged an incoming Katy Railroad passenger train. She, my sister and I planned to ride to Checotah 6 miles away to do some shopping. We boarded the train where it stopped, and before we could take a seat, the train was moving again. We sat down in the nearest seats, at which time the conductor ordered us to go to the Negro coach, half of which, by tradition, was for baggage.

My mother declined to move, asserting that we had as much right to sit there as anyone. That was not only impertinent from the point of view of the conductor, but revolutionary. He stopped the train and put us out in the woods. Disgusted and dejected, we found our way back to Rentiesville on foot. It was a searing experience that a 7-year-old lad would never forget.

I was reminded of that experience in 1945 when, after attending a college commencement in Greensboro, NC, I was traveling back to Durham where I was living. We were in the final months of World War II, and the train was packed, or almost so. Negroes were uncomfortably crowded into the traditional half baggage, half passenger coach. When I observed to the conductor that there were only five white men in the next coach, and if they could not be accommodated in another white coach, they could be put in our coach and we could use the coach they were occupying. In such an arrangement, we all could be seated. The conductor told me that the five white men were German prisoners of war and had to be left where they were.

I do not know how much the Germans understood of American racial mores, traditions, and laws, but they seemed to relish our discomfort. They laughed at us all the way to Durham. They could have wondered what we had been fighting for.

If we did not derive much benefit from fighting the Nazis and the Japanese as far as equal rights and transportation at home were concerned, we fought and won that battle in the courts. Thanks to the decision in such cases as ***Mitchell* v. *United States, Morgan* v. *Virginia,*** and ***Bob-Lo Excursion Company* v. *Michigan,*** the Supreme Court decreed that people such as my mother and her family, and those blacks traveling to Durham from Greensboro, would never again be subjected to degradation and humiliation while traveling in the land of their birth to which they had given so much.

When I graduated from college in 1935 and was headed for graduate school, the only gesture that my State of Oklahoma made was to bar me from studying for my doctorate at the State University and provide a portion of my out-of-State tuition expenses if I was successful in my course work. Thus, I was not only deprived of the equal opportunity to succeed or fail at the university which was financed by taxpayers such as my parents, but was sent into exile at Harvard University, so alienated by my State's action that I never returned there to live.

Then, when I went to North Carolina to do research for my doctoral dissertation, I was not permitted to use the State archives until a separate room could be set aside for my exclusive use. So that the stack assistants—all of whom were white—would not have to serve me, I was given a key to the stacks and told that I could go in and collect the manuscripts myself and any other materials that I needed for my own use.

That arrangement continued for about 2 weeks, at which time the white researchers protested that they were being discriminated against because they did not have the privileges that I had of access to the stacks. The stack privilege was taken from me on the day of the protest, but the segregation and discrimination against me continued. I was denied the use of the search room where all of the white researchers worked and used the reference materials, and the stack assistants were now required to serve me in my small room.

Then came the assault on segregation and discrimination in higher education, and ultimately in the public schools. The decision of the U.S. Supreme Court in ***Sipuel* v. *The Board of Regents, Sweatt* v. *Painter,*** and ***McLaurin* v. *Oklahoma State Regents*** made it possible for black aspirants to higher education to attend the public universities in their own States and enjoy the equal protection afforded by the Constitution.

When I went to Howard University to teach in 1947, the only restaurants I could use while doing research at the Library of Congress were those in the Supreme Court building and in the Methodist building. If I worked on weekends when those two places of public accommodation were closed, I had to bring my own lunch or leave the area altogether if I wished to have a hot meal. Meanwhile, my fellow white researchers could go anywhere on Pennsylvania Avenue or the side streets where already the specialty eating establishments were springing up.

Those of us who were black and wished to pursue a life of the mind paid a high price, not only in time and energy wasted in being denied service by white restaurant owners, but also in emotional stress arising from the absence of constitutional protection in our quest for even a cup of coffee. It was the Supreme Court of the United States that opened the restaurants of this city to blacks in the case of the *District of Columbia* v. *John R. Thompson and Company,* 1953. And in the Civil Rights Act of 1964 and in the Supreme Court decisions upholding the constitutional of that act—notably in *Heart of Atlanta Motel* v. *the United States* and *Katzenbach* v. *Morgan,* the right of blacks to enjoy public accommodations was at last affirmed.

Members of the committee, I come here today because I am deeply concerned about the future composition of this Court, knowing full well that what you do in this matter will greatly affect the future of our country. I will not demean this discussion by even taking notice of the claim advanced by some that criticisms of Judge Bork are patently political. Surely one can differ with Judge Bork's philosophy, his remarkable activism in pressing for the acceptance of his own views, or his opinions in the Circuit Court without having to respond to the specious claims that those who oppose his nomination are politically motivated.

Nothing in Judge Bork's record suggests to me that, had he been on the Supreme Court at an earlier date, he would have had the vision and the courage to strike down a statute requiring the eviction of a black family from a train for sitting in the so-called white coach, or the rejection of a black student at a so-called white State university, or the refusal of a white restaurant owner to serve a black patron.

As a professor, he took dim view of the use of the commerce clause to protect the rights of individuals to move freely from one place to another, or to uphold their use of public accommodations. He said in 1964, "If Congress can dictate the selection of customers in a remote Georgia diner because the canned soup once crossed the state line, federalism, so far as it limits national power to control behavior through purported economic regulations, is dead."

In the 1973 hearings on his nomination to serve as Solicitor General, Professor Bork recanted those views, stating that title II of the Civil Rights Act "has worked well, and were that to be proposed today, I would support it."

Views may change, of course, but history cannot be recanted. I am concerned that, had Judge Bork been on the Court in 1964 before the statute had a chance to work well, he would have asserted that it was an unconstitutional exercise of the commerce clause, and it may never have become law. It is not comforting to discover that only in a confirmation hearing has the nominee relented on a matter so obviously desirable and constitutionally protected as the proposition that all persons shall have equal access to public accommodations.

One wonders, for example, if Judge Bork continues to view as constitutional the proposed antibusing bills in 1972 and 1973 which he supported and this Congress rejected. One wonders if he would have supported this administration's ill-fated proposal to grant tax exempt status for educational institutions that practice racial segregation and discrimination. One wonders if he continues to dismiss the efforts of those persons honestly seeking formulas for the resolution of the problems of admission of blacks to certain areas of higher education from which they had been excluded for centuries.

These are some of my concerns. Perhaps the greatest concern is that the remarkable and historic strides that this country has made during the past 35 years in at least mitigating some of the cruder aspects of its problem of race, could become the victim of one who has rarely assumed judicial restraint in this area. There is no indication in his writings, his teachings or his rulings that this nominee has any deeply held commitment to the eradication of the problem of race or even of its mitigation.

One searches his record in vain to find a civil rights advance that he supported from its inception. The landmark cases I cited earlier have done much to make this a tolerable, tolerant land in which persons of African descent can live. I shudder to think how Judge Bork would have ruled in any of them had he served on the Court at the time that they were decided.

We cannot afford the risk of having a person on the U.S. Supreme Court whose views make it clear to me that his decisions in this area would be inimical to the best interests of this nation and the world.

Thank you, Mr. Chairman, and thanks to the committee.

[Prepared statement follows:]

Testimony of John Hope Franklin, James B. Duke Professor of History Emeritus, Duke University, before the Senate Judiciary Committee Considering the Nomination of Robert Bork to the United States Supreme Court, September 23, 1987

Thank you, Mr. Chairman and Members of the Committee. I am deeply grateful to you for this opportunity to make a statement, and I will be brief. Through the use of personal experiences, I wish to illustrate how segregation and discrimination have operated in such a way as to degrade a whole race of people who have as much right to constitutional protection as any other Americans and how the Supreme Court, viewing such degrading practices as violations of the Constitution, has effectively moved to eliminate them. Thus, black Americans have an unusual stake in the future of the Supreme Court of the United States. That is why I, as one of them, am so concerned about any appointment to that Court and especially about this one that is under consideration by this Committee and the United States Senate.

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Chicago Tribune
Mar 1, 1964

In 1973, at the Senate Hearings on his nomination to serve as Solicitor General, Professor Bork recanted those views, saying that Title II of the Civil Rights Act "has worked well ... and were that to be proposed today I would support it." Views may change, of course, but history cannot be recanted. I am concerned that had Judge Bork been on the Court in 1964, before the statute had a chance to work well, he would have asserted that it was an unconstitutional exercise of the commerce clause, and it may never have become law. It is not comforting to discover that only in a confirmation hearing has the nominee relented on a matter so obviously desirable and constitutionally protected as the proposition that all persons shall have equal access to public accommodations. One wonders, for example, if Judge Bork continues to view as constitutional the proposed anti-busing bills of 1972 and 1973 which he supported and Congress rejected. One wonders if he would have supported this administration's ill-fated proposal to grant tax-exempt status for educational institutions that practice racial segregation and discrimination. One wonders if he continues to dismiss the efforts of those persons honestly seeking formulas for the resolution of the problem of admission of blacks to certain areas of higher education from which they had been excluded for centuries.

These are some of my concerns. Perhaps the greatest concern is that the remarkable and historic strides that this country has made during the past thirty-five years in at least mitigating some of the cruder aspects of its problem of race, could become the victim of one who has rarely shown judicial restraint in this area. There is no indication -- in his writings, his teachings, or his rulings -- that this nominee has any deeply held commitment to the eradication of the problem of race or even of its mitigation. One searches his record in vain to find a civil rights advance that he supported from its inception. The landmark cases I cited earlier have done much to make this a tolerable, tolerant land in which persons of African descent can live. I shudder to think how Judge Bork would have ruled in any of them had he served on the Court at the time they were decided. We cannot afford the risk of having a person on the United States Supreme Court whose views make it clear that his decisions in this area would be inimical to the best interests of this nation and the world. Thank you, Mr. Chairman, and thanks to the Committee.

The CHAIRMAN. Thank you, Professor.

TESTIMONY OF WILLIAM LEUCHTENBURG

Mr. LEUCHTENBURG. Mr. Chairman, members of the committee, like Professor Franklin, I will confine my remarks to 10 minutes.

In Philadelphia, in May, at the opening ceremonies marking the Bicentennial of the Constitutional Convention of 1787, Judge Bork and I spoke on separate panels devoted to interpreting the Constitution. Consequently, I had an opportunity at first hand to observe him. Anyone who heard him in Philadelphia then or who witnessed his performance here this past week would acknowledge that he is an able man who articulates his views with uncommon force; and to deny that is to be unfair to the nominee. Unhappily, though, his speeches, his writings, and his testimony also raise very troublesome questions. As a historian, I would like to place those questions in a historical context.

Last May and again this past week at the very time these hearings were getting under way, in thousands upon thousands of communities throughout the land, tribute was paid to the Founding Fathers as the framers of the Constitution. And rightly so. For no one who goes to Philadelphia this year, as every American should, can fail to find inspiration in the thought that on these very streets walked Benjamin Franklin and Alexander Hamilton, James Wilson and James Madison. Yet in another important sense, it is misleading to think that our Constitution is wholly the work of men in powdered wigs who stepped to the measure of the minuet. Too few Americans today recognize that the Constitution, considered not merely as parchment but as a living legacy, is also, to a very considerable extent, the work of people of modern times, and that a good number of its most significant features were developed within the lifetime of many in this room, within the lifetime of Robert Bork.

To explain this point to my students, I begin my course on the U.S. Supreme Court at the University of North Carolina with a fictitious scenario. The year, I tell them, is 1859. The North Carolina legislature, they are to imagine, has enacted a law stipulating that any criticism of the State government, no matter how gentle, is punishable by death. A Chapel Hill newspaper publishes an editorial mildly critical of the Governor. The editor is arrested and hauled off to prison to await prosecution for an offense that could cost him his life. What protection, I ask, does he have under the U.S. Constitution?

Since it is the first day of class, students might be expected to be a bit shy about speaking out, but this question seems so easy that from every spot around the room answers are called out. "Freedom of the press." I shake my head no. "Freedom of speech." No. "Right to a fair trial." No. "Habeas corpus." No. "The Bill of Rights." No. "The First Amendment." No. Finally, the students subside in puzzlement, and they await the answer. And it comes as a shock to them to learn that the answer is that the editor in 1859 has no protection under the U.S. Constitution, none at all.

For as originally conceived, the Bill of Rights was a restraint only on the national Government, not at all on the States. The Supreme Court itself had confirmed that stark reality, in a case involving the arrest of a New Orleans priest, in John Marshall's very last opinion. This aspect of the Constitution proved to be a critical shortcoming. For as a constraint on the national Government, the Bill of Rights—contrary to what one often reads—has been almost altogether unimportant. The Supreme Court has almost never struck down any act of Congress for violating civil liberties. Furthermore, for most Americans, the national Government has been far less a threat to civil liberties than State and local governments, and, too often, State and local legislative bodies and courts provided inadequate protection for our liberties.

It was not until 1931—less than 60 years ago—that the Supreme Court, in two decisions within a 2-week interval, first invalidated State laws for violating the protections of the Bill of Rights implicit in the 14th amendment. In his seminal opinion in *Near* v. *Minnesota,* the Chief Justice of the United States, Charles Evans Hughes, declared, "It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the 14th amendment." Over the next 40 years, the Court absorbed more and more of the Bill of Rights into the 14th amendment: 1937, the right of peaceable assembly; 1940, the right to free exercise of religion; 1947, the prohibition against establishment of religion; 1961, the prohibition against unreasonable searches and seizures; 1962, the ban on cruel and unusual punishment; 1963, the right of indigent defendants to counsel in non-capital cases; 1964, the right against self-incrimination; 1965, the right to confront one's accuser; 1967, the right to compel testimony on behalf of a defendant, and the right to a speedy trial; 1969, the protection against double jeopardy.

And during this same period, the Supreme Court for the first time began to give full scope to the equal protection clause, a matter to which my distinguished colleague, John Hope Franklin, has just alluded. As a consequence of these changes, I can now say to my students that not only the mythical Chapel Hill editor but real editors, speakers, worshippers in this country do have the shield of the U.S. Constitution against arbitrary State action. The America of 1987 is not that of 1859 or even of 1930.

It has not been easy for the Justices of the Supreme Court to hand down these decisions. Many of the rulings came on behalf of plaintiffs who were far from admirable people; Jay Near, the beneficiary of Chief Justice Hughes' landmark opinion on freedom of the press, was no crusading editor but a viciously anti-Semitic scandalmonger who may well have been an extortionist. Many of the rulings were misunderstood, and the Justices were often reviled. Especially in the 1950's and the 1960's, there were frequent calls for impeachment and removal of the Chief Justice of the United States.

In these circumstances, we may well ask where Robert Bork stood. Is there a single notable instance when he came to the support of the beleaguered Justices when it was so badly needed? In response to a question here last week, he admitted that he had never praised the rulings of the Court, only criticized them. Some of his most savage criticisms, we should remember, were of the Burger court.

If he now says grudgingly that he accepts these rulings, it is important to note that at the time, when it counted, he was one of the most boisterous of the fault-finders. And if he claims that the objections he so aggressively advanced then are not now to be taken seriously, for they were only the casuistries in which scholars typically engage, he demeans the profession of which he was so long a member, and he invites incredulity.

I believe that generations to come, while continuing to venerate the 18th century framers, will also pay homage to the Justices of the past and the present generation who have been so severely assailed by Judge Bork and who deserve better. They will recognize that what has been achieved over the past 60 years has made us a freer society and a fairer society, a development that permits us to say to a world tempted by totalitarianism, "This is what a free people can do."

This remarkable chapter in the never-ending struggle for liberty toward which Judge Bork has been so antagonistic has not been the work of men from a single party or persuasion. Though the famed champion of civil liberties, Louis Brandeis, had been adviser to a Democratic President, it was a prominent Republican, Charles Evans Hughes, who handed down the rulings in *Near,* in *Stromberg,* and in *de Jonge;* another Republican, Harlan Fiske Stone, who emphasized the importance of safeguarding the rights of minorities. Nor has the achievement been the work of any one section. It was a Justice from Utah who handed down the vital ruling on trial by jury; an Alabamian who delivered the opinion denouncing the third degree; and the future dean of the University of Pennsylvania Law School who spoke for the Court in the case of Angelo Herndon. These men, and those who have sustained them, have been the creators of a great tradition in modern jurisprudence.

The fundamental question before the committee, I suggest, is this: Why has Robert Bork not been part of the one great legal tradition of his lifetime? Why does he stand not with Brandeis and Holmes and Hughes and Stone and the other architects of expanded freedom but against them? And what are the implications of his behavior for the future? Is it conceivable that a man, whatever his ability, who deplores *Shelley* v. *Kraemer,* where a unanimous Court ruled that a State may not enforce covenants to deny blacks or Jews or others the opportunity to buy a home, has very much sympathy for the reach of the 14th amendment? Has the nominee ever supported the claims of blacks or of women at the time they were litigated in the Supreme Court, or is his support always retrospective? Does he believe, as the framers did, that there are fundamental rights—what Justice Powell called "liberties deeply rooted in this Nation's history and tradition"—or merely "gratifications?" Does he respect the very words of the Constitution that "Congress may pass no law" abridging our liberties and "no State" may deny liberty without due process of law?

On the answers to these questions may well depend whether the next time we have occasion to commemorate a milestone in the history of the Constitution will be one for continued rejoicing or one for melancholy reflection.

I thank you.

[Prepared statement follows:]

TESTIMONY OF WILLIAM E. LEUCHTENBURG, WILLIAM RAND KENAN PROFESSOR OF HISTORY, THE UNIVERSITY OF NORTH CAROLINA, CHAPEL HILL, BEFORE SENATE JUDICIARY COMMITTEE CONSIDERING THE NOMINATION OF ROBERT BORK TO THE UNITED STATES SUPREME COURT, SEPTEMBER 23, 1987.

HOLD FOR RELEASE UNTIL 11:00 A.M., SEPTEMBER 23, 1987.

In Philadelphia in May, at the opening ceremonies marking the bicentennial of the Constitutional convention of 1787, Judge Bork and I spoke on separate panels devoted to interpreting the Constitution, and, consequently, I had an opportunity, at first hand, to observe him. Anyone who heard him in Philadelphia then or who witnessed his performance here last week would acknowledge that he is an able man who articulates his views with uncommon force, and to deny that conclusion is to be unfair to the nominee. Unhappily, though, his speeches, his writings, and his testimony also raise very troublesome questions, and, as a historian, I would like to place those questions in a historical context.

Last week, at the very time that these hearings were getting under way, in thousands upon thousands of communities throughout the land, tribute was paid to the Founding Fathers as the framers of the Constitution. And rightly so. For no one who goes to Philadelphia this year, as every American should, can fail to find inspiration in the thought that on these very streets walked Benjamin Franklin and Alexander Hamilton, James Wilson and James Madison. Yet in another sense it is misleading to think that our Constitution is wholly the work of men in powdered wigs who stepped to the measure of the minuet. Too few Americans today recognize that the Constitution, considered not merely as parchment but as a living legacy, is also, to a very considerable extent, the work of people of modern times, and that a good number of its most important features were developed within the lifetime of many in this room, within the lifetime of Robert Bork.

To explain this point to my students, I begin my course on the United States Supreme Court at the University of North Carolina with a fictitious scenario. The year, I tell them, is 1859. The North Carolina legislature, they are to imagine, has enacted a law stipulating that any criticism of the state government, no matter how gentle, is punishable by death. A Chapel Hill newspaper publishes an editorial mildly critical of the governor. The editor is arrested and hauled off to prison to await prosecution for an offense that could cost him his life. What protection, I ask, does he have under the United States Constitution?

Since it is the first day of class, students might be expected to be a bit shy about speaking out, but this question seems so easy that from every spot around the room answers are called out. "Freedom of the press." I shake my head No. "Freedom of speech." No. "Right to a fair trial." No. "Habeas corpus." No. "The Bill of Rights." No. "The First Amendment." No. Finally, the students subside in puzzlement, and await the answer. And it comes as a shock to them to learn that the answer is that the editor in 1859 has no protection under the United States Constitution, none at all.

For as originally conceived the Bill of Rights was a restraint only on the national government, not at all on the states. The Supreme Court itself had confirmed that stark reality, in a case involving the arrest of a New Orleans priest, in John Marshall's very last opinion. This aspect of the Constitution proved to be a critical shortcoming. For as a constraint on the national government, the Bill of Rights, contrary to what one often reads, has been almost altogether unimportant. The Supreme Court has almost never struck down any act of Congress for violating civil liberties. Furthermore, for most Americans, the national government has been far less a threat to civil liberties than the state and local governments, and, too often, state and local legislative bodies and courts provided inadequate protection for these liberties.

It was not until 1931 -- less than sixty years ago -- that the Supreme Court, in two decisions within a two-week interval, first invalidated state laws for violating the protections of the Bill of Rights implicit in the Fourteenth Amendment. In his seminal opinion in Near v. Minnesota, the Chief Justice of the United States, Charles Evans Hughes, declared, "It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the 14th Amendment." Over the next forty years, the Court absorbed more and more of the Bill of Rights into the Fourteenth Amendment:

1937: the right of peaceable assembly.
1940: the right to free exercise of religion.
1947: the prohibition against establishment of religion.
1961: the prohibition against unreasonable searches and seizures.
1962: the ban on cruel and unusual punishment.
1963: the right of indigent defendants to counsel in non-capital cases.
1964: the right against self-incrimination.
1965: the right to confront one's accuser.

1967: the right to compel testimony on behalf of a defendant, and the right to a speedy trial.

1969: the protection against double jeopardy.

And during this same period, the Supreme Court, for the first time, began to give full scope to the equal protection clause, a matter about which my distinguished colleague, John Hope Franklin, will speak. As a consequence of these changes, I can now say to my students that not only the mythical Chapel Hill editor but real editors, speakers, and worshippers in this country do have the shield of the United States Constitution against arbitrary state action. The America of 1987 is not that of 1859 or even of 1930.

It has not been easy for the Justices of the Supreme Court to hand down these decisions. Many of the rulings came on behalf of plaintiffs who were far from admirable people; Jay Near, the beneficiary of Chief Justice Hughes's landmark opinion on freedom of the press, was no crusading editor but a viciously anti-Semitic scandalmonger who may well have been an extortionist. Many of the rulings were misunderstood, and the Justices were often reviled. Especially in the 1950s and the 1960s, there were frequent calls for the impeachment and removal of the Chief Justice of the United States.

In these circumstances, we may well ask where Robert Bork stood. Is there a single notable instance when he came to the support of the beleaguered Justices when it was so badly needed? In response to a question last week from Senator Simon, he admitted that he had never praised the rulings of the Court, only criticized them. If he now says, grudgingly, that he accepts these rulings, it is important to note that at the time, when it counted, he was one of the most boisterous of the faultfinders. And if he claims that the objections he so aggressively advanced then are not now to be taken seriously, for they were only the casuistries in which scholars typically engage, he demeans the profession of which he was so long a member, and he invites incredulity.

I believe that generations to come, while continuing to venerate the eighteenth-century Framers, will also pay homage to the Justices of the past and the present generation who have been so severely assailed by Judge Bork and who deserve better. They will recognize that what has been achieved over the past sixty years has made us a freer society and a fairer society, a development that permits us to say to a world tempted by totalitarianism, "This is what a free people can do."

This remarkable chapter in the neverending struggle for liberty toward which Judge Bork has been so antagonistic has not been the work of men from a single party or persuasion. Though the famed champion of civil liberties, Louis Brandeis, had been adviser to a Democratic president, it was a prominent Republican, Charles Evans Hughes, who handed down the rulings in Near, in Stromberg, and in de Jonge; another Republican, Harlan Fiske Stone, who emphasized the importance of safeguarding the rights of minorities. Nor has the achievement been the work of any one section. It was a Justice from Utah who handed down the vital ruling on trial by jury; an Alabaman who delivered the opinion denouncing the third degree; and the future dean of the University of Pennsylvania law school who spoke for the Court in the case of Angelo Herndon. These men, and those who have sustained them, have been the creators of a great tradition in modern jurisprudence.

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Senator KENNEDY. Professor Dellinger.

TESTIMONY OF WALTER DELLINGER

Mr. DELLINGER. I thank you, Senator, and members of the committee.

We are in the midst of a debate that reverberates through two centuries. How does a republic protect against what James Madison called the disease most incident to republican government, majoritarian tyranny, while still preserving, as Madison put it, "the spirit and form of democracy?"

On June 6, 1787, Madison took the floor at the Constitutional Convention in Philadelphia and asked his fellow delegates the following question: "What has been the source of those unjust laws complained of among ourselves? Has it not been the real or supposed interest of the major number?"

His point was that some of the worst laws were, in fact, supported by at least temporary majorities. "We have seen," Madison said, "the mere distinction of color made in the most enlightened period of time, a ground of the most oppressive dominion ever exercised by man over man." And yet he suggests that slavery was in its time and in its place supported by a majority of those who held political power.

Thus began the quest for a remedy for the disease. Madison began that quest by finding some protection for the rights of the minority and the rights of the individual in the structure and extent of the great extended republic.

By the time of the first Congress, Madison has come to see that the judiciary could play a critical role in balancing the tendency to majoritarianism otherwise built in the system. And as he proposed in that first Congress the addition of a Bill of Rights to the Constitution, he spoke of the judiciary as independent tribunals of justice which could provide a bulwark of protection.

It was not until after the Civil War, as my colleague, Professor Leuchtenburg has noted, that we would add an amendment to the Constitution broadly protecting individual rights against the sometimes thoughtless actions of State and local officials. That amendment has been the foundation of the post-World War II protection of American liberties.

A great deal of that modern tradition has come under attack from Attorney General Meese in a somewhat crude fashion in a series of speeches in 1984 and 1985. I mean to suggest by that in a fashion that lacks the greater sophistication that Judge Bork has brought to his critique of that main line of decisions. This critique sometimes marches under the banner of original intent, as it did in Judge Bork's 1986 San Diego Law Review article.

It suggests that the dozens of decisions that Judge Bork has criticized and the others that the Attorney General has criticized—lack legitimacy. I do not believe that a review of the history and the founding of the Constitution and the adoption of the Civil War amendments substantiates this charge. In fact, it seems to me that the approach Judge Bork and Attorney General Meese take to the great guarantees of the 14th amendment is inconsistent with the text, the original intention, and the history leading up to that clause.

Judge Bork—and Attorney General Meese more sharply—redact the great guarantees of the 14th amendment into a series of specific rights that the framers would have included had the framers chosen to write a specific list. The short answer to this argument is that the framers did not so choose.

Ignored by their argument that the 14th amendment can be limited to a series of isolated rights is, first of all, the text of the amendment itself. It says in its critical passage, "No state shall make or enforce any law which shall abridge the privilege of immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person the equal protection of the laws."

Mr. Chairman, there is no appendix that comes with the Constitution that provides us with a list of what are the liberties that are protected by that sweeping language of the 14th amendment, nor is it likely that those who met at the 39th Congress to propose the 14th amendment to the States failed to anticipate that the phrases such as "liberty" and "equal protection" would be given content through an evolving Constitutional tradition.

My colleague, Jefferson Powell, has written a masterful study showing that the framers in 1787 were unlikely to have this narrow a view of original intent. It is even more clear about those who framed the 14th amendment because they were writing against a half century background of judicial protection of constitutional rights.

The members of the 39th Congress who were in leadership roles in proposing the 14th amendment were all familiar with the Court's decision in *Marbury* v. *Madison*, with the expansive reading of the Constitution in *McCulloch* v. *Maryland*, and *Gibbons* v. *Ogden*. They were aware of *Fletcher* v. *Peck* because it involved one of the great controversies in the early republic—a case in which Chief Justice Marshall gave a very broad reading to the very few limitations that there were on State authority under the Impairment of the Obligation of Contracts clause.

Against that background, when the framers adopted the 14th amendment which states in sweeping language that "No state shall deprive any person of liberty without due process of law." It is in my view certain that they could have anticipated that it would be the responsibility of the judiciary to give some content to that sweeping phrase.

When Judge Bork says, as he does of *Griswold* v. *Connecticut* at these hearings last week that,"There is no provision of the Constitution that applies to the case", he is simply ignoring the sweeping language of the 14th amendment. I noted that in his major address on incorporation, Attorney General Meese wholly omits any reference to the 14th amendment at all. But that is the textual provision which gives the Court the responsibility it has exercised in evolving a sense of privacy rights, a right of marital freedom under the Constitution.

As Justice Powell said in *Moore* v. *East Cleveland*, this Court has long recognized that freedom of choice in marriage and family life is one of the liberties protected by the 14th amendment. With that sweeping text, with that as history, how can one decline to exercise the responsibility that is given, a responsibility which as Justice Powell says must be exercised with caution and restraint, but to be exercised nonetheless if the guarantees of the 14th amendment are not to become an empty set.

I would suggest to you, Senator, that Judge Bork's rejection of this line of constitutional development ultimately rests on a policy judgment on his part.

There is no basis, he says, for making these "impressionistic determinations"—his term—that the right of a married couple is more fundamental than the right of a utility company to pollute. That has been much discussed.

But I would like to bring perhaps one new suggestion to bear on this point. One critical aspect of Judge Bork's approach is set out in his 1986 San Diego Law Review article where he acknowledges that, "There are some general statements by some framers of the 14th amendment that seem to support this conception of the judicial function." But he concludes with a clear policy judgment that "Such a revolutionary alteration in our Constitutional arrangements ought to be more clearly shown to have been intended before it is accepted."

Now, Senators, I will conclude. I know that there is no one who approves of all of the major decisions of the Court over the last 30 to 40 years. But I venture to say that I believe that most Americans are in general comfortable with the role that the court has played, though they may object to a decision here and a decision there, and though some of these decisions are controversial. On the whole, my view is that the people of this country are comfortable with the role that the court has played since World War II in giving some concrete protections to the concept of liberty.

We have just completed celebrating the 200th anniversary of the Convention in Philadelphia. We need to recall, however, that the result of that Convention in 1787 was not a completely just and democratic society, but only the beginning of a quest we have yet to complete.

Thank you, Mr. Chairman.

The **CHAIRMAN**. Thank you very much, Professor.

Now let me begin with you, Dr. Franklin, if I may. You have been a professor for over 50 years they tell me, and probably one of the best known in this country.

Do you have a view as to whether academic writings are less reliable expressions of the views of an academic because they are provocative, as some have suggested? I am sure you have heard the argument that, as an academic, Judge Bork was merely being provocative. And essentially what we have been told is we should just disregard all that he has written. What are your views?

Mr. **FRANKLIN**. Well, Senator, I have been at the task of teaching for more than a half a century, and I have been guilty of writing a considerable number of books and articles. And I make a quite clear distinction between, say, on the one hand, my teaching responsibilities, which are to challenge and to provoke and to stimulate and, on the other hand, my scholarly responsibilities, placing on the record my views and my findings that result from my extensive research and my considered analysis and judgment of that research.

I do play the devil's advocate sometimes in my classes, but I do not take my position that I have in my classes as the devil's advocate, and then put those views in the American Historical Review, in the Journal of Southern History, and in the Journal of American History merely to provoke.

As a matter of fact, I think if there is that intention, then it is irresponsible frankly, and I think that there is a limit to which one should go in expressing his own views when he is writing in a place and at a time where the impression can be conveyed that those are considered scholarly writings.

We all have the dilemma which comes from time to time as to whether we should focus on some great thing that we would like to advocate, on the one hand, or whether we should bring to bear our scholarly judgment based on our research and our thinking on a particular matter.

And I would simply observe, Senator, that there are limits and that one, I think, cannot go to law reviews and other responsible learned journals and carry on there arguments which are for the purpose of provoking and stimulating, and then not bear the responsibility for the arguments that are advanced in those——

The CHAIRMAN. Thank you.

I want to make it clear because I heard an uttered sigh. As I said, there are those who suggest that we should ignore Judge Bork's writings. I am not suggesting that my colleagues have said that all the writings should be ignored, although my colleagues have suggested that we should pick and choose what to ignore and what to accept.

Senator HATCH. Nobody is saying that.

The CHAIRMAN. Let me speak please.

Senator HATCH. At least get an accurate idea. Look, nobody is saying that you should not examine everything——

The CHAIRMAN. I have the floor.

Senator HATCH. Well, you take the floor but——

The CHAIRMAN. I have the floor.

Senator HATCH [continuing]. Do not misstate what we are saying over here.

The CHAIRMAN. I am misstating nothing.

Senator SIMPSON. You are for me.

Senator HATCH. We will——

The CHAIRMAN. You can make your statement when it is your time.

The question comes as to whether or not we are going to selectively look at parts of what the Judge has written. Some are selective, some are portions he says he no longer holds, and some at a later date he has said "I still basically adhere to."

And others off of this committee have suggested that what we should really look at is only his work on the court. And that was the basis of my question.

Now I have one more question, and that is to you, Professor Leuchtenburg. There have been comparisons again—I have not heard them on this committee but I have seen them in print—between the FDR experience and packing the courts in the 1930's, and this experience of the President in the minds of some attempting to change the direction of the Court. Are they analogous?

Mr. LEUCHTENBURG. Well, I think what seems to me most relevant about the experience of the 1930's is that the Senate has to look very closely when it confirms, when it considers confirmation, of a nominee when the Court is closely divided, because the consequences can be enormous.

When Franklin Roosevelt took office in 1933, with 15 million unemployed, the stock market closed down, the banks closed, and he attempted to cope with that worst of all crises domestically in our history, he knew ahead of time that four of the nine Justices had closed their minds against whatever he would propose.

Oliver Wendell Holmes said of one of the Justices that there was no seam in him that the frost could get through. This meant that the administration of Franklin Roosevelt knew in its efforts to pull the country out of the Depression that it had to have all five of the other votes, and that one vote could be decisive.

And what happened was that the appointment made by his predecessor, President Hoover, of Owen Roberts had enormous consequences. It was more than simply a matter of one vote because it created a 5 to 4 majority. And in 1935 and in 1936 more acts of Congress, more important pieces of social legislation, were struck down than at any time in our history before or since.

The result was the court packing crisis, the greatest crisis in our history between the President and Congress and the Court, and it was not until Justice Roberts had changed his mind—in the phrase of the day, "A switch in time, save nine"—that the court-packing plan failed, and the country pulled through that particular crisis.

So I think that the main lesson I would draw from that experience of the 1930's is how significant a single appointment to the bench may be.

The CHAIRMAN. My time is up.

Senator Thurmond.

Senator THURMOND. I want to welcome you gentlemen here and I am so glad you were here when Chief Justice Burger spoke. There you heard him, I presume, so you have learned the truth, the whole truth about Mr. Bork, Judge Bork.

Thank you very much. [Laughter.]

The CHAIRMAN. Senator from Massachusetts.

Senator KENNEDY. Mr. Franklin, I think all of us have to give great weight to your views, as we do to the other members of the panel. We are very much aware of your extensive writings and your historical analysis that, in an important way, helped the court in the *Brown* v. *Board of Education* decision. You made a very extraordinary contribution, enlightening the Court about some of the realities that existed in parts of our country.

When you were talking about activism and support or efforts to strike down the stain of discrimination, those of us who know your record know that you, even as a person who was getting on in years, was prepared to make the march with Dr. King from Selma to Montgomery.

Yours has been a life of not only academic pursuit but also of putting your beliefs out on the line in a very important way.

During the course of these hearings, we have heard both from the nominee, Judge Bork, and we have seen from the record that Judge Bork was opposed to striking down on the poll taxes, was opposed to congressional action in terms of striking down the literacy tests that were used to discriminate in parts of our country, and was opposed to the court decisions that would have ended segregation here in the District of Columbia.

We have also heard during the course of this morning an eloquent voice that said, "Well, we can put the past behind in terms of writings, opinions, decisions in these areas", and once a person is elevated to the position on the Supreme Court, that it is a whole new ball game, so to speak, because you are guided only by the Constitution itself.

Should Judge Bork be successful and be elevated as an Associate Justice of the Supreme Court, what kind of message would this send to citizens in the South, who have been in the vanguard, black and white alike, as well as citizens in the North, who have been attempting to remove the various barriers of discrimination in our society?

As a historian and a person who has been a social philosopher, and somebody who has really had his finger on the pulse of society, what sort of message does it send?

Mr. **Franklin**. Senator, permit me, first of all, to say that it would be presumptuous of me, as indeed I think it would be of anyone, to try to indicate how a particular person would function once they got on the Court. I really think that involves a power of perspicacity and of discernment that I do not possess, and I think that few do possess.

But the elevation of this particular candidate to the court sends a message—it would send a message to me and I think to large numbers of others in various parts of the country who have looked at problems of liberty and problems of race, and problems of gender, and it would say to them that it really is not terribly important what views one holds at a particular time, that all can be transformed, in a sense, by the powers of this body, the U.S. Senate, to bring that person into a kind of redemptive state.

That would be asking too much for persons to accept who have witnessed a long line of opposition to these various groups, and who, as my colleague said, has never been in the vanguard on any of these matters, but at times made some grudging concessions very late in the day, and at other times made no concessions.

Thus, it would, I think, send the message that this body is impervious to a record which speaks in negative terms when, as a matter of fact, it has been claimed that it might by some transforming force speak in positive terms later.

Senator **Kennedy**. I thank you.

I had other questions. I see the light is on. I will——

The **Chairman**. Senator from Utah, Senator Hatch.

Senator **Hatch**. Thank you, Mr. Chairman.

I want to welcome all three of you here. We appreciate your testimony, and appreciate having your points of view, and recognize each of your expertise in these areas.

We want to correct our Chairman, if I got the quote fairly accurate—I think it is accurate—he said that there are some on our side of the table who would essentially disregard all that he has written.

I do not think anybody should disregard——

The CHAIRMAN. Excuse me. If I can just clarify. I said there are some who are not at this table who said we would——

Senator HATCH. You have it the other way, but——

The CHAIRMAN. I said there are some at this table who would tell us selectively to regard and disregard parts of what he has written.

Senator HATCH. I think that is probably true, but they are not on this side of the table. So I can guarantee you that. [Laughter.]

The fact of the matter is I think everything he has written is relevant, and I think criticism is relevant. What I have trouble with is selectively choosing a few cases out of everything he has done or a few comments that he has made, and he has made many, many comments. He has been a very provocative professor. He has written provocatively. And I think to the benefit of the law, whether or not you agree with him, just as you have been doing the same thing.

As I know, that we are well acquainted and we have had a lot of time together and you have appeared before this committee many times where I have sat and where I chaired the Constitution Subcommittee, and in all honesty, if you look at what has been going on here, they have looked at—and I think selectively—have looked only at parts of the cases on what he has really stood for—the poll tax, literacy test cases, contraceptive privacy cases, affirmative action, the *Shelley* v. *Kraemer* case, which he has very easily explained, the *Wrightman* case, but I think have ignored 17 out of 19 Solicitor General briefs that he filed, which favored minority rights, including the *Runyon* v. *McCrary* case, which of course made racial, private racial bias in contracts illegal, and of course ignored the fact that he sustained all civil rights laws ever since he has been on the court.

Now that is something to think about. I think that is pretty selective.

Mr. DELLINGER. Well, Senator, if I could comment on that.

Senator HATCH. Well, let me just finish my comments and I will turn it over to you.

Mr. DELLINGER. I am sorry. Yes.

Senator HATCH. Let me just do it this way. Mr. Dellinger, you were a law clerk for Mr. Justice Black, and as you know Justice Black voted against or dissented in the poll tax case, the *Harper* case, the contraceptive privacy case, the *Griswold* case, the racial bias in housing sales case, the *Wrightman* case, the landmark one-man/one-vote case of *Reynolds* v. *Sims*.

Now these have been four of the largest issues that have been raised against Judge Bork, who by the way did not vote against these cases but only commented on their legal reasoning.

Now given his record—I am talking about Justice Black—which I feel was outstanding in the defense of constitutional principles, I really wonder if Justice Black would win confirmation today given the selective reading of these cases and the fact that much of what Judge Bork said this last week has been ignored.

Now I think we ought to be clear about these things, and I can tell you this. I do not know anybody on this side who feels that anything is not fair to go into, but at least you ought to listen what the man says, and we ought to read carefully what he writes. And we ought to consider the fact that professors write differently from judges, as the Chief Justice indicated here today. He was a professor for 12 years, and he did things a little differently as a professor he admitted than he did as a judge. And he even sustained cases with which he disagreed from time to time as a judge, which he probably would have criticized as a professor.

And I think that that is something that these hearings have been bringing out. It is a little unfair to look at only part of the record of the man and not look at the most recent part, which is the most relevant part, and just ignore and sweep it away as though it does not exist, when his record stands pretty four-square for civil rights.

I admit he did not march with Martin Luther King, many others did not. But many people who did not feel very deeply about civil rights and human rights and personal liberties, and I think he has certainly evidenced that he is one of them who does, even though from a judicial philosophy standpoint he is a judicial restraint advocate.

Well, now I will turn it over to you, Professor.

Mr. **Dellinger**. Yes, Senator, I will respond to two aspects of your question. First, the selective criticism of Judge Bork and, second, the comparison with Justice Black, in particular.

I think it is an unfortunate fact of our public life that when matters are closely contested, that there is a tendency among all of us to question one another's motives as contending factions move for each inch of advantage. And I know that you would share my wish that the public discourse on matters of this kind was one that recognized that we have different ideas about and different visions of, how to go about accomplishing the public good. And I think you understand that.

Senator **Hatch**. And because there are differences does not mean that either side is necessarily wrong.

Senator **Kennedy**. May he be permitted to answer, Mr. Chairman?

Senator **Hatch**. He does not mind. He and I have had dialogues like this before.

Senator **Kennedy**. That is fine, but I would just like to hear his whole response.

Senator **Hatch**. Let the chairman rule. Go ahead, Professor.

Mr. **Dellinger**. Senator Hatch and I have——

Senator **Hatch**. We get along well.

Mr. **Dellinger**. Senator Hatch and I have had dialogues before, but I appreciate your permitting me to speak.

It is, of course, the case that, to say the least, that Judge Bork's record is not a record of consistent error, far from it. I was a student of his, I am an admirer of his. I think he has added greatly to the intellectual discourse of our time by his challenges.

It is in the nature of things that hardly any major proposition the court has decided has been one that has united every member, so that one can often find a member of the court who has agreed with Judge Bork. I think in the final analysis the responsibility for this committee and then for the Senate is to ask for each Senator where they think the balance lies in terms of those aspects of his positions and his record that reject parts of the main line of cases, and those parts of it—and indeed there are some—which accept it.

With respect to Justice Black, as I think with most every Justice there would be some issues on which Justice Black reached the same position that Judge Bork did, but there would be major areas of difference. Justice Black would have been appalled by Judge Bork's writings about *Brandenburg* v. *Ohio,* in which he would have cut back the protection of the first amendment, a position that Judge Bork has modified or at least has now accepted in these hearings.

I think certainly Justice Black supported the basic principle of one person, one vote. He supported the Congressional authority to ban literacy tests. He emphatically would have applied the Bill of Rights to the States with a vengeance; that is, you can find some cases in which Justice Black would have concurred with the result that professor or Judge Bork would take. You can find some cases where you can say that Justice Harlan would agree.

Justices Black and Harlan, who as you may know were great friends, had two very different approaches to giving some content to the liberty clause of the 14th amendment.

Justice Harlan believed that liberty is a principle that has to stand on its own bottom, that the court must evolve and exercise its own judgment about what those liberties are. Justice Black did not adopt that approach but instead believed in a complete and total incorporation of the Bill of Rights, no more and no less, every jot and every title. He would have enforced the first amendment against subversive speech, and he would have protected artistic speech no matter how much it veered into what some might call obscenity.

These two vigorous approaches—Justice Harlan's and Justice Black's—overlapped but were not contiguous. But each of them was a vigorous approach.

When I look at the writings of Judge Bork, both before and after he has gone on the bench, I do not find that he adopts either of these approaches; that is, he is unwilling to have the court take on the responsibility that Justices Harlan and Frankfurter and Powell would have it discharge under the liberty clause of deciding cautiously on a case-by-case basis what fundamental liberties should be protected.

Neither does he adopt the enthusiastic approach of Justice Black, which fills in the liberty clause by a complete and total incorporation of the Bill of Rights.

Senator HATCH. Those are fair comments. If I could just say, Mr. Chairman, I have always enjoyed listening to Walter and appreciate having him here today. But I think that is precisely the point, that there are going to be differences among all of these Justices on various issues, and I think Judge Bork has spoken relevantly, in a relevant way over the last couple of weeks, and certainly I think has clarified some of the worries that I think some people have had, and maybe not to your satisfaction, but certainly I think to the satisfaction of many.

Thank you. I appreciate——

Mr. FRANKLIN. Senator, could I just raise a point?

The CHAIRMAN. Yes.

Mr. **Franklin**. I do not know whether Senator Hatch's comment was to the point of judging selectively or taking things selectively.

There are two points I think that one wants to make here. One is that you do not necessarily count the decisions and say, you know, there are 10 on one side—there is 10 on one side and 15 on another. All those decisions are not of equal importance certainly. Decisions are not.

The other point is if you want to focus on some of the great problems of our time, and some of the persistent problems that have been with this country from the beginning to now, to focus on that is not necessarily to suggest that you are doing it selectively, because, after all, it is of sufficient critical nature to put some emphasis on that.

And in my own case, for example, when I was talking, it did not mean that I was ignoring everything else that Judge Bork had said or written or done. But I tried to address an area that is of surpassing importance to this country, and has been for three centuries, and to emphasize that is not necessarily to be guilty of selective judgment or anything.

It is so important that I think we all focus a good deal of attention on areas like that.

Senator **Hatch**. I think those are good points, and my criticism was of the comment that was made, not of any comments that you made.

Thank you, Mr. Chairman.

The **Chairman**. The Senator from Vermont.

Senator **Leahy**. Thank you, Mr. Chairman.

Professor Dellinger, I found fascinating what you were saying about Judge Black. When I was a law student, I had the good fortune once of being seated next to him at a law school function, where I said something about my father being a printer and having a weekly newspaper, and he launched into a lecture on the first amendment, which I will never forget. And it was much along the lines of what you have recounted. He did it with great vigor and wonderful anecdotes. And I remember that incident more than any other in my 3 years in law school.

And, Mr. Franklin, it is good to see you here, sir. I have read so much about you over the years, and it is nice to meet you in person.

I would like to go to some of the things that were said. And, Professor Leuchtenburg, I had to step out of here briefly, but I watched what you said on the monitor in my office, and I was very, very impressed by that. I hope everybody watched it.

Let me just refer to one part. You said—I am quoting you now in response to a question—he, Judge Bork, admitted that he never praised the rulings of the Court, only criticized them. If he now says grudgingly that he accepts these rulings, it is important to note that at the time when it counted, he was one of the most boisterous of the fault-finders. And if he claims that the objections he so aggressively advanced then are not now to be taken seriously, for they were only the casuistries in which scholars typically engage, he demeans a profession of which he was so long a member and he invites incredulity.

And, Professor Dellinger, you said that no Justice who has sat on the Court in the past 60 years, with the possible exception of Justice Rehnquist, has held as an impoverished a view as Judge Bork of a great guarantee of the 14th amendment, that no State may deprive any person of liberty without due process of law.

The reason I go back and reread these points is that I have heard over and over at these hearings that Judge Bork is at the forefront of civil rights and civil liberties issues. We have heard this from people who have testified. One said that he thought there was no judge with a more outstanding record on civil rights issues.

Professor McConnell suggested that Judge Bork's record on first amendment rights is as strong, if not stronger, than current Supreme Court doctrine. I know that especially because I had questioned Judge Bork about an hour-and-a-half on the questions of the first amendment.

And my colleagues on the minority side here said these same things and more.

So I am going to ask each one of you one simple question. Do you agree that Judge Bork has been at the forefront of civil rights and civil liberty issues, and that his record on first amendment rights is as strong, if not stronger, than current Supreme Court doctrine?

Let me start with you, Mr. Franklin.

Mr. FRANKLIN. No, I do not believe.

Senator LEAHY. Professor Leuchtenburg.

Mr. LEUCHTENBURG. No, not at all. Just two responses to that, Senator Leahy.

I think if you consider what his approach to civil rights has been over time, how many professors at Yale Law School do you think were opposed to the Civil Rights bill of 1964, and not just quietly opposed, but took the trouble to write a major article denouncing the advocates of civil rights that late in the game, a decade after *Brown*?

There is no way at all that Judge Bork can now be dressed up as a champion of civil rights.

And with respect to civil liberties, as recently as 4 years ago, when he was already a member of the bench, already a member of the court of appeals, he said at a faculty symposium at the University of South Carolina that he did not believe that the 14th amendment embraced the original Bill of Rights. And, moreover, he was not yet persuaded that this was a matter of settled law, which every judge was compelled to abide by.

Senator LEAHY. Professor Dellinger.

Mr. DELLINGER. Senator Leahy, let me expand upon the statement of mine that you quoted comparing Judge Bork with Justices who have sat in the last 60 years. The baseline consists of the 45-year period from the Court's unanimous opinion in *Skinner* v. *Oklahoma,* striking down a compulsory sterilization statute—which Justice Black joined—to the decision in 1987 in *Turner* v. *Safley,* also unanimous, involving the right to marry on the part of a prisoner. So you have two unanimous decisions in 1942 and 1987 that, in a sense, bracket this period of individual liberties.

On the matter of Judge Bork's role in civil rights, I would want to preface anything I said by noting, first, that he has said that his 1964 civil rights article was an article with which he no longer agrees, and he said that in 1973. And I would also want to make it clear that I believe that as a person and as a citizen, that Judge Bork is not hostile to civil rights.

But as one who was in the South in 1963 and 1964 when his articles were written in the New Republican and the Chicago Tribune, and who listened earlier this week to my fellow Southerners, Barbara Jordan and Andrew Young, I was struck at what seems to me to be a failure on Judge Bork's part to read the great tides of history correctly. That is, while I acknowledge that he has modified the position, I was struck at how badly he misread the South that I knew.

He wrote in the New Republic that it is easy to imagine that Southerners would not comply with the 1964 Civil Rights Act. It is not difficult to imagine, he said, the many ways in which barbers and landlords will evade this act, and that it is not likely to be enforceable unless there is sort of a massive federal bureaucracy, or otherwise it will be just a symbol of hypocritical righteousness.

Well, that seems to me to be a fundamental misreading of the South and where the South was ready to go in 1964. And I am a bit concerned that someone who was then a mid-thirties professor at Yale Law School could so misread the direction of the South and of the country at that time on what was so clearly, in my view, the great moral issue of mid 20th century America, which was whether we would use the force of the law to bring an end to the Jim Crow regime in the South.

I think my question is not with respect to Judge Bork's own personal views on these matters about which I have no doubt of both his integrity and his humanity. But I am concerned about his inability to perceive the need to use the forces of the law, both congressional and judicial, to bring an end to the moral tragedy that so blighted my native region.

Senator **Leahy**. Thank you very much. Thank you, Mr. Chairman.

Senator **Kennedy**. The Senator from Wyoming.

Senator **Simpson**. Mr. Chairman, my chairman is gone. I was going to have a ranging shot at him as he strolled past, but I can get him in my sights when he gets back.

No, what you've said is eloquent, your remarks, sir, and Mr. Franklin, eloquent. You make the Constitution live for your students. There's no question about that. I'm certain of that.

I must say, and the chairman is absent, but indeed I do continue to make, and will continue throughout these hearings, to speak about the fact that we have spent more time on the Indiana Law Journal article of the fall of 1971 than we have on the Constitution. I will continue to say that right down to the last gasp, because it was tentative, it was exploratory, it was informal, it was not heavily researched, it was not balanced. These are things that the author put in the beginning of the article.

If I ever saw anything that should chill a law professor, it would be what has happened with these remarks in 1971. That's what I have said and will continue to say. And meanwhile not one witness yet has come in and said anything about the quality of this man's work on the federal district court of appeals, not one single person. You haven't either.

Mr. DELLINGER. I'll volunteer to do so.

Senator SIMPSON. I've got a word there for you, pal. Just a second. [Laughter.]

I wanted to say, in relation to what you were saying, it is not Ed Meese who is before us for nomination. That's number one with regard to your remarks. You spent half of it on Ed Meese. So that, I think we want to get that in context.

And then the most curious statement I've ever heard from a professor, and I've heard a lot of them, that the South was ready to go somehow. Isn't that curious? I forget how you placed that in 1964, and suddenly then later the people that spoke against that bill were later dressed up as champions, or something to that effect. Three of them sit in the U.S. Senate who voted against that bill. We didn't see them dress up as champions; they are champions. But they didn't happen to feel that way in 1964, just like Bork.

Well, if the South was ready to go, and all those magnanimous things you say, then 27 of their elected representatives weren't, because the vote in the U.S. Senate was 27 persons opposed to the Civil Rights Bill of 1964, and three of them are still sitting with us. And they are not one less of a human being in that situation.

So I think we ought to kind of keep that in context, and please spare me the argument that they're elected and the others aren't. I don't think I can stand any more of that one.

The issue is that was a different time. Indeed, it was. So that's the way that is. And the extraordinary poignancy of your remarks, and the story about going back to the Negro coach, those things happened.

I lived in Cody, WY, and was practicing law and had stirrings about, you know, I guess I could go join in that. But I didn't, and I don't feel guilt. It just didn't happen. If we are going to feel guilty about what we did in this country in 1964, we'll never get anywhere in this country. As I said when I started this with a little earthy description, how long are we going to pick old scabs in this country? It stalls us from progress.

Those things happened. They were repugnant, they were repulsive. We've made tremendous strides. And your remarks were powerful and intimate and painful and anguishing. But Robert Bork did not place those roadblocks in your path. He helped tear them down. You may not like that——

Mr. FRANKLIN. In what way? In what way?

Senator SIMPSON. Yes, sir. I am putting into the record the court decisions where he helped tear them down. He didn't just mumble it, he did it. And they will go into the record. I ask they be entered again. They seem to be ignored time after time after time, and case after case, where he rallied to your cause. And you know that. And it is true.

Mr. FRANKLIN. All it is that I've cited, Mr. Senator, were cases which were decided long before he went to the court, and cases against which he spoke by the way too.

Senator SIMPSON. I understand, sir. But I'm talking about cases of his since he was Solicitor General of the United States. They're all on record. They're very clear.

So, to me, the hypothetical exercise that we hear—and I've heard it here—I've heard time and again the phrase from this panel, "one wonders if he did this," "one wonders if he did that." "I shudder to think what would happen if he had done this."

Well, I tell you, I think you might be wary of what might happen to you if you lose Judge Bork, because the next time there will be no opportunity for you to plumb the public record. The next person out of the box is going to be something pretty sterile perhaps, or unassailable perhaps, and then you will run the risk of a man who put court decisions and amicus briefs on the barrelhead, and you will simply trash him. And you will have succeeded. But, in this year of our Lord, we are going to put a nominee on the U.S. Supreme Court, and I think it would be well for you to consider that that is going to happen, and there will never be a surveillance like this. It's the most exciting time to participate in our history.

As Senator Specter said the other day, "it is a thrill to be involved." But you're never going to see it again. Get a good look at it. And the next time you won't have the ability to probe and push and hypothesize.

Mr. **Franklin**. Mr. Chairman, may I ask him a question?

The **Chairman**. Yes, you may.

I came back for two reasons. One, to accept my ranging shot, and I appreciate it, and now——

Senator **Simpson**. You were out of range.

The **Chairman**. I was out of range.

Mr. **Franklin**. Senator Simpson, do you mean to suggest then that we ought not to have anything to say about this?

Senator **Simpson**. Not at all. Of course not.

Mr. **Franklin**. That this is our last chance?

Senator **Simpson**. No, indeed not.

Mr. **Franklin**. Do you mean to tell me that you as a Senator and a member of this committee would not examine the next nominee who comes up?

Senator **Simpson**. You bet. Oh boy, you bet.

Mr. **Franklin**. We'll all have a chance.

Senator **Simpson**. I didn't say that at all.

Mr. **Franklin**. We'll all have a chance, and I'll be glad to come back.

Senator **Simpson**. Good. I'll be ready too. That's what I like with professors, you know, the students get to speak too.

The **Chairman**. Would anyone else like to say anything in response?

Mr. **Dellinger**. Yes. Senator Simpson, I understand that the 1971 Indiana Law Journal article has been mentioned more than one wants to hear it. But the positions that raise some concern about the direction in which the Court would go are basically repeated by Judge Bork through his period on the bench, including the 1986 San Diego Law Review, and he says in the 1986 San Diego——

Senator **Simpson**. Could you quote cases instead of law review articles? That would be helpful, wouldn't it?

Mr. **Dellinger**. All right. All right. I was going to.

Franz v. *United States*, for example. The point I was going to make out of San Diego can be made out of *Franz*.

Judge Bork has consistently taken the position, and he's taken it in good faith as a serious and intellectual proposition, that every time the Court holds that the Government must have a very good reason before it interferes with a citizen's fundamental liberty, he assumes that the Court is creating a "new right."

In the *Franz* case, he criticizes his colleagues for suggesting that given the line of cases on family privacy that the Government ought to have a good reason before it tells a noncustodial parent that he will no longer have any access to his child. And Judge Bork says there's simply no basis for developing that kind of constitutional right on behalf of a broken family; that whatever theme there is to family privacy, it doesn't apply to broken families in Judge Bork's views.

Now, in the San Diego Law Review, he asks what is a court to do when told that a ban on the use of contraceptives in fact reduces the amount of adultery in the society? How are they to make an impressionistic choice that that's not a good enough reason?

So it seems to me that on and off the bench—though he has been, I think, a court of appeals judge faithful to following the Supreme Court—however grudgingly it at times——

Senator SIMPSON. Are you saying that too? You just said that too. You're the most recent witness to say that.

Mr. DELLINGER. Absolutely. I have to.

Senator SIMPSON. Not a bad job at all has it been?

Mr. DELLINGER. No and——

Senator SIMPSON. A pretty good one.

Mr. DELLINGER. I would think that the most serious reservation would be, and particularly when coupled with his writings through 1986, is that he is very grudging as a court of appeals judge in his applications of Supreme Court precedent.

Senator SIMPSON. Are you now in psychology? Is that where we're headed now?

Mr. DELLINGER. Well, by grudging, I would look to the record. I would say it's grudging.

Senator SIMPSON. You said he was frightened. How do you base that?

Mr. DELLINGER. Frightened?

Senator SIMPSON. Didn't you? What did you just say?

Mr. DELLINGER. No. Grudging.

Senator SIMPSON. What?

Mr. DELLINGER. That Judge Bork is grudging. Only grudgingly, occasionally only grudgingly does he accept the Supreme Court's precedent, though he does so faithful to the duties of his office.

I base my comment on this. When you have a line of cases on family privacy, Judge Bork would consider it an extension to a new right for the court of appeals to extend that right to a noncustodial father. That did not seem like a very large jump to me.

Senator SIMPSON. He described that case very thoroughly when he was on the stand here or in the witness chair.

But I think, you know, we're talking about position and agreeing and not agreeing. It's heavy stuff and biased. I have a bias, so do you. You were counsel to the committee when you filed the rebuttal on the White House briefing, isn't that correct?

Mr. DELLINGER. No, Senator, that's not correct.

Senator **Simpson**. It is not correct? You were not a counsel to the committee in any activity with regard to the rebuttal here on the report of the White House?

Mr. **Dellinger**. I've never been an employee or paid by the committee——

Senator **Simpson**. I don't mean that you have, but you've been——

Mr. **Dellinger**. No, my role was to advise the Chairman and the Democratic members of the committee on this nomination, that is correct.

Senator **Simpson**. That's right. That's what I want to get into the record.

Mr. **Dellinger**. Yes.

Senator **Simpson**. You didn't take any money for that but you did that.

Mr. **Dellinger**. Yes, sir.

Senator **Simpson**. Yes. You counseled them.

Mr. **Dellinger**. I counseled them, yes.

Senator **Simpson**. And advised them.

Mr. **Dellinger**. Yes, sir.

Senator **Simpson**. Thank you.

Mr. **Leuchtenburg**. One brief comment.

The **Chairman**. What a terrible thing. Do you feel good or bad about that? [Laughter.]

Senator **Kennedy**. Horrible accusation. Horrible accusation.

Senator **Simpson**. It's not horrible. You ought to do it. But the other people ought to know it.

Mr. **Dellinger**. Senator, I am perfectly happy to have people know.

Senator **Kennedy**. I don't know why that's news to anyone.

Mr. **Dellinger**. It was stated on the cover of the report, I think, that Professor Tribe——

Senator **Simpson**. But you see the people of America don't know that. Now they do, and that's helpful to them in basing their judgment about your credibility and your bias.

The **Chairman**. Professor Leuchtenburg.

Mr. **Leuchtenburg**. Thank you. Thank you, Mr. Chairman.

Just one——

The **Chairman**. For the record, have you ever advised me on anything?

Mr. **Leuchtenburg**. Not that I know of.

The **Chairman**. Thank you. It's been my loss.

Mr. **Leuchtenburg**. I would just like to comment on what Senator Simpson said by saying it's simply not true that the nominee did not put roadblocks in the way of civil rights. He was an outspoken opponent of the most important civil rights legislation in this century. And he was not a Senator from a Southern State who was facing difficulty. He was a member of the faculty of Yale Law School.

And if he had had his way, we would not have had the Civil Rights Act of 1964, and he would not have had the opportunity to recant his views about that legislation as he has recanted so much in the past week.

The **Chairman**. From whom I might add I suspect at the time, although I don't know, some may have taken some sense of reassurance for their ability to be against it because a Yale professor showed the way, the rationale as we all do.

When I find a distinguished professor from a distinguished university who shares my point of view on issues of this very day, I never hesitate, nor do any of my colleagues, I suspect, to point and say, see, this can't be all that crazy because Professor So and So of the great Yale University or Harvard University or the greater University of Delaware, you know, said that. So I just think that point should be made too.

But we're way over our time, and there are two more witnesses.

Senator **Simpson**. I think you did allow me extra time and I appreciate that, Mr. Chairman.

The **Chairman**. I think it was warranted to get in this colloquy.

Senator **Kennedy**. Are we going to ask every witness now who they counseled with on this committee from now on?

Senator **Simpson**. It wouldn't hurt.

Senator **Kennedy**. Is that going to be a standard procedure for the conduct of these hearings? It's an unusual one. In 25 years in the U.S. Senate, I haven't seen it. I guess we're seeing something different here.

The **Chairman**. Well, in fairness to the Senator from Wyoming, I think it's a valid point. Possibly I should have said it at the very outset. I just assumed everyone knew since the report was circulated all over America. But I think it's a valid point. And now I'd like to follow my own counsel and yield to the Senator from Pennsylvania.

Senator **Specter**. Thank you. Thank you, Mr. Chairman.

The **Chairman**. Excuse me. Before I do, may I put in the record, since there was a reference to make sure both sides of this are out, there was a reference to a statement made by Judge Bork at the University of South Carolina, and it was accurate, it was an accurate statement made by Professor Leuchtenburg. But I would like to put the whole record in.

It's a letter addressed to me that I received this morning from Professor McAnnage, I did not want to mispronounce the last name, professor of law, saying in part, I'll read the whole letter. It's two paragraphs—three paragraphs.

> Judge Robert H. Bork was a distinguished visitor at the University of South Carolina School of Law during the spring of 1983, shortly after he was appointed to the United States Court of Appeals for the District of Columbia. It was his practice to commute from Washington to Columbia for his once a week class on constitutional decisionmaking.
>
> During this time, he participated in a faculty colloquium, in the course of which he stated that, in his view, the 14th amendment was not intended to incorporate the guarantees of the various provisions of the Bill of Rights against the States. He explicitly stated that the first amendment's protection for freedom of speech and press should not have been held applicable to the States. He did add,

I want this emphasized,

> He did add that he was not certain though whether those decisions should now be reversed, and that it was, in all events, unlikely that they would be.
>
> I recall these remarks because they were in response to a question which I had asked. My constitutional law class was then covering the doctrine of selective

incorporation. Both my students and I are interested in Judge Bork's views and the issue. Professor Randall Chaston shares my recollection.

And further I would like to put in the record—and that was dated—that took place the spring semester of 1983.

On June 10, 1987, in fairness to Judge Bork, in an interview before Worldnet, he said at page 4 of the transcript, "Similarly, incorporation of the Bill of Rights, which was originally applied only against the Federal Government through the 14th amendment, through the 14th amendment to apply against the States, was probably a Supreme Court innovation which the ratifiers had not intended. It is by no means a bad development, but a good development."

So 4 years later, he has suggested on the record that he thought the incorporation doctrine, as I understand it, was a good development. I submit both of these for the record, and I yield to the Senator from Pennsylvania.

Senator SPECTER. Thank you, Mr. Chairman.

Professor Franklin, I found your recounting your experience being ousted from a train in Oklahoma to be a very powerful event. I regret to hear that that dissuaded you from returning to Oklahoma. I think Oklahoma is the loser.

I noted with interest your reference to the *Scipio* case. I was a student at the University of Oklahoma when Ms. Ada Lois Scipio sought admission to law school in the fall of 1947. I was born and raised in Kansas and went to a neighboring State university, and Oklahoma was required to give Ms. Scipio an equal education, and they started the separate law school in Oklahoma City. That did not work. Then they brought her down to Norman, and they put her right outside the doorway. She could look through the doorway to the professor. That did not work. They built a small fence inside the classroom around her. That did not work. Then they tore it all down, and she became a law student at the University of Oklahoma. I am happy to see that we have come a very long way since then.

Professor Leuchtenburg, you have commented and written in your paper critical of Judge Bork that he does not stand with the architects of expanded freedom. Yet we know that there is a balance, really, on what the Constitution seeks. We have had extended discussion in this room about Madison's principles about the tension between the majority, tyrannical majority, or the majority's rights, and the role of constitutional protections for minorities.

Professor Dellinger has commented that most people are comfortable with the role that the Court has played. I am not sure that is right. If you come to my office and get my telephone calls, people are not necessarily happy with the role the Court has played. There are a lot of people who are calling me daily in support of Judge Bork, my constituents, and I hear a lot of this comment, as I have open house town meetings around my State. And I am not making a comment as to what weight to give to that. I think there is some weight to the calls and the constituents' interest. There is a broader responsibility, I think, in totality that has to be considered on Judge Bork, but I think the constituents' interest are part of it.

But I make that comment because of the concern I have for balance, and I repeat, I am not sure where I am coming out on this matter. I am listening with great interest to what you and every other witness has said. I have been here for all the witnesses.

The question I have for you, Professor Leuchtenburg, is: Assuming you are right that Judge Bork does not stand with the architects on one side, is that really necessary? Is there not a place for a nominee to the Court who articulates the view of the majority, Madisonian majoritarianism, as he writes about it, and as learned constitutional scholars have written to talk about the rights of the majority, and to have that in the balance as you apply the rights of the minority to maintain this tension and to have some sort of balance? State it specifically. Is there not a place for that kind of a doctrine or that kind of philosophy on the Court?

Mr. LEUCHTENBURG. Well, I would say in response, Senator Specter, that that attitude is very well represented on the present Supreme Court; that in the views of Chief Justice Rehnquist, of Scalia and others, that there is no doubt that a view is going to be expressed at many times with respect to balancing. It is not that that kind of attitude is not voiced at all.

I think what troubles me about Judge Bork's attitude on this question, which he expressed in the hearings last week, is this curious notion that if you give a right to somebody, you take it away from somebody else, that kind of calculus. And I think that is not a matter of taking a Madisonian view. It is a fundamental misconception of what has happened. I think that the extension of liberties, the extension of rights, over the past generation has enriched, liberated all of us, or certainly a great many of us.

I think what is involved here is not a Madisonian tradition but a misconception.

Senator SPECTER. Professor Leuchtenburg, I do not think it necessarily resolves it to say that there is someone on the Court to express the view. The issue, really, as I see it, is whether Judge Bork in his philosophy, whether that constitutes an appropriate philosophy for the Court.

To say that Justice Scalia is going to represent that view is fine. I think Justice Scalia has been very successful; as already noted, some surprises on Justice Scalia.

The question, really, is whether Judge Bork in his view—and I think an arithmetic computation majoritarianism, if you give it to individuals, you take it away from the majority, I do not think that is right. I do not know that Judge Bork really intends that.

But the point that I come to is if that point of view is philosophically justifiable within the ambit of propriety, as Justice Scalia articulates it, then why not with Judge Bork?

But let me move on to you, Mr. Dellinger, for another question because there is so little time here.

You say that you have no reason to doubt Judge Bork. You find him to be a man of integrity and a man of professional competence, and you say that you are an admirer of Judge Bork.

An issue that I wrestle with is, given all of that—given competence and given integrity and given his oath of office and given his keen interest, which I think we have seen, not to be disgraced in history; if Judge Bork has established anything, it is an interest in his place in history. If he asserts that he will apply equal protection of the law to women under the standard of Justice Stevens, and if he asserts that he will apply *Brandenburg* on free speech with the concern I have about being philosophically opposed to it—and I know you heard Chief Justice Burger's testimony that he says Justices frequently have to apply doctrines that they do not agree with—what is wrong with that? Can we trust Judge Bork?

Mr. DELLINGER. Senator Specter, I have no basis whatsoever for thinking one cannot trust Judge Bork. But I think the Senate has to make a determination as to whether yet another appointment of someone who is from one edge of the legitimate spectrum of legal thought is appropriate on this Court at this time.

Senator SPECTER. Is he within the spectrum of appropriate or respectable legal thought?

Mr. DELLINGER. Yes, in the sense that he is not one of those persons who I think should be disqualified for the U.S. court of appeals because they simply are not part of the kind of discourse.

Senator SPECTER. But is he within the spectrum of respectable legal thought for the Supreme Court?

Mr. DELLINGER. Well, that is the determination that you have to make. That, to me, is the ultimate question.

Senator SPECTER. Well, I am not going to accept your judgment necessarily, but I would like your view.

Mr. DELLINGER. I would say at this time that his views are sufficiently out of the mainstream in certain major areas like individual privacy. And you specifically mentioned his statement that he agrees with the reasonableness test with respect to gender discrimination.

Now, I have no doubt that he makes that statement sincerely; but if you look at the example that he gave you, Senator, of one case—*Craig* v. *Boren*—it becomes very clear that the reasonableness that he is talking about is quite different from the reasonableness that Justice Stevens was speaking of. Because Judge Bork says that, in his view, a statute that discriminates against women is reasonable if it is statistically justified; that is, if you can show that the statistical group of men and woman are different. That is why he said that he would have sustained the Oklahoma statute in *Craig* v. *Boren*.

Well, that is not what Justice Stevens is talking about, because Justice Stevens enunciated his reasonableness test in the very case in which he voted to strike down the Oklahoma statute in *Craig* v. *Boren*. And this is not a trivial issue.

If you permit those discriminations against women that can be said to have a "statistical validity," and therefore be reasonable—and that's the *Craig* approach of Judge Bork, and the approach he would take in approving the Oklahoma statute—if you allow statistical generalizations to determine the fate of individuals, then I think you have made a major inroad undercutting the protection of women against discrimination.

Take, for example, a case in which an employer finds that women with preschool aged children statistically, according to some hypothetical statistics, have more employment-related problems than men with preschool-aged children—I have no idea whether that is true, but assume that there are such statistics. The approach that Judge Bork is suggesting would allow the Court to sustain discriminating against an individual woman applicant, such as *Ida Phillips* in a comparable case, because you have aggregate group statistics, generalizations about women. And I think that could be very damaging.

The individual woman employee who wants to say to the employer, "I do not care what the statistics are on women generally. I am an individual. I have made arrangements for child care. Do not judge me from the moment of my birth by statistics that pertain to a group of persons with whom I share nothing in common but the gender we have with half the human race. Those are not my statistics."

I think Judge Bork's adoption at these hearings of a reasonableness standard on sex discrimination cases should give no comfort at all to those who are concerned about gender discrimination, given the fact that he would uphold the discriminatory statute in *Craig* v. *Boren.*

Senator SPECTER. Mr. Chairman, my time is up, but I wonder if we might hear from Professor Franklin on the same issue.

Senator KENNEDY. Professor Franklin.

Mr. FRANKLIN. I will be very brief, Mr. Chairman.

I would merely say that I would agree with my colleague that on matters such as this I would not be comfortable to say that if Judge Bork had not specifically ruled on a particular issue he considered—that that would be a point of view that would be acceptable on the Court.

I thought what you were wanting to know, Senator Specter, was whether or not there was a place on the Court for the point of view which he represents. And I thought that what was said here was that that place was already represented. I do not know that one should say that it should not be represented more than once or more than whatever the number is or, indeed, at all. But as my colleague, Walter Dellinger, said with respect to this particular area and that particular case, I would be uncomfortable with that kind of interpretation which he would say would be within the mainstream or should be represented. As a matter of fact it raises some questions which make me uncomfortable—namely, that you would be making generalizations, to use the example, that need not necessarily apply to a single individual. Just because a majority of people have problems does not mean that this other person would have the same problems. That person ought to be judged in this case, on his or her own merits and not on the merits of the statistical sample.

Senator SPECTER. Thank you, Professor Franklin.

Thank you, Mr. Chairman.

Senator KENNEDY. The Senator from New Hampshire.

Senator HUMPHREY. Mr. Chairman, with all due respect to the members of this panel, I think we must also bear in mind that there are other witnesses who deserve that same respect, and we are well behind schedule again today. So I will pass.

Senator KENNEDY. I want to thank the panel very much for their very useful and helpful contribution to the committee and the Senate's understanding of the issues that are to be considered on the nomination of Judge Bork. We are very fortunate to have your presence here this morning and grateful for the time that you have taken and the analysis that you have given to the judge's work. I want to express all of our appreciation for your presence here.

The committee will stand in recess until 2:15.

[Whereupon, at 1:15 p.m., the committee recessed, to reconvene at 2:15 p.m., the same day.]

AFTERNOON SESSION

The CHAIRMAN. The hearing will come to order.

Senator KENNEDY. I am wondering if the chairman would yield for just a moment?

The CHAIRMAN. Surely.

Senator KENNEDY. I know the chairman, Senator Biden, has made an important statement in the last few moments. I, for one, certainly respect his decision. I admire his courage in making that decision, and we welcome him as our chairman of this committee, as he was before he made the decision and as he is now.

We are very glad to have Senator Biden as the chairman of our committee.

The CHAIRMAN. Thank you.

Senator THURMOND. Mr. Chairman, I just want to say the Democrats have now lost their most articulate spokesman.

The CHAIRMAN. Well, thank you very much, Mr. Chairman. I do not plan on moving over. But thank you. That is a very, very nice thing of you to say.

Look, my business is behind us. Let us move on.

Would you stand, Mr. Cutler, to be sworn?

Do you swear to tell the whole truth and nothing but the truth, so help you, God?

Mr. CUTLER. I do.

The CHAIRMAN. Thank you.

Our first witness this afternoon is Lloyd Norton Cutler, a distinguished lawyer here in the city of Washington, DC. He is currently a partner in the Washington law firm of Wilmer, Cutler & Pickering; and during the Carter administration, he was White House Counsel.

Welcome, Mr. Cutler. It is a pleasure to see you here. Do you have an opening statement?

Mr. CUTLER. I have a very brief opening statement with some attachments, Mr. Chairman.

The CHAIRMAN. Please proceed.

TESTIMONY OF LLOYD N. CUTLER

Mr. Cutler. I would like to make one point clear at the outset. I regard many members of this committee and many of the witnesses before you as personal friends. I have both professional and personal respect for everyone who has spoken in these proceedings, for or against Judge Bork, and for those who have reserved their position.

Along with many of my friends in opposition and you on this committee, I have served my time in the cause of expanding and upholding civil rights, and I intend to do so in the future.

I hope that my views on this matter will be accepted as views presented in good faith, as I accept the good faith of those with contrary views.

The issues, I believe, are much too important for anyone to descend to the level of personal criticism and invective.

I have no quarrel whatever with the Senate's right to rest its decision to confirm or reject Judge Bork's nomination on a searching inquiry in this hearing into his judicial philosophy, informed by his extensive writings as a law professor, as Solicitor General arguing the Government's Supreme Court cases, for over four full court terms, and as a court of appeals judge for the past 5 years.

Based on my reading of this written record, and on 20 years of personal knowledge of Judge Bork, I appraise him as a highly qualified, conservative jurist, who is closer to the moderate center than to the extreme right.

As you know, this view is shared by Justice Stevens, certainly a jurist of the center, who stated publicly this summer, after reading from an opinion of Judge Bork's, *Ollman* v. *Evans,* which has been discussed in these hearings, that Judge Bork's judicial philosophy, "is consistent with the philosophy you will find in opinions by Justice Stewart and Justice Powell and some of the things that I have written."

This was hardly an off-the-cuff remark. Justice Stevens' duties have required him to review many Bork opinions, and to hear him argue many Government cases as Solicitor General. And it cannot be squared with some of the extravagant characterizations of Judge Bork as a throwback to *Dred Scott* and to Simon Legree.

Judge Bork's opponents compare him unfavorably with a number of moderate-conservative Justices who sat on the Warren and Burger courts, and who sit on the Court today—distinguished Justices like Hugo Black, John Marshall Harlan, Potter Stewart, Byron White, Lewis Powell, and John Paul Stevens. They are cited as residing in the mainstream of current judicial philosophy, whereas Judge Bork is placed well to the right of that mainstream.

But there is something wrong with this picture. In virtually every Supreme Court decision that the committee staff has attacked Judge Bork for criticizing, one, two, or three of these distinguished Justices dissented, placing himself on the same side of the issue as Judge Bork. Indeed, Judge Bork's criticisms usually endorse the criticisms set forth in the dissents of these dissenting Justices. I have included their names and the case citations in an attachment to my statement.

You will find that Justice Stewart, for example, dissented from almost all of these decisions. And I would doubt that there is a single member of this committee who would place Justice Stewart outside of the moderate mainstream or who, if by some magic power of reincarnation, he could reappear before you again for confirmation today, would vote against that confirmation.

Let us take the case of Justice Stevens. Justice Stevens is the author, I suppose, the initiator, of the principle of the standard of reasonableness for judging due process classifications, which has been discussed here, which Judge Bork has endorsed, and which has caused some doubt in the minds of some members of the committee, as compared to the three-tiered standard of strict scrutiny, intermediate scrutiny, and rationality, that is the prevailing view of the Court.

If by some magic, such as a limited term, Justice Stevens were here for reappointment today, or if he were nominated for the first time, and he had said to you, "I have trouble with the three-tiered system or standard, for classifications in equal protection cases," can it be that any of you would seriously think of rejecting Justice Stevens' nomination on that ground?

I think it is particularly an important point when you consider that under Justice Stevens' standard, or under the three-tiered standard, all of the decisions involving gender discrimination and, so far as I can tell, almost every other kind of discrimination, have come out the same way. In each case, Justice Stevens has gone along with a majority of the Court, striking down the gender or other discrimination in question.

You had Chief Justice Rehnquist before you, after he had cast his strong dissenting vote in *Roe* v. *Wade*. While that bothered a number of members of this committee and of the entire Senate, I do not believe any—certainly, not a majority—thought that that alone would be a sufficient ground for rejecting his nomination as Chief Justice.

I would like to lay to rest, if I could, one or two other canards. First, it has been charged that Judge Bork's views would have compelled him to rule that the late Dr. Martin Luther King had no right to urge violating the segregation laws.

As Judge Bork has already testified, he has always recognized that the right to disobey, or urge disobeying, a law believed by the disobeyer to be unconstitutional, is appropriate as the only way of mounting a judicial challenge to that law. And I am morally certain, had he been on the Court at the time, that he would have done so in a case involving Dr. King.

I will skip over the next point or so and conclude by saying that for these reasons, it is my view—I would be prepared to bet a dinner on it, if it happened—that if Judge Bork is confirmed, that the journalists and academics of 1992, 5 years from now, who follow the Court will rank his opinions as nearer to the center than the extreme right, nearer to the center than some of the other sitting Justices on the Court whom you have confirmed, and fairly close to those of the very distinguished Justice—I think we all agree on that—whose seat he would fill.

In my view, his confirmation would not shift the so-called balance of the Court nearly as much as the appointment of Hugo

Black to succeed Willis Van Devanter, or of Arthur Goldberg to succeed Felix Frankfurter, or of Thurgood Marshall to succeed Tom Clark.

Of course, there is plenty of room for disagreement with some of Judge Bork's views about particular Supreme Court opinions. I disagree myself with his critique of Justice Powell's decisive concurring opinion in the *Bakke* case, although I concede that its first amendment rationale cannot readily be expanded outside the university to other types of job hiring, and discrimination.

But mere disagreement does not justify placing Judge Bork's views outside the mainstream any more than it justified those who opposed the confirmation of Justice Brandeis in 1916 on the ground that he was a "dangerous radical who would distort the Court's decisions for generations"—and those are quotes. Of course, we now know how valuable Justice Brandeis' ideas turned out to be.

Even if Judge Bork's presence on the Court would lead to some shift in the Court's balance and direction, the example of Justice Brandeis suggests that this is not necessarily a good reason to reject his nomination. To perform its function as the ultimate interpreter of the Constitution the Court must, of course, retain its capacity for gradual and moderate change with the times.

Many other witnesses have quoted Learned Hand to you. He said, almost 50 years ago, "A judge must preserve his authority by cloaking himself in the majesty of an overshadowing past; but he must discover some composition with the dominant trends of his time—at all hazards, he must maintain that tolerable continuity without which society dissolves, and men must begin again the weary path up from savagery."

And I would submit that those who prefer the status quo—and there is every reason why the disadvantaged groups in society whom the Warren Court reached out to protect should prefer the status quo—those who prefer the status quo ought not to convert this preference into a rigid orthodoxy that bars the confirmation of any nominee who has at some times been critical of one or more prevailing majority views.

I would like to make one particular statement, if I could, to the Democratic members of the committee, who are understandably chafing under 8 years of a Republican President who has made several appointments to the Court.

The time is going to come—and it cannot come too soon for me—when there is going to be a Democratic President. And, given our growing national penchant for ticket-splitting and lack of party sensitivity and loyalty on the part of voters, a Democratic President may well come to office with a Republican Senate.

It is necessary for Democrats who would vote against a moderate conservative nominee to the Court to recall or remember that they are giving a hostage to the time when a Democratic President will be appointing a moderate liberal, or perhaps a very liberal member to the Court, who will be judged by the same standard in reverse that you would be applying, in my view, if you rejected Judge Bork today.

That is the end of my statement.

[Statement of Lloyd N. Cutler follows:]

Statement of Lloyd N. Cutler
Before the Committee on the Judiciary
United States Senate
September 22, 1987

My name is Lloyd Cutler. I last appeared before you at the request of Judge Antonin Scalia on the occasion of your hearing on his nomination to the Supreme Court. I do so today at the request of Judge Bork.

I want to make one point clear at the outset. I regard many members of this Committee and many of the witnesses before you as personal friends. I have both personal and professional respect for everyone who has spoken in these proceedings for or against Judge Bork. I hope that my views on the matter will be accepted as views presented in good faith as I accept the good faith of those with contrary views. The issues are much too important for anyone to descend to the level of personal criticism or invective.

I have no quarrel whatever with the Senate's right to rest its decision to confirm or reject Judge Bork's nomination on a searching inquiry into his judicial philosophy, informed by his extensive writings as a law professor, as Solicitor General arguing the Government's Supreme Court cases over four full Court terms, and as a Court of Appeals Judge for the past five years. Based on my reading of this written record and on twenty years of personal knowledge, I appraise Judge Bork as a conservative jurist who is closer to the center than to the extreme right.

As you know, this view is shared by Justice Stevens -- certainly a jurist of the center -- who stated publicly this summer what he had expressed privately at the request of the ABA Judicial Selection Committee, namely that he welcomed Judge Bork's nomination. Justice Stevens went on to say, after quoting from Judge Bork's opinion in Ollman v. Evans, that Bork's judicial philosophy "is consistent with the philosophy you will find in opinions by Justice Stewart and Justice Powell and some of the things that I have written." This was hardly an off-the-cuff remark; Justice Stevens' duties have required him to review many Bork opinions and to hear him argue many Government cases as Solicitor General. It cannot be squared with the extravagant characterizations of Judge Bork as a throwback to the era of Dred Scott and Simon Legree.

Judge Bork's opponents compare him unfavorably with a number of moderate conservative justices who sat on the Warren and Burger courts and who sit on the Court today -- distinguished justices like Hugo Black, John Marshall Harlan, Potter Stewart, Byron White, Lewis Powell and John Paul Stevens. They are cited as residing in the mainstream of current judicial philosophy. But in virtually every Supreme Court decision that the Committee staff has attacked Bork for criticizing, one, two or three of these distinguished moderate justices dissented, placing himself on the same side of the issue as Judge Bork. Indeed, Judge Bork's criticisms usually endorse the criticisms of these dissenting Justices. I have included their names and case citations in an attachment to my statement. You will find that Justice Stewart, for example, dissented from almost all of these decisions. I doubt that there is a single member of this Committee who would place Justice Stewart outside of the moderate mainstream, or who would vote against his confirmation if he were to be miraculously reincarnated and renominated today.

Let me lay to rest two other canards. First, it has been charged that Judge Bork's views would have compelled him to rule that the late Dr. Martin Luther King had no right to urge violating the segregation laws. As Judge Bork has testified, he has always recognized the right to disobey or urge disobeying an unconstitutional law as the only way of mounting a judicial challenge to that law, and I am morally certain he would have done so in a case involving Dr. King.

The Commmittee staff has charged that Judge Bork criticized a Supreme Court decision holding unconstitutional a law providing for the sterilization of habitual criminals. This is wrong on at least three grounds. The case in question, Skinner v. Oklahoma[1], did not hold that sterilization of habitual criminals was unconstitutional. It never reached that question. It held only that Oklahoma could not discriminate between sterilizing robbers and sterilizing embezzlers. Judge Bork's only comment in the article cited by the Chairman was that this holding was inconsistent with several other Supreme Court cases finding no discrimination in other comparable legislative classifications. And he expressed no criticism whatsoever of the concurring opinions of Chief Justice Stone and Justice Jackson, who would have struck down the Oklahoma statute on the more fundamental ground that sterilization of habitual criminals as such was unconstitutional. As Judge Bork indicated in responding to the Chairman, he believes such a statute could not carry the constitutional burden of reasonableness then or now.

For the reasons set forth above, I believe that if Judge Bork is confirmed, the journalists and academics of 1992 will rank his opinions as nearer to the center than the extreme right, and fairly close to those of the very distinguished justice whose seat he would fill. In my view, his confirmation would not shift the "balance" of the Court nearly as much as the appointments of Hugo Black to succeed Willis Van Devanter, Arthur Goldberg to succeed Felix Frankfurter, or Thurgood Marshall to succeed Tom Clark.

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[1] 316 U.S. 535 (1942).

There is plenty of room for disagreement with some of Judge Bork's views about particular Supreme Court opinions. I disagree myself with his critique of Justice Powell's decisive concurring opinion in Bakke, although I concede its First Amendment rationale cannot readily be transferred from the university to job discrimination in general. But mere disagreement does not justify placing Judge Bork's views outside the mainstream any more than it justified those who opposed the confirmation of Justice Brandeis in 1916 on the ground that he was a "dangerous radical" who would "distort the Court's decisions for generations." We know now how valuable Justice Brandeis' ideas turned out to be.

Even if Judge Bork's presence on the Court would lead to some shift in the Court's balance and direction, the example of Justice Brandeis suggests that this is not necessarily a reason to reject his nomination.

To perform its function as the ultimate interpreter of the Constitution, the Court must retain its capacity for gradual and moderate change with the times. As Learned Hand said almost fifty years ago:

> A judge. . . must preserve his authority by cloaking himself in the majesty of an overshadowing past; but he must discover some composition with the dominant trends of his time -- at all hazards he must maintain that tolerable continuity without which society dissolves, and men must begin again the weary path up from savagery.

Those who prefer the status quo ought not to convert this preference into a rigid orthodoxy that bars the confirmation of any nominee who has at some times been critical of a prevailing majority view.

Attachment

Judge Bork is now being attacked for having criticized various Supreme Court opinions in his days as a law professor. Consider this list of the moderate Justices, so widely and rightly admired by Judge Bork's present opponents, who dissented from the majority opinions which Judge Bork has questioned.

- In Harper v. Virginia Board of Elections, [2], the poll tax case, the dissenters included Justices Black, Harlan and Stewart.
- In Griswold v. Connecticut[3], the contraceptive right of privacy case, the dissenters included Justice Black and Justice Stewart.
- In Roe v. Wade[4], which expanded the Griswold precedent to cover some abortions, the dissenters included Justice Byron White. Justice Stewart, who wrote a concurring opinion in Roe, said he joined the majority only because he bowed to the majority precedent set over his dissent in Griswold seven years earlier.

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[2] 383 U.S. 663 (1966).

[3] 381 U.S. 479 (1965).

[4] 410 U.S. 113 (1973).

- In Katzenbach v. Morgan[5/], the Puerto Rico voting rights case, the dissenters included Justices Harlan and Stewart. Justice Powell, who was not appointed until several years later, criticized the Morgan majority's rationale in City of Rome v. United States.[6/]

- In Reynolds v. Sims[7/], the "one man, one-vote" apportionment case, the dissenters included Justices Black and Stewart.

- In Regents v. Bakke[8/], the university racial quota case, the four justices who read Title VI of the Civil Rights Act to exclude race as a factor in admissions included Justice Stevens and Justice Stewart. Four years earlier, Justice Douglas (who retired before Bakke) had read the Fourteenth Amendment the same way in DeFunis v. Odegaard[9/]. Two years later, Justice Stewart reiterated the same position in Fullilove v. Klutznick[10/]

[5/] 384 U.S. 641 (1966).

[6/] 446 U.S. 156, 200 (1980).

[7/] 377 U.S. 533 (1964).

[8/] 438 U.S. 265 (1978).

[9/] 416 U.S. 312, 342 (1974).

[10/] 448 U.S. 448 (1980).

- In Reitman v. Mulkey,[11] the state action case invalidating a provision of the California Constitution guaranteeing the freedom to sell property, the dissenters included Justices Harlan, Black and Stewart.
- As for Judge Bork's criticisms of the rationale of the unanimous 1942 Supreme Court opinion in Shelley v. Kraemer[12], striking down state court enforcement of private racial covenants, his view is similar to that expresed by Professor Archibald Cox, Professor Lawrence Tribe and many other scholars nowhere near the extreme right.

The same is true of Judge Bork's own judicial opinions. In Allen v. Wright[13], the Supreme Court, with Justice Powell and Justice White concurring, cited with approval Judge Bork's currently criticized dissent on standing to sue in Vander Jagt v. O'Neill.[14]

There are a few instances, of course, where Professor Bork's academic critiques of Supreme Court opinions were not joined by moderate dissenting justices or by his academic colleagues. But as to most of the holdings he has criticized, his views were and are widely shared by justices and academics who are in the center of the judicial spectrum, not the extreme right.

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[11] 387 U.S. 369 (1967).

[12] 334 U.S. 1 (1948).

[13] 468 U.S. 737, 750 (1984).

[14] 699 F.2d 1166 (1983).

THE NEW YORK TIMES, THURSDAY, JULY 16, 1987

Saving Bork From Both Friends and Enemies

By Lloyd N. Cutler

WASHINGTON — The nomination of Judge Robert H. Bork to the United States Supreme Court has drawn predictable reactions from both extremes of the political spectrum. One can fairly say that the confirmation is as much endangered by one extreme as the other.

The liberal left's characterization of Judge Bork as a right-wing ideologue is being reinforced by the enthusiastic embrace of his new conservative supporters. His confirmation may well depend on whether he can persuade the Senate that this characterization is a false one.

In my view, Judge Bork is neither an ideologue nor an extreme right-winger, either in his judicial philosophy or in his personal position on current social issues. I base this assessment on a post-nomination review of Judge Bork's published articles and opinions, and on 20 years of personal association as a professional colleague or adversary. I make it as a liberal Democrat and as an advocate of civil rights before the Supreme Court.

Let's look at several categories of concern.

He is neither an ideologue nor an extreme rightist.

Judicial philosophy. The essence of Judge Bork's judicial philosophy is self-restraint. He believes that judges should interpret the Constitution and the laws according to neutral principles without reference to their personal views as to desirable social or legislative policy, insofar as that is humanly practicable.

All Justices subscribe at least nominally to this philosophy, but few rigorously observe it. Justices Oliver Wendell Holmes, Louis D. Brandeis, Felix Frankfurter, Potter Stewart and Lewis F. Powell Jr. were among those few, and Judge Bork's articles and opinions confirm that he would be another. He has criticized the right-wing activism of the pre-1937 court majorities that struck down social legislation on due process and equal protection grounds. He is likely to be a strong vote against any similar tendencies that might arise during his own tenure. [illegible]

Freedom of speech. As a judge, Judge Bork has supported broad constitutional protection for political speech but has questioned whether the First Amendment also protects literary and scientific speech. However, he has since agreed that those forms of speech are also covered by the amendment. And as a judge, he has voted to extend the constitutional protection of the press against libel judgments well beyond the previous state of the law. In his view, "it is the task of the judge in this generation to discern how the Framers' values, defined in the context of the world they knew, apply to the world we know." Over Justice (then Judge) Antonin Scalia's objections, he was willing to apply "the First Amendment's guarantee . . . to frame new doctrine to cope with changes in libel law [huge damage awards] that threaten the functions of a free press."

Civil rights. While Judge Bork adheres to the "original intent" school of constitutional interpretation, he plainly includes the intent of the Framers of the post-Civil War amendments outlawing slavery and racial discrimination. In this spirit, he welcomed the 1954 decision in Brown v. Board of Education proclaiming public school segregation unconstitutional as "surely correct," and as one of "the Court's most splendid vindications of human freedom."

In 1963, he did in fact oppose the public accommodations title of the Civil Rights Act as an undesirable legislative interference with private business behavior. But in his 1973 confirmation hearing as Solicitor General he acknowledged he had been wrong and agreed that the statute "has worked very well." At least when compared to the Reagan Justice Department, Judge Bork as Solicitor General was almost a paragon of civil rights advocacy.

Judge Bork was later a severe critic of Justice Powell's decisive concurring opinion in the University of California v. Bakke case, leaving state universities free to take racial diversity into account in their admissions policies, so long as they did not employ numerical quotas. But this criticism was limited to the constitutional theory of the opinion. Judge Bork expressly conceded that the limited degree of affirmative action it permitted might well be a desirable social policy.

Abortion. Judge Bork has been a leading critic of Roe v. Wade, particularly its holding that the Bill of Rights implies a constitutional right of privacy that some state abortion laws

Lloyd N. Cutler, a lawyer who was counsel to President Jimmy Carter, was a founder of the Lawyers Committee for Civil Rights Under Law.

[illegible]. But this does not mean that he is a sure vote to overrule Roe v. Wade; his writings reflect a respect for precedent that would require him to weigh the cost as well as the benefits of reversing a decision deeply embedded in our legal and social systems. (Justice Stewart, who had dissented from the 1965 decision in Griswold v. Connecticut, on which Roe v. Wade is based, accepted Griswold as binding in 1973 and joined the Roe v. Wade majority.)

Judge Bork has also testified against legislative efforts to reverse the court by defining life to begin at conception or by removing abortion cases from Federal court jurisdiction. If the extreme right is embracing him as a committed right-to-lifer who would strike down the many state laws now permitting abortions, it is probably mistaken.

Presidential powers. I thought in October 1973 that Judge Bork should have resigned along with Elliot L. Richardson and William D. Ruckelshaus rather than carry out President Richard M. Nixon's instruction to fire Archibald Cox as Watergate special prosecutor.

But, as Mr. Richardson has recently observed, it was inevitable that the President would eventually find someone in the Justice Department to fire Mr. Cox, and, if all three top officers resigned, the department's morale and the pursuit of the Watergate investigation might have been irreparably crippled.

Mr. Bork allowed the Cox staff to carry on and continue pressing for the President's tapes — the very issue over which Mr. Cox had been fired. He appointed Leon Jaworski as the new special prosecutor, and the investigations continued to their successful conclusion. Indeed, it is my understanding that Mr. Nixon later asked, "Why did I go to the trouble of firing Cox?"

I do not share Judge Bork's constitutional and policy doubts about the statute institutionalizing the special prosecutor function. But if the constitutional issue reaches the Supreme Court, he will most likely recuse himself, as he has apparently already done in withdrawing from a motions panel about to consider this issue in the Court of Appeals. Moreover, as he testified in 1973, he accepts the need for independent special prosecutors in cases involving the President and his close associates.

Balance-the-budget amendment. While this proposed amendment is not a near-term Supreme Court issue, Judge Bork's position on it is significant because support for that amendment is a litmus test of right-wing ideology. He has publicly opposed the amendment on several grounds, including its unenforceability except by judges who are singularly ill-equipped to weigh the economic policy considerations that judicial enforcement would entail. This reasoning is far from the ritual cant of a right-wing ideologue.

Experience shows that it is risky to pigeonhole Supreme Court Justices along the ideological spectrum, and in the great majority of cases that reach the Court ideology has little effect on the outcome.

The conventional wisdom today places two Justices on the liberal side, three in the middle and three on the conservative side. I predict that if Judge Bork is confirmed, the conventional wisdom of 1990 will place him closer to the middle than to the right, and not far from the Justice whose chair he has been nominated to fill.

Every new appointment creates some change in the "balance" of the Court, but of those on the list the President reportedly considered, Judge Bork is one of the least likely to create a decisive one.

THE AMERICAN LAWYER
SEPTEMBER 1987

OPINION: *The Battle Over Bork*

For:

Lloyd Cutler

The Senate vote on whether to advise and consent to President Reagan's appointment of Robert Bork to the Supreme Court could be the confirmation battle of the century. It may be even closer and more dramatic than the struggle over the confirmation of Louis Brandeis in 1916.

There are close parallels between the two cases. Like Bork, Brandeis had superb professional and intellectual qualifications. Like Bork, Brandeis was attacked because of his alleged radical ideology, in his case to the left rather than, as in Bork's case, to the right. Like Bork, Brandeis was seen by his critics as shifting the political and social "balance" of the Court.

There are also significant differences. In 1916 it was unheard of for a Supreme Court nominee to testify before the Senate Committee on the Judiciary, and Brandeis never did so. In 1916 there was neither radio nor television. The public received little information and played only a minor role in the outcome. In 1987 Bork will testify at length on every imaginable subject. The public will see and hear everything that happens. Public opinion polls and public lobbying groups are likely to have a major influence on the final vote.

Justice Brandeis was confirmed because he and his supporters were able to convince a majority of the Senate that he was not a radical ideologue of the left. Judge Bork's chances of confirmation will depend on whether he and his supporters are able to convince the Senate that he is not a radical ideologue of the right. To do that, he will probably have to convince an informed and attentive public as well.

Some of Bork's most fervent supporters seem to reinforce his critics' claim that he is indeed a right-wing ideologue. According to *The Washington Post*, Reverend Jerry Falwell has written his constituency that "our efforts have always stalled at the door of the U.S. Supreme Court," and that Bork's nomination "may be our last chance to influence this most important body." Other supporters argue that since Bork's personal character and scholarly credentials are unchallenged, his ideology should be no proper concern of the Senate.

That argument finds little support in historical practice and is bound to offend many members of the Senate. The Brandeis case is a strong historical precedent for the Senate's right to take ideology into account. Ideological issues also dominated the confirmation battles over the nominations of Felix Frankfurter and of sitting Justices Fortas and Rehnquist to be chief justice. The Constitution lays down no limiting standards governing the Senate's discretion to advise and consent. Advice and consent can be granted or withheld for any reason, high or low, and there is no court that will rule the Senate's action invalid.

A true ideologue holds and maintains a fixed set of views regardless of the course of events or strength of contrary arguments or evidence. That is an undesirable quality for a Supreme Court justice, since it appears to place his or her impartiality into question.

If I thought a Supreme Court nominee was an ideologue on either the right or left, I would urge the Senate not to confirm. But after studying Judge Bork's writings and reflecting on two decades of professional association with him, I believe the "ideologue" charge is as false as the charge against Justice Brandeis. I believe Bork's present views are more to the center than the right, and that his changes in philosophy over the years—from socialist to free-marketeer to libertarian and now back toward the center—belie the very definition of an ideologue. Bork has modified his views to reflect the course of events and reasoned criticisms of his earlier positions—things an ideologue is never supposed to do.

BORK'S OPINIONS

Bork's opinions on the Court of Appeals over the past five years (more than 400 decisions and 125 opinions) are the best evidence of how he would perform as a Supreme Court justice. They are his most recent and mature views. They range over a wide field of constitutional and statutory interpretation. A recent study examined only the small fraction of Bork's cases in which the court split and a public interest advocacy group was on one side or the other. The study concluded that Bork voted against the public interest group most of the time. Any such study is fraught with definitional problems, sampling defects, and questions about the categories that are selected. But an analysis examining *all* of Bork's cases, while subject to some of the same weaknesses, presents a very different picture:

1) Although the Court of Appeals for the D.C. Circuit is closely balanced between "conservatives" and "liberals," Bork and his "liberal" colleagues voted the same way in 75 percent or more of the cases.

2) Bork took part in 24 race, sex, and age discrimination cases. In 14 of these cases, the decision turned on a procedural issue or on factual findings of the trial court. In the ten remaining cases involving substantive legal issues as to the scope of the protected right, Bork voted in the plaintiff's favor seven times. In two of the three cases in which Bork voted against the plaintiff, the Supreme Court upheld Bork's position.

3) In 11 cases that the Supreme Court accepted for review, Justice Powell voted on Bork's side eight times. No decision in which Bork voted with the majority has been reversed by the Court.

No Bork judicial opinion can fairly be assessed as that of a right-wing ideologue. One that strongly suggests the contrary is *Ollman* v. *Evans*, a libel case in which Bork voted with the majority over a dissent by Justice (then Judge) Scalia. Bork's concurring opinion reasoned that the First Amendment required courts "to frame new doctrine" by taking certain mixed issues of law and fact from the jury because the modern phenomenon of huge damage awards by juries has a chilling effect on a free press. In response to Judge Scalia's charge that he was putting a subjective contemporary spin on "judicial restraint," Bork replied: "It is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know." That tells us far more about how Bork would perform as a justice than his professional writings ten to twenty-five years ago.

BORK'S ARTICLES

Bork the professor wrote an excellent treatise that has had a major influence on the evolution of antitrust law. He has also written a number of scholarly articles and journalistic essays on constitutional interpretation, stimulated by his friend and mentor Alexander Bickel. In some early pieces, Bork tried to formulate an Einsteinian "general theory" for deciding all constitutional cases—a venture that he ultimately abandoned. Four of the pieces he wrote in the course of that effort are the main bases for the claim that he is a right-wing ideologue.

- In 1962 at the height of his libertarian phase, he argued that the public accommodations provisions of the Civil Rights Act were bad policy because they infringed libertarian principles. He subsequently acknowledged he had been wrong, agreed that the act in practice had worked very well, and conscientiously enforced it as solicitor general. He has consistently praised *Brown* v. *Board of Education* as one of "the Court's most splendid vindications of human freedom." As solicitor general he argued for broad civil rights protections and remedies, including ones that were more expansive than the Supreme Court accepted. For example, in *Washington* v. *Davis* the Supreme Court, including Justice Powell, rejected Bork's argument that an employment test was unlawful because of its discriminatory "effect." And in *General Electric Company* v. *Gilbert* the Court rejected Bork's argument that discrimination on the basis of pregnancy was prohibited sex discrimination. During his time in the Nixon Department of Justice, its civil rights enforcement record was better by far than that of the Reagan Justice Department.
- In 1971 he "tentatively" suggested that full First Amendment protection should be limited to political speech, and should not extend to literary and scientific speech. But he soon recanted and has written since that both literary and scientific speech should be protected. And as a judge, he has expressly held that commercial advertising is also entitled to significant protection.
- In 1973 he attacked the rationale of

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the Supreme Court's decision in *Roe* v. *Wade* because it was based on an implied constitutional right of privacy not expressly mentioned in the Bill of Rights or, in his view, reasonably inferable from those rights. The rationale of *Roe* v. *Wade* had many academic critics, including Archibald Cox, John Hart Ely, and Philip Kurland. While Bork adheres to his 1973 criticism, he is not a sure bet to vote to overturn the result in *Roe* v. *Wade*. In a July interview in *The Baltimore Sun*, Bork said, "There are decisions around which too much has grown up to be uprooted. . . . To tear them up now would be to create chaos." His respect for *stare decisis*, his concern about the "revolving door" effect of reversing an important Supreme Court decision by a one-vote margin whenever a new justice is appointed, his willingness to consider alternative rationales for striking down overly rigid abortion laws, and his silence to date on the social policy of banning abortions leave considerable room for doubt as to how he will vote when the next case to raise the issue comes before the Court.

- In 1977 he criticized Justice Powell's decisive concurring opinion in *Bakke* banning state universities from adopting numerical racial quotas for admission but permitting them to take racial diversity into account in making individual admission decisions. But his criticism was limited to the constitutional theory of the opinion, not the social policy it allowed. During Bork's tenure at the Yale Law School, while he continued to oppose proportional group representation in education and employment as a principle of social justice, he had no quarrel with Yale's policy of considering racial diversity in individual cases.

Despite the polemic tone and substance of these early articles, all but the 1962 public accommodations position (long since abandoned) argue points of legal theory, not points of social or legislative policy. They do not suggest that Bork is anti–civil rights, anti–civil liberties, or anti-abortion. His own theories of judicial restraint make him most unlikely to uphold constitutional challenges to liberal legislation on social policy, as a true right-wing ideologue might be expected to do. And while most right-wingers favor legislation or constitutional amendments to reverse Supreme Court decisions that frustrate their social agenda, Bork has consistently opposed all such efforts.

Bork is a follower of Professor Herbert Wechsler's theory that, insofar as humanly practicable, constitutional cases should be decided according to neutral principles, that is, principles that do not reflect the judge's own preferences in social and legislative policy. In his recent Boyer Lecture, he said:

> The sole task of the judge—and it is a task quite large enough for anyone's wisdom, skill, and virtue—is to translate the framer's or the legislator's morality into a rule to govern the unforeseen circumstances. That abstinence from giving his own desires free play, that continuing and self-conscious renunciation of power, that is the morality of the jurist.

A few final points are worth noting:

- In 1982 the Senate confirmed Bork's appointment to the nation's most influential Court of Appeals. The vote to confirm was unanimous. Nothing he has said or done since 1982 would justify a different vote today.
- Rejection is not justified because Bork's elevation at this time would change the "balance" of the Court. Every new appointment changes the "balance" to some extent, and when one party holds the White House for an extended period, a change in the direction of that party's philosophy is inevitable. Robert Bork for Lewis Powell appears to be less of a change in balance than Hugo Black for Willis Van Devanter, Arthur Goldberg for Felix Frankfurter, or Thurgood Marshall for Tom Clark. Justice Stevens stated publicly in an address to the Eighth Circuit Conference this summer that he would favor Judge Bork's confirmation. He quoted at length from Bork's opinion in *Ollman* v. *Evans*, saying, "It is consistent with the philosophy you will find in opinions by Justice Stewart and Justice Powell and some of the things that I have written." This casts at least some doubt on the validity of the charge that Bork's appointment would significantly change the balance of the Court.
- In the close cases involving hard facts that are the typical menu of the Supreme Court, the justices are usually more open-minded and therefore more unpredictable than we think. As Learned Hand wrote about Justice Cardozo almost 50 years ago:

> At times to those of us who knew him, the anguish which had preceded decision was apparent, for again and again, like Jacob, he had to wrestle with the angel all through the night, and he wrote his opinion with his very blood.

It may be old-fashioned and naive to think so, but I believe this description remains valid for all members of the present Court. If Bork is confirmed, I believe it will also be valid for him.

THE WASHINGTON POST
September 16, 1987

Lloyd N. Cutler

Judge Bork: Well Within the Mainstream

The book against Robert Bork is that he is "outside the mainstream" of contemporary judicial philosophy. To locate the "mainstream" for us, the bookmakers cite such recent and current paragons as Justices Hugo Black, John Harlan, Potter Stewart, Byron White, Lewis Powell and John Paul Stevens. They are portrayed as conservative moderates, in contrast to Bork the ideologue of the extreme right.

But there is something wrong with this picture. It is at odds with the recorded views of these distinguished justices themselves.

Let's start with Justice Stevens. He stated publicly this summer what he had already expressed privately at the request of the American Bar Association's Judicial Selection Committee, namely, that he welcomes Judge Bork's nomination. Stevens went on to say, after quoting from one of Bork's opinions, that Bork's judicial philosophy "is consistent with the philosophy you will find in opinions by Justice Stewart and Justice Powell and some of the things that I have written." This was hardly an off-the-cuff remark. During Stevens' years on the court he has reviewed many Bork opinions and heard him argue many government cases as solicitor general. It cannot be squared with the extravagant characterizations of Bork as a throwback to the era of Simon Legree and Dred Scott.

There is strong judicial evidence to support Stevens' view. Consider this list of the moderate justices, so rightly admired by Bork's present opponents, who dissented from the very Supreme Court opinions that Bork is now being attacked for having criticized in his days as a law professor. For the most part, Bork's criticisms support what these moderate justices said in their dissents.

> *"His views were and are widely shared by justices and academics who are in the moderate center."*

In *Harper v. Virginia*, the poll tax case, the dissenters included Black, Harlan and Stewart.

In *Griswold v. Connecticut*, the contraceptive right-of-privacy case, the dissenters included Black and Stewart.

In *Roe v. Wade*, which expanded the *Griswold* precedent to cover some abortions, the dissenters included White. Stewart, who wrote a concurring opinion in *Roe*, said he joined the majority only because he bowed to the majority precedent set over his dissent in *Griswold* seven years earlier.

In *Katzenbach v. Morgan*, the Puerto Rico voting rights case, the dissenters included Harlan and Stewart. Powell, who was not appointed until several years later, criticized the *Morgan* majority's rationale in *City of Rome v. United States*.

BY JAMES K.W. ATHERTON — THE WASHINGTON POST

In *Reynolds v. Sims*, the one-man, one-vote apportionment case, the dissenters included Black and Stewart.

In *Regents v. Bakke*, the university racial quota case, the four justices who read Title VI of the Civil Rights Act to exclude race as an admissions factor included Stevens and Stewart. Four years earlier, Justice William O. Douglas (who retired before *Bakke*) had expressed the identical view in *Defunis v. Odegaard*. Two years later, Stewart reiterated the same position in *Fullilove v. Klutnick*.

In *Reitman v. Mulkey*, the state action case invalidating a provision of the California Constitution guaranteeing the freedom to sell property, the dissenters included Black, Harlan and Stewart.

In *Allen v. Wright*, the Supreme Court, with Powell and White concurring, cited Judge Bork's currently criticized dissent on standing to sue in *Vander Jagt v. O'Neill*. As for Bork's criticisms of the rationale of the unanimous 1942 Supreme Court opinion in *Shelley v. Kraemer*, striking down state court enforcement of private racial covenants, his view is similar to that expressed by Prof. Archibald Cox, Prof. Laurence Tribe and many other scholars nowhere near the extreme right.

There are a few instances, of course, where Bork's academic critiques of Supreme Court opinions were not joined either by moderate dissenting justices or by his academic colleagues. But as to most of the holdings he has criticized, his views were and are widely shared by justices and academics who are in the moderate center of the judicial spectrum, not the extreme right.

Judge Bork's views about these cases cannot reasonably be classed as outside the mainstream by the same opponents who put these moderate justices inside the mainstream. While Judge Bork is by no means the mirror image of those distinguished justices (who are by no means the mirror image of one another), neither is he their exact opposite. Whether or not one agrees with his or their views on particular cases, they are all well within the mainstream.

The writer, a Washington attorney, was White House counsel under President Carter.

The CHAIRMAN. Thank you. I am going to yield for the moment, but let me ask just one question to make sure I understood your statement.

Did you say that Judge Bork has always believed in the right to disobey the law to make a constitutional point?

Mr. CUTLER. That is my understanding, and I believe he said that in his testimony before you last week.

The CHAIRMAN. How do you square that with some of his speeches and writings where, in Senator Simpson's favorite writing, the "Neutral Principles" article in the Indiana Law Review, page 20, he says, "Moreover, within that category of speech we ordinarily call political, there should be no Constitutional obstruction to laws making criminal any speech that advocates forceful overthrow of the Government or the violation of any law." And then, in his University of Michigan speech, he said, "*Hess* and *Brandenburg* are fundamentally wrong interpretations of the first amendment. Speech advocating the forcible destruction of democratic governments, or the frustration of such government through law violation, have no value in a system whose basic premise is democratic rule. Speech of that nature, moreover, poses obvious dangers. If it is allowed to proliferate, the social and political crises come once more to the Nation so that there really is a likelihood of imminent lawless action. It will be too late for the law."

Are they consistent?

Mr. CUTLER. I believe they are, Mr. Chairman. I would read into the first set of statements, about any law, any constitutional law—and I believe Judge Bork made that clear in his statement, just as I would read into that language you have there an exception for what the Court has called political hyperbole, making an extravagant statement in the course of a political discussion that says, for example, as in a case I happened to argue in the last term, the black woman who said on the day President Reagan was shot, in the course of a political discussion about President Reagan's policies, she said, "If they try it again, I hope they get him." That was classified by the Court as hyperbole.

With respect to *Brandenburg*, I personally agree with *Brandenburg*. I agree with the Holmes and Brandeis dissents in the earlier cases, and as I understood Judge Bork in his testimony last week, he now accepts those decisions as binding precedents which he would also follow.

The CHAIRMAN. I do not recall Judge Bork ever carving out a special category for a speech advocating violation of unjust laws, though; do you?

Mr. CUTLER. Well, in the "Neutral Principles" article, it is not there.

The CHAIRMAN. Anywhere; anywhere in the world.

Mr. CUTLER. He sat in hundreds of classrooms, hundreds of debates with Alex Bickel in the course on constitutional theory. It must have come up any number of times.

But he has said to you in this hearing that that is what he meant, and it is perfectly logical that that is what he had meant—not violating, say, an unconstitutional alien and sedition law, for example.

The CHAIRMAN. I see. I will reserve the remainder of my time, if I have any.

The Senator from South Carolina.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Cutler, we are glad to have you.

Mr. CUTLER. Thank you.

Senator THURMOND. We realize your credibility as a lawyer and a public-spirited citizen in this city.

Mr. Cutler, approximately how many civil rights cases have you participated in as an attorney?

Mr. CUTLER. Well, I have argued two, or one might say three, if you count *Buckley* v. *Valeo,* as an advocate in the Supreme Court on behalf of the party asserting a civil right.

I served as one of the initial founders and the initial secretary, and several years later as one of the two co-chairmen of the Lawyers' Committee for Civil Rights Under Law.

Senator THURMOND. Could you speak a little bit louder? I do not think the people in the back can hear you.

Mr. CUTLER. Yes. I served as one of the founders of the Lawyers' Committee for Civil Rights Under Law, at the stimulus of President Kennedy and Vice President Johnson and Attorney General Robert Kennedy, who remarked on one of the famous days of—perhaps it was the *Bull Connor* case or another—"Where are all the lawyers?"

I participated in the original formation of the Lawyers' Committee for Civil Rights Under Law. I was the original secretary, I believe. Many years later, I was one of two co-chairmen who serve each year; I served for a period of 2 years.

The co-chairmen regularly take part in selecting cases, civil rights cases, which are argued, briefed and argued, by the Lawyers' Committee, and the co-chairmen regularly review and sign those briefs. And I must have reviewed and signed dozens and dozens of such briefs.

Senator THURMOND. I believe you represented the NAACP before the Supreme Court in the *Claiborne-Hardaway* case; isn't that correct?

Mr. CUTLER. That is correct.

Senator THURMOND. Mr. Cutler, with your strong record on civil rights, would you support Judge Bork or any nominee to the Supreme Court who you believed would be hostile to civil rights?

Mr. CUTLER. No. I might expand on that. I do not mean that if he criticized one or two or even a half dozen civil rights decisions of the Court, that would necessarily brand him as hostile to civil rights. But if I thought that a nominee was going to vote against the civil rights plaintiff in a considerable majority of the cases on a regular basis, I would be against him.

Senator THURMOND. Mr. Cutler, you have stated that Judge Bork, if confirmed, would not be on the extreme right of the Court, but rather would be more like the Justice whom he would be replacing, Justice Powell.

Would you explain that remark and tell us the basis for your conclusion?

Mr. CUTLER. I said fairly close, I believe. No Justice is a mirror image of any other Justice, and Judge Bork certainly is not a mirror image of any of the moderate Justices whose names I have mentioned.

I believe he would come fairly close, in part because my review of Justice Powell's opinions shows him to be in fairly close agreement with Judge Bork on a number of matters. One example is the issue of standing, which has been discussed before this committee. Justice Powell joined in an opinion of the Court which quoted directly, with approval, from Judge Bork's—I believe it was a concurring opinion—in the *Vander Jagt* case, involving the standing of a Republican Congressman complaining that the Democratic majority had not allotted enough seats on committees to the Republicans.

In the case of, I believe it is the *City of Rome* case, Justice Powell, who came to the Court after *Katzenbach* v. *Morgan*, the case which Judge Bork had criticized, criticized the *Morgan* majority's rationale on substantially the same grounds as the dissenters in *Katzenbach* v. *Morgan*, and substantially the same grounds as Judge Bork. And I believe there are a number of other examples.

Of course, there are cases on which they split. There is the *Bakke* case, in which the rationale was attacked, and Justice Powell, of course, did join in the *Roe* v. *Wade* majority decision, the rationale of which Judge Bork has attacked.

But on the whole, I think he would come much closer, particularly as a sitting Justice if he is confirmed, to a Justice like Justice Powell and Justice Stevens—and I remind you that that is precisely what Justice Stevens himself said, that "you will find in Judge Bork's opinions a philosophy similar to that you will see in the opinions of Justice Stewart, Justice Powell, and some of the things that I [Justice Stevens] have written."

That is his opinion, and he is probably in a much better position to judge than I.

Senator THURMOND. I believe my time is up. Thank you very much.

Senator KENNEDY. Mr. Cutler, I too wish to welcome you here. There has been a good deal made about whether people çan really present to this committee a candid and honest presentation and one of integrity if they appear to be supporting or opposing Judge Bork. Even the word "bias" has been levelled at certain witnesses who have expressed their reservations in terms of the Judge. I, for one, disassociated myself with that.

I think all of us who know you and have worked with you may differ with you on different positions—I do on this particular nominee—but have great respect for your integrity.

I listened to your admonition about the possibility of a future Democratic President and a Senate made up perhaps of a party that was not the same as that President, and that we ought to be careful in terms of our consideration or deliberation on a particular judge. I think that that is a wise admonition.

I think it is probably of some use to realize that this President has nominated and had approved some 300 judges on the federal courts including the Supreme Court. I believe it is fewer than 10 of those that have actually been contested.

I have had the privilege to vote for Warren Burger, for Justice Blackmun, for Justice Scalia, for Justice O'Connor, for Justice Powell, and for Justice Stevens, and I think by and large the overwhelming majority of the members of our party have done so as well.

But we have viewed, as you have gathered certainly, in terms of these hearings, that this nominee is different in terms of some of those issues which have been raised involving privacy, involving the first amendment, involving civil rights, and involving the scope of the inherent power of the President. And those have been the issues on which we have tried to elicit comments from thoughtful men and women as to their interpretation both of his record and also as to what type of a Justice he might be and to give us some assessment as to the risks that might be taken by those who would be persuaded to support the nominee.

I understand that you support Judge Bork on the ground of what could be called dissent by association—that is, with respect to the numerous historic Supreme Court precedents that Judge Bork has criticized, he is only stating the same viewpoint as well-known Justices who dissented in those decisions. Obviously, in one or another specific case, distinguished Justices did dissent, but none of those Justices dissented in all of the cases criticized by Judge Bork.

Indeed, as Professor Tribe told us yesterday, and I quote, "Not one of the 105 past and present Justices of the Supreme Court has ever taken a view as consistently radical on the concept of liberty as Judge Bork's."

So let us take *Shelley* v. *Kraemer*. That was the decision by the Supreme Court outlawing racially restrictive covenants in the sale of property. It was a unanimous decision by the Supreme Court. There was no dissent. It was decided almost 40 years ago, and it has been the law ever since. Yet Judge Bork continues to this day to criticize it harshly.

I am not aware that any of the other Justices who you have cited ever criticized that decision. So it seems to me that here, Judge Bork stands alone——

Mr. CUTLER. If I might interrupt for a moment, Senator Kennedy, Judge Bork may stand alone among the Justices, although *Shelley* v. *Kraemer* has not been much cited since that time; but he certainly does not stand alone among the academics. He is joined by Lawrence Tribe and by Archibald Cox, who both criticized, certainly deeply questioned, the State action rationale of *Shelley* v. *Kraemer*.

Senator KENNEDY. All right, then, let us take——

The CHAIRMAN. If I could interrupt, they both—go ahead.

Senator KENNEDY. Okay. Let us take Justice Frankfurter. We heard William Coleman testify Monday that Judge Bork was very different and much more extreme than Justice Frankfurter. He knew Justice Frankfurter very well for many years, and that was his testimony.

And let us take Justice Black. He was perhaps the greatest defender of freedom of speech, freedom of the press, and the first amendment in the history of the Supreme Court. And Judge Bork is virtually the opposite of Justice Black in this area. Judge Bork takes an extremely narrow view of the first amendment that, in the opinion of many scholars, puts him well outside the mainstream of settled constitutional interpretation.

Let us take Justice Stewart. He dissented in 1965, in *Griswold* v. *Connecticut,* when the right to privacy was first clearly established. But in 1973, he turned around and solemnly endorsed the right to privacy when he joined the majority of the Court in *Roe* v. *Wade.*

So Justice Stewart clearly parts company there with Judge Bork on the fundamental issue of the right to privacy of the individual.

If you take the issues one by one, in isolation, there might well be less controversy about Judge Bork's view. But if you take them together, they show a judge whose ideology is much more extreme than that of any of the great dissenters in the past.

Isn't that the heart of our difference, Mr. Cutler? You are urging us to look closely at the trees and urging us not to look too closely at the forest.

Mr. **Cutler**. That is certainly the heart of our difference, Senator Kennedy, but I think some of your characterizations and those of some of the witnesses of what these other distinguished Justices have done are a bit off the mark.

Professor Tribe was Justice Stewart's law clerk, and I certainly bow to that. Justice Stewart was also my best personal friend on the Supreme Court, and I believe I knew his mind fairly well.

Senator **Thurmond**. Speak into the machine a little closer, please, so we can hear you better.

Mr. **Cutler**. I will, Senator Thurmond. I am sorry.

Justice Stewart, in *Roe* v. *Wade,* made very clear in his dissenting opinion that he had dissented in the *Griswold* case because he thought the Court was through with substantive due process. He said in *Roe* v. *Wade,* essentially, "I still think that."

It is an interesting point—a little bit off—that Justice Douglas in *Roe* v. *Wade* did not rely upon substantive due process—in *Griswold,* I am sorry. He found the right he was looking for, this right of privacy, in the penumbra of the other amendments. He was very clear that we were not returning to the days of striking down social welfare laws under the doctrine of substantive due process, and his opinion said that.

Over time, all the other Justices, including some of the dissenters in *Griswold,* said that is what you are saying, but what you are really doing is invoking substantive due process.

Justice Stewart's dissent makes very clear that he still feels the same way, but if this is now the doctrine, he accepts it, and he certainly willingly applied it to the right of a woman to have an abortion if she so desired, at least in the early term.

You referred to Justice Black and Justice Frankfurter. As you know, Justice Black and Justice Frankfurter were opponents on the issue that is known as incorporation, whether the 14th amendment was intended to incorporate within it, or should be construed as incorporating within it, most of the first 10 amendments, the Bill of Rights.

Justice Black wanted it limited to the first 10 amendments. Justice Frankfurter thought it should not be so limited and that other liberties could be found that were not expressly set forth in the Bill of Rights Amendments.

It is quite true that as an academic, Judge Bork was on Justice Black's side of that argument. But it would be impossible in that argument to be on the side of both Justice Black and Justice Frankfurter. They were polls apart from one another.

Senator **Kennedy**. Well, just to make a very brief comment. I must say I have difficulty accepting your characterization of Justice Stewart's view of the concept of liberty. I believe it is very clear from Justice Stewart's concurrence in *Roe* that Justice Stewart came to embrace the view that the Constitution protects personal privacy. He stated that "the Constitution nowhere mentions the specific right of personal choice in matters of marriage and family life, but the liberty protected by the due process clause of the 14th amendment covers more than those freedoms explicitly named in the Bill of Rights."

That is a great deal different than the testimony——

Mr. **Cutler**. That is after he has said, "I do not believe in substantive due process, as I said in *Griswold*, but now that the Court has in effect reembraced substantive due process, I go along with it, and I certainly believe that among the liberties one could find if one did follow substantive due process was the right of the woman to have the abortion."

Senator **Kennedy**. Well, Judge Bork has not reached that interpretation of privacy, at least in his testimony here before the committee, even after that decision.

My time is up.

Mr. **Cutler**. Well, if the question is what would he do in *Roe* v. *Wade*, obviously, I cannot answer that.

Senator **Kennedy**. That was not the question. It dealt with the whole question of privacy and the role about what kind of protection there is on privacy within the context of decisions by the Court as well as by the Constitution. And I believe that his statements before this committee are very much at odds, certainly, than Justice Stewart's interpretation of the rights of privacy, and I daresay the opinions of the Supreme Court holding as of today.

Mr. **Cutler**. Well, you heard Chief Justice Burger this morning, I believe, disagree with you on this point and say that many times, sometimes even a majority of the Court disagreed with a line of precedent which they nevertheless went ahead and applied. And it remains to be seen whether that will also happen in *Roe* v. *Wade*, but I would be willing to bet another one of those dinners that should it come up, it would be very difficult for me, and I believe it would be very difficult for Judge Bork, to support a law as restrictive as the Texas statute, which forbid abortions at any time, even in the case of a rape.

The **Chairman**. Before I yield, that is all very compelling, but I am confused here. Are you telling us that Judge Bork embraces the notion of a generalized right to privacy, now or at any time?

Mr. **Cutler**. No, no. I am not telling you that. He has had no occasion in his opinions, as far as I know, to consider that sort of generalized right of privacy except to say, citing *Roe* v. *Wade*, it does not apply to private homosexual conduct.

The **Chairman**. You are aware here that we asked him that, and he said he could find it nowhere in the Constitution; he could think of no theory as to how you could arrive at it, but he had an open mind.

Mr. CUTLER. No; but he did not say he could think that there were no theories on which one could sustain a woman's right to have an abortion.

The CHAIRMAN. That is not what I—I want to make sure. That is not the question I am asking.

Mr. CUTLER. Yes. He does not agree intellectually with a generalized right of privacy. I believe I can say—and I have to say it on the basis of what I believe a man now deceased thought—I believe that Justice Stewart did not agree intellectually with a generalized right of privacy. He accepted the decisions of the Court.

The CHAIRMAN. I am confused. "Intellectually"—do you think Judge Bork—you represent him—does he——

Mr. CUTLER. I do not represent Judge Bork.

The CHAIRMAN. Oh, I am sorry—but you have conferred with him about this, haven't you?

Mr. CUTLER. I have known Judge Bork for 20 years, and I have certainly talked to him, yes.

The CHAIRMAN. But you have met with him since the hearings began, and you have helped plan hearings for him, right?

Mr. CUTLER. No.

The CHAIRMAN. I beg your pardon.

Mr. CUTLER. I have not helped plan the hearings for him.

The CHAIRMAN. To be more precise, you helped prepare them.

Mr. CUTLER. I have participated in a moot court with him. I have done that, yes.

The CHAIRMAN. To prepare for these hearings?

Mr. CUTLER. Yes.

The CHAIRMAN. Right. There is nothing wrong with that.

Now have you heard him say anywhere, any time, any place, intellectually or otherwise, that he believes there is a generalized right to privacy that can be found in the Constitution?

Mr. CUTLER. You heard him say here, I believe, that he does not accept the notion of a generalized right of privacy, but that does not mean that, should he take his seat on the Court, facing all of these decisions since *Griswold,* and the present disposition of the Court to recognize such a right at least in particular cases, that he would go the other way.

The CHAIRMAN. I thank you for attempting to clarify it, and for my colleagues yielding to me.

The Senator from Utah.

Senator HATCH. I have to say I really have enjoyed this interchange between you and Senator Kennedy. I would be happy to yield some more time to you if you need it.

The CHAIRMAN. No, no. We will have plenty of time to come back. I plan to ask Mr. Cutler a lot of questions.

Senator HATCH. All right.

Welcome to the committee, Mr. Cutler. As you know, I have great respect for you. We have been on a number of programs together and I have a great deal of respect to you.

In the New York Times article you categorized Judge Bork as likely to fall within a select class of Supreme Court Justices, including Oliver Wendell Holmes, Louis Brandeis, Felix Frankfurter, Potter Stewart and, yes, Mr. Justice Powell as well.

Now I can think of a few higher forms of praise that could come to any jurists and to be compared with Holmes, Brandeis, Frankfurter, Potter Stewart and Mr. Justice Powell as well.

Mr. CUTLER. May I just interrupt for a moment——

Senator HATCH. Sure.

Mr. CUTLER [continuing]. To say I associated Judge Bork's views on what he calls judicial restraint following neutral principles, with those views about judicial restraint held, I believe, by Justice Holmes, Justice Frankfurter. I was not comparing their general decisions on particular cases.

Senator HATCH. No, I agree.

Mr. CUTLER. I did compare them with Justice Stewart, Justice Powell, Justice Stevens, Justice Black.

Senator HATCH. And it seemed to me you compared them intellectually——

Mr. CUTLER. Yes.

Senator HATCH [continuing]. That he would certainly rank in that intellectual category with those eminent Justices.

Mr. CUTLER. I would rank him as an intellectually highly qualified Justice. When we start asking ourselves how many sitting or future Justices compare with Justice Holmes and Justice Brandeis or Justice Cardozo, they are generally accepted to be giants. They are on Mount Rushmore. It does not mean that I feel Judge Bork today is ready to take his place among them.

I think he has a potential. I certainly think that.

Senator HATCH. That is the way I took the article, and I thought it was great praise, and I have to say I enjoyed your article. I think it took great courage for you to write it, and I just want to compliment you for it.

As has been mentioned, you served as counsel for President Carter. You have classified yourself in the past at least as a liberal Democrat.

Do you perceive Judge Bork as representing either a conservative or liberal ideology? Maybe I could put it another way: Are you convinced that he would strike down conservative judicial activism just as much as he would strike down liberal judicial activism?

Mr. CUTLER. Certainly, if you mean by that, Senator Hatch, would he strike down what we might call loosely social welfare laws, laws designed to advance the rights of the under privileged, I believe he would not strike down such laws, that his theories of judicial restraint and neutral principles would not permit him to do so, even if he thought they were bad laws.

But I do not think there is anything in the record or anything I know of Judge Bork to suggest he thinks most of these laws are bad laws——

Senator HATCH. I agree with that.

Mr. CUTLER [continuing]. As a matter of policy.

Senator HATCH. Now we have heard Judge Bork attacked or even criticized, because some have said that he would shift the balance of the Court to the right. Now is it not true that any change in the Court sometimes shifts its balance to a certain degree to some extent? And do you think that Judge Bork would actually shift the balance of the Court from where it stood when Justice Powell sat on it?

Mr. **Cutler**. It is certainly possible it would shift some. It always shifts some, as I said earlier. No two Justices are mirror images of one another. In most of the cases, probably 90 percent of the cases, the conservative-liberal rating does not make much difference. There are many, probably well over half the cases, in which, let us say, Chief Justice Rehnquist and Justice Powell and Justice Marshall and Justice Brennan are in agreement.

I would think Judge Bork is certainly a conservative in this spectrum of judicial thinking, but I would place him closer to the center than to the right, and closer to the center than some of the sitting Justices. And I hope you will forgive me not to identify particular names.

I think, as I said, he would come fairly close to Justice Powell, certainly not to the left of Justice Powell.

Senator **Hatch**. I would certainly agree with that.

Thank you, Mr. Cutler. I appreciate your being here.

Senator **Metzenbaum**. Mr. Cutler, again it is a pleasure to see you. It always is.

In a column in the Washington Post last week and in your testimony today, you argue that Judge Bork's positions are in the mainstream of judicial thought. You basically say that the following positions do not take him outside the mainstream.

As a matter of fact, in your article, as I recollect it, you constantly allude to this judge or that judge or that scholar agreeing with him. But the fact is that he has stated his position, written about or criticized earlier court decisions that would appear to take him outside the mainstream, one would be a decision refusing to strike down a poll tax, refusing to strike down a statute banning the use of birth control by married adults, refusing to recognize the constitutional right to a personal choice on abortion, refusing to recognize the constitutionality of the Voting Rights Act ban on literacy tests, refusing to require one-man/one-vote, refusing to accept the university's right to institute a modest affirmative action plan, refusing to strike down a provision of the California constitution, which permitted whites to refuse to sell property to blacks, refusing to recognize Congress' right to sue, refusing to strike down racially restrictive covenants in the sale of property.

Now as I understand your position, you say, "Don't worry, because at one time or another some respected judge or scholar or more than one agreed with those positions." Frankly, I do not think that is the question.

The question is the effect on the country if his view becomes the law. What would it do to settle the issues of segregation, and marital relations and free speech and Congress' right to bring an action against the press? Do you not have some concern that if Judge Bork's views were to prevail, regardless of who agrees or disagrees with them, that it would have a tremendous unsettling effect upon the community in America? Does that not bother you?

Mr. **Cutler**. I do agree, Senator Metzenbaum, that if all of the decisions of the Warren and Burger courts upholding the rights of the disadvantaged, and of the press were set aside, that would be a very grave thing for the country.

I do not think that is going to happen with the appointment of Judge Bork. To begin with, Judge Bork has testified to his own respect for precedent and Chief Justice Burger has repeated to you this morning how frequently the Justices of the Court, even when a majority of them disagree with a particular precedent, will still regard it as well enough settled so that they follow it.

Second, in each of those cases you mentioned—the poll tax case, Black, Harlan and Stewart were dissenters; in *Griswold,* Black and Stewart were dissenters; in *Roe* v. *Wade,* Justice Byron White was a dissenter. In *Katzenbach,* Harlan and Stewart were dissenters. That is the Puerto Rican language case. And Justice Powell took the same position in the *City of Rome* case when he came on the Court a few years later.

In the one-man/one-vote case, Black and Stewart were dissenters. In the *Bakke* case, there were four Justices, including Justice Stevens and Justice Stewart, who read title VI of the Civil Rights Act to exclude race as a factor in admissions, and Justice Douglas, a very liberal Justice of the Court, had construed the 14th amendment exactly the same way a few years earlier. He retired before the *Bakke* case.

So that my central point is you cannot say those Justices are within the mainstream, as many of the opponents have said and as I believe many of those who appeared to be opposed to Judge Bork on the committee have said. You cannot say those Justices are in the mainstream, and that Bork is outside of it, unless you are making a statistical comparison that he has done——

Senator METZENBAUM. Mr. Cutler, by your own line of reasoning you have proven my point, because what you have done is you have picked one or two here and one or two there and one or two in another case, but the fact is that Judge Bork is consistent. He is consistent with respect to all of these cases. You cannot find anybody else's decisions or writings, but mostly decisions, that have the consistency of Judge Bork, and that is the reason——

Mr. CUTLER. Well, may I make a point in response?

Judge Bork from the beginning has been a strong supporter of *Brown* v. *Board of Education.* There are many distinguished scholars who applaud the result of *Brown* v. *Board of Education,* who still question its reasoning today, and they include some of those who have been here in opposition to Judge Bork before you.

Senator METZENBAUM. The problem that we——

Mr. CUTLER. Now that does not fit your model.

Senator METZENBAUM. My time has expired, but I think the problem we have is the uniformity with which this man has criticized previous Supreme Court decisions, and then he asks us to confirm him for the Supreme Court on the basis that either he will recant and change his position, or in one instance he says he will look for a new constitutional basis on which to support that decision.

Mr. CUTLER. Senator Metzenbaum, if you had judged Felix Frankfurter by the number of times he had criticized decisions of the pre-New Deal courts, striking down social welfare legislation, he criticized them all, as did Justice Brandeis who was already on the Court, by applying that test you would not or your Republican colleagues would not have confirmed Justice Frankfurter.

Senator METZENBAUM. Mr. Cutler, my time has expired, but I think we cannot overlook the fact that if Judge Bork should be confirmed for the Supreme Court, you have a different kind of Court now than you had when Justice Frankfurter was on it, and that is the reason there is the sense of alarm in the country, the sense of concern by women and minorities, because it is a different Court, and he will be the swing vote.

Mr. **Cutler**. It is a judgment though that is not shared by Justice Stevens or apparently by the Chief Justice—former Chief Justice—in his testimony this morning.

Senator **Metzenbaum**. My time has expired, Mr. Chairman.

The **Chairman**. The Senator from Wyoming.

Senator **Simpson**. Well, Mr. Chairman, first, a swift comment on your recent announcement which I observed. I would say that I am sure that was very painful for you, and I would say too that you have never turned from your duty, your obligation as a Senator in the time I have I have known you as you pursued your quest for the Presidency, and I hope you remain as chairman, and that is of course not part of my decision process in the minority, but you have handled it all with good grace, and now you will move on.

The **Chairman**. I thank you very much, and I assure you I am going to remain as chairman as long as the Democrats are in control. Thank you very much.

Senator **Simpson**. It is a remarkable arena. It can be savage and barbaric and yet also caring and supportive. I think we politicians move at such a pace in our lives, we really do not have time to savor either victory or anguish and defeat. And that is good, I think that is good. But I hunch that care and support will surface now, and it always has, and so heal up swiftly. We need you out here in the fray so we can box each other around. I would not want to miss any of that.

The **Chairman**. I will be there, Senator, and thank you for——

Senator **Simpson**. It is a remarkable forum where appetite and ambition compete openly with knowledge and wisdom. [Laughter.] It is an interesting place to work.

Well, Lloyd Cutler, you are a powerful witness. You are also one of the first members of the Carter administration that I met when I came here in 1979, and that has been my great pleasure to get to know you ever better.

You have a demeanor that really engenders great confidence. You exude a sense of fairness and balance and steadiness. That is what I have seen in you.

I think it is really wisdom that is the essential element you bring to this city and to the nation, and to these proceedings. You have given me good counsel and guidance and support in some of my causes and activities.

Courage is certainly not your weak point here because I know that you have taken a tremendous amount of flak because of your position here. I know what you have said. I am well aware of that. So I need not redevelop or develop that further.

You have heard the list repeated just a few moments ago, the list. If you did not know what was going on in this chamber or with the opponents of Judge Bork, you would be quite alarmed about the list, would you not?

Mr. **Cutler**. Senator Simpson, I think the terms of the inquiry are perfectly fair. I think it is appropriate for the Senators to raise these questions and worry about these questions as long as in the end the majority take a long view, a view based on the admitted inaccuracies and imperfections of judging how a particular nominee will turn out to be when he gets to enjoy that appointment during his good behavior, and is independent from then on.

It is perfectly appropriate to judge that. It is perfectly appropriate for those who value the gains made, the status quo now achieved by the Warren and in major respects the Burger courts, to get worried that they might lose it.

What worries me the most is that some standard of orthodoxy is going to be developed, that any new nominee who threatens the status quo that has been achieved after a long battle is thereby disqualified to serve, if he is seen to threaten and offend a number of people.

I believe—I think I heard the question asked the other day: Does it not disturb you or would it disturb you that a substantial segment of the population feels very strongly about this appointment if that were true?

It certainly is something to take into account, but think of the substantial segment of the population that has hounded Justice Blackmun ever since *Roe* v. *Wade*. Should that really be taken into account in judging the qualification of as decent a man and intelligent a man as Justice Blackmun?

Senator SIMPSON. Well, Lloyd, I do not suggest that anyone on this panel has been involved in anything but the most appropriate line of inquiry; I really do not. I think it all has been totally appropriate, and I have not booked about that or wrangled about that at all.

I am talking about the national advertising campaign of certain groups, and that list that goes with that. That is the one that is offensive to me. I think that is——

Mr. CUTLER. I think it is true that that exists on both sides, Senator.

Senator SIMPSON. Oh, yes, I would say that; I sure would. I said that once and got caught in the great pile of unwritten somewhere—but I said that once, that they both had gone too far. I thought maybe the baiting had reached an art form.

Mr. CUTLER. One could even say, "With friends like these, who needs enemies?"

Senator SIMPSON. I did say that the other day, yes, or something close to that. And boy, that is the truth.

But since you phrased that right there at that moment, I guess the final question I have—out of curiosity and nothing more, because I think you have been superb, and I think in your answers to the questions of other members of the panel of both parties, that you have set a tone for us that I hope we do not ignore in the process, especially the last part of your remarks in your opening statement about what happens next time, and you just developed that again a moment or two ago—but in the midst of that, out of curiosity, as your former comrades-in-arms have seen you do this and rally to this man you have known for 20 years, just out of curiosity, how have you handled these slings and arrows that have been diverted your way?

Mr. CUTLER. Well, usually when you take a public position, you tend to hear more from those who agree with you than those who disagree. I do not really feel I have felt any particular slings and arrows. I certainly respect my friends and colleagues in the civil rights movement who have gone the other way on these issues; I hope they respect my views.

Senator SIMPSON. Well, sir, thank you very much. And again, I look forward to working with you in the future on so many things, just as we have in the past, and I have the deepest admiration and respect for you, sir.

The CHAIRMAN. I would just say to my friend from Wyoming, running the risk of another ranging shot, since we are going back and forth here today, the Senator from Wyoming does not question the bias of this witness, does he?

Senator SIMPSON. Oh—if we all left our bias and our egos home, we would have to shut down the city. There is not a person in this room who does not have a bias about this case—not one. Who is saying any different than that?

The CHAIRMAN. No, I just wanted to make sure. I observed that you were pointing out about Mr. Dellinger's participation in the brief, which we all thought was appropriate, and I think it is appropriate that Mr. Cutler participated in the moot court preparation for this, with——

Senator SIMPSON. Mr. Chairman, all I am saying and have said is that that is a critical part of this operation. Bias is what we all have. None of us—anybody who tells me they do not have a bias about this case, as I say often, they may believe it, but I do not believe it. So that is no problem.

All I am saying is that there is now a public out there that does not know that maybe Lloyd Cutler has had this particular capacity with Judge Bork, and certainly that the professor, or that Lawrence Tribe has been a counsel and helped write things; they do not know that out in the real world. And I say it is kind of good to kind of trot that out on the table occasionally so the American public can have the full essence of it.

The CHAIRMAN. Thank you.

I yield to my friend from Vermont, Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

Mr. Chairman, I too have watched—if you will excuse just a personal observation—I too watched your press conference this afternoon. I am frankly sorry to see you dropping out of the race. I thought you brought a great deal to the debate, and certainly you have been forceful in your positions on arms control and the judiciary, environment, and everything else, and I relished listening to you, and I know many others did. But I should also note that you have juggled it well in presiding over this committee. And I have heard from an awful lot of pepole both for and against Judge Bork who have complimented you on the fact that you have even-handedly arranged to have witnesses on both sides and have handled them even-handedly and have also even-handedly arranged for those of us on both sides of the issues and those uncommitted to be involved. And I compliment you for that, Mr. Chairman.

The CHAIRMAN. It is nice that you say that. Thank you very much.

Senator LEAHY. Mr. Cutler, if I could just note one thing you just said. You tend to hear from those who agree with you and not from those who disagree with you. If you would like a refreshing change, come and run for office in Vermont, or hold office in Vermont. Believe me, the taciturn Vermonters, you tend to hear from those who disagree with you; and those who agree with you, when you ask them, "Why didn't you say something?" they say, "Well, we figured we had the same idea; it was not necessary."

So if you want a change, sir, if you want a change, come to Vermont. It is a nice time of year for it, anyway; the foliage is out.

Mr. CUTLER. Senator Leahy, I have two daughters who live in Alaska, another small State where, unless the candidate actually literally shakes hands with every voter in the State, he does not have a chance. But in that State, you can do it, and in Vermont you can do it.

Senator LEAHY. I know the feeling.

The CHAIRMAN. May I interrupt for a moment? For your planning purposes, we will take a 10-minute break at 3:30.

Senator LEAHY. Mr. Cutler, in your prepared statement, you point out that you last appeared before this committee in support of the nomination of Judge Scalia to the Supreme Court, and you pointed at that time to Judge Scalia's opinion in the libel case of *Ollman* v. *Evans* to show that Judge Scalia was not out of tune with the mainstream of contemporary judicial thought.

And then, in the case of Judge Bork, you pointed in your New York Times article of July 16 to his opinion in the same case, to refute the charge that Judge Bork was out of the mainstream. And there has been some question about this, so I thought I would give you a chance to clear it up, because Judges Scalia and Bork came down on opposite sides of that.

Mr. CUTLER. On opposite sides, that is correct.

Senator LEAHY. In fact, if I could just quote a little bit from them, Judge Scalia's opinion described Judge Bork's approach as frightening and a strange notion. And then Judge Scalia joined another opinion in the case, written by Judge Wald, in which he described Judge Bork's approach as unprecedented and astonishing.

Now, I understand that you say they are both in the mainstream, and you cite that case, but it seems if they are in the mainstream, they are on the opposite banks of that same stream and kind of taking potshots at each other.

Mr. CUTLER. What I cited in the prepared remarks about Justice—then Judge—Scalia was that he agreed on a number of occasions with his liberal colleagues on the court of appeals. And that is why I cited *Ollman* v. *Evans,* where he was in agreement with his liberal colleagues on the court of appeals, including Chief Judge Wald, as you mention.

I cited Judge Bork's opinion in *Ollman* v. *Evans* as a willingness on his part to go beyond the present—or before that decision, the presently defined scope of press protections against large libel judgments to the point of being willing, as the majority was in that case, to take a mixed question of law and fact as to whether a particular statement was an opinion or not, away from the jury.

Senator LEAHY. But you acknowledge that they were in opposite positions.

Mr. CUTLER. Oh, absolutely. And I will be very clear that of the two opinions, the opinion I prefer is the opinion of Judge Bork, and that was also the opinion of Anthony Lewis in a column praising Judge Bork's opinion in that case.

Senator LEAHY. Now, in your statement you also point out that in virtually every Supreme Court decision that the committee staff has attacked Judge Bork for criticizing that one, two or three of these distinguished moderate Justices had dissented.

That is not quite so, Mr. Cutler. Judge Bork consistently criticized, for example, *Brandenburg* v. *Ohio* as fundamentally wrong until last week, under questioning from me, he told the committee he accepted it. But there were not any dissents in *Brandenburg* v. *Ohio;* that was a 9-to-0 decision.

Mr. CUTLER. That is also true of *Shelley* v. *Kraemer,* as I tried to point out, and I believe I stand——

Senator LEAHY. *Shelley* v. *Kraemer*—there were no dissents, and yet he criticized the restrictive covenants decisions in *Shelley* v. *Kraemer,* and that was also 9 to 0, was it not?

Mr. CUTLER. That is right. I said in the attachment, which lists all the dissents and the citations, "There are a few instances, of course, where Professor Bork's academic critiques of Supreme Court opinions were not joined by moderate dissenting Justices or by his academic colleagues."

Senator LEAHY. Does your addition list *Bolling* v. *Sharpe*?

Mr. CUTLER. Well, I think *Bolling* v. *Sharpe* is a unanimous decision. It is a sort of fluke decision and an anomalous decision, I believe, Senator Leahy. The Court had just gone through all the agony of issuing *Brown* v. *Board of Education,* holding that separate was not equal under the equal protection clause of the 14th amendment. It then had to consider this appeal coming up from legislated segregation in the District of Columbia, to which the equal protection clause as such does not apply; the 14th amendment does not apply to the District of Columbia. And the Court concluded, since it would be ridiculous to have the States barred from segregating schools while the District of Columbia under a congressional statute did segregate the schools, it concluded that segregation was a violation of liberty under the fifth amendment.

Senator LEAHY. But you use the point—when you say, in virtually every Supreme Court decision that the committee staff has attacked Judge Bork for criticizing, there was a little bit of support for his position—but in fact, I believe he told Senator Specter that you could not identify a principled basis for the decision in *Bolling* v. *Sharpe,* the segregation decision——

Mr. CUTLER. Yes.

Senator LEAHY [continuing]. But there were also no dissents in that, either; that was also a 9-to-0 decision.

Mr. CUTLER. That is quite right, and I thought I had taken care of that by my statement in the attachment to our summary on his decisions.

Senator LEAHY. I did not want to leave the impression that in virtually every decision that he has been criticized for criticizing that there was a dissent, because a number of them were unanimous decisions.

Mr. CUTLER. I think, though, that what one might call these civil rights cases were the main cases, the main thrust, of the staff memorandum.

Senator LEAHY. Thank you, Mr. Chairman.

The CHAIRMAN. We will recess until a quarter of.

Mr. CUTLER. Thank you.

[Short recess.]

The CHAIRMAN. Well, Mr. Chairman, you have just experienced a "15-minute" Senate break.

Mr. CUTLER. I have experienced them before, Mr. Chairman.

The CHAIRMAN. I know.

Let us begin with the Senator from Iowa, a State I still love dearly—and will be back to.

Senator Grassley.

Senator GRASSLEY. Thank you very much, Mr. Chairman.

It is nice to hear from you, Mr. Cutler. I particularly appreciate the opportunity to ask you some questions.

You know that 2 days ago, we heard some very powerful testimony from those who, over a long period of time, have been intimately involved in the civil rights movement. We heard from Barbara Jordan, William Coleman, and Andrew Young. They expressed, and I think very sincerely so, opposition to the nomination of Judge Bork.

You know these men and women probably better than I do, although I served in the House with Barbara Jordan and Andrew Young, but you identify with some of the feelings that they feel and express about the progress of minorities in America.

Why don't you share the same views on Judge Bork that they do?

Mr. CUTLER. Well, Senator Grassley, I have great respect for Bill Coleman and Barbara Jordan and Andy Young. I have great respect for virtually everyone I have met in the civil rights movement, both white and black. I understand their concern that the rights that have been won and expanded, as I said earlier by the Warren and Burger courts, might be threatened.

I just do not think they will be threatened, and I take comfort in finding that Justice Stevens seems to agree with me on that. Certainly, he is a centrist that they would trust, and he, as you know, places Judge Bork on legal philosophy in the same group with Justice Powell, Justice Stewart and himself.

I also worry, as I said, about any group sincerely desiring to defend the rights it has won, its stake in the status quo—and one of the most important achievements of the Warren court, in my view, was that it changed the perception of the Court in the minds of the general public from a Court which most of the time protected the rights of the advantaged, the propertied classes, into a Court which protected everyone's rights, including the rights of the disadvantaged and the minorities. I understand that. I value that very much.

But for any group having won its rights to seek to exercise a veto in effect over the appointment of any Justice who might be seen, rightly or wrongly, to threaten those rights would stamp the Court with a kind of orthodoxy which would be very undesirable.

And if one had conceded that power, let us say, to the propertied classes who were so worried about Mr. Justice Brandeis nomination, we might not have seen the changes over time that Justice

Brandeis' criticisms of the majority rulings of those days eventually produced for us.

I respect the difference of opinion. I personally evaluate the concern at a lower level than they do as to any real threat to those rights through the appointment of Judge Bork, but it is an issue on which people can honestly differ. But I would not want to accord to any group, such as the Right To Life group, which certainly feels very deeply about its view of the abortion issue, a veto power, because some judge, some nominee, might threaten their position, when, as and if they ever achieved such a position.

Senator GRASSLEY. Mr. Cutler, you have been in the vanguard of many civil rights legislative battles here on Capitol Hill and I would like to know if you would agree that legislative changes that are enacted and tailored, to fit particular situations, have been more likely to effect changes in the lives of females, minorities and other Americans; than the abstract theories of constitutional law that have been a subject of discussion here for the last 2 weeks.

Mr. CUTLER. Well, certainly the consolidation of rights is achieved most effectively by the legislative process. The Court in our system is able to make a unique contribution, though, when the legislative process is deadlocked as it was on the issue of discrimination against blacks in this country.

The fact that the Supreme Court, reversing precedent, read the Constitution to establish a principle of nondiscrimination, that segregation was unconstitutional, did crystallize public opinion. It brought into being a public opinion in favor of remedying this injustice once the Court had recognized it. That would have been very difficult to achieve by simply the legislative process itself. That is a very valuable contribution of the Court.

Senator GRASSLEY. Okay. And I don't mean to diminish from it, but all of these specific improvements have been enacted into legislation and been cemented in legislation by the democratic process both in Congress and in the State legislature, in the final analysis. You would agree with that?

Mr. CUTLER. Yes, I would agree with that. There have, of course, been legislative efforts to cut back on some of those legislative gains, as well as on some judicial decisions, but those have been on the whole rebuffed by the intelligent majority.

Senator GRASSLEY. Well, how comfortable are you that given the advances that have been made legislatively, that Judge Bork's philosophy will give full effect to these policies adopted by democratically controlled—and I mean small "d"—democratically controlled State legislatures and the Congress?

Mr. CUTLER. He will, I think, short of plain violations of the Bill of Rights or some other constitutional power, he will be reluctant to read into the generalized clauses of the Constitution, like the right of liberty or the due process clause or equal protection a way to—a means by which to strike down legislation that favors minorities or the rights of disadvantaged people.

Senator GRASSLEY. Mr. Cutler, thank you, my time is up.

The CHAIRMAN. The Senator from Alabama, Senator Heflin.

Senator HEFLIN. Mr. Cutler, Judge Bork has been criticized for undergoing what some have called a confirmation conversion—Senator Leahy's term—or a changing or softening of some of his earlier criticisms of the Supreme Court in order to enhance his chances for confirmation. This criticism has been directed toward three major areas: free speech, equal protection, and stare decisis.

Would you like to comment on this criticism? Do you believe there is any validity to it? Does it cause you any concern?

Mr. Cutler. It does not cause me concern, Senator Heflin. It shows, I believe, that Judge Bork does not fit the current idiom of the definition of an ideologue, a man who has fixed views that he does not change in the light of new arguments or new conditions.

I believe Judge Bork has changed with respect to a number of those issues, and I believe, with respect to some of the others on which he has not changed, he has made very clear that he respects the weight of judicial precedent and is not about to vote to overturn what has been long established. I think that is particularly going to be so for the precedents which are rooted in the social policy of the country for at least the last decade or two or three, and which if changed would have to be changed by a 5-to-4 margin. I will give the abortion issue as an example.

If you are going to change a Supreme Court precedent, if you are going to go against the weight of that past precedent as in *Brown* v. *Board of Education*, it makes much more sense—and I believe Judge Bork agrees with this—to do it when you have the weight, the authority of a unanimous or close to a unanimous Court. Otherwise, you create a kind of revolving door in which the Court's view of a matter changes from one appointment to the next depending on which side of the 5-to-4 majority the new Justice may jump.

So I would not be concerned that he has shown that degree of maturation of his mind and respect for precedent.

Senator Heflin. Well, if you were a nonoriginalist or a real strict interpreter of the language of the Constitution that would—in other words, if you were, in effect, a person who believes in the trend of where we have been going, that would give you some feeling of relief and security about his potential appointment, would it not?

Mr. Cutler. If you believed in that trend and did not think you were creating a boomerang which a future, much more conservative Court could use against social welfare legislation, I suppose that would give you concern. But, given the evolution of Supreme Court doctrine to fit the views of the times and the conditions of the times, for the Senate to judge a nominee by whether he will or will not carry on a particular judicial trend, it seems to me is a grave—something you should think about very gravely.

This does raise the specter of orthodoxy, crowding out vigorous criticism and new ideas. I have mentioned earlier the example of Justice Brandeis. If you were part of the group that believed in the status quo as it existed in 1916, you would be very concerned about a Brandeis. And yet, in the end, it turned out to be better for the country I think, in part, I suppose, thanks to the fact that there was—the same party controlled both the White House and the Senate, although there was very vigorous opposition to Justice Brandeis, and there was a 4-month hearing with respect to his nomination. In the end it was better for the country that a man who showed some dissent and criticism from the trend of the time was appointed to the Court.

Senator **Heflin**. Well, if you were on the opposite camp where you believed that there ought to be reversal of decisions of the Supreme Court and you saw and read of this confirmation conversion, would not you be disappointed?

Mr. **Cutler**. Well, of course, on these critical social issues that have fallen to the Court to resolve there will be zealots, if I can use that word not disparagingly, on both sides of each of these issues. And I would suppose people like the Reverend Jerry Falwell and other right-to-life people might very well be concerned at what they see as a falling away from the Judge Bork they thought existed to the Judge Bork that you brought out in your 4 or 5 days of hearings here.

But I don't think they should be allowed to impose an orthodoxy or a standard that we will only approve Justices who are going to change the trend of the Court in our direction.

There is, as I mentioned earlier, a very low order of predictability about these matters. We have all of the examples Chief Justice Burger told you about this morning. There is, perhaps, the most famous of all, Chief Justice Salmon Chase, who was appointed by President Lincoln at a time when Chase was the Secretary of the Treasury. The burning issue at that time was whether the Court would uphold the constitutionality of the Legal Tender Acts, concerning the right of the Government to issue paper money under the laws passed during the Civil War.

Chase had been the leader in putting that legislation through the Congress. Lincoln wrote—in those days, Presidents wrote instead of talking on the telephone—to someone when he was about to appoint Chase: "We dare not ask him how he will vote, and if he should answer us, we should despise him for it." And he went ahead and appointed Chase in the belief that Chase would vote to uphold the Legal Tender Acts. In the outcome, Chase joined a majority holding the Legal Tender Acts unconstitutional.

Senator **Heflin**. Mr. Chairman, could I ask one final question? Do you have any explanation for the fact that this group who would be disappointed continued to support him very fervently and very vehemently and strongly in spite of the words of the confirmation conversion?

Mr. **Cutler**. Well, I believe that the juggernauts for and against Judge Bork organized and financed and began their active lobbying campaigns before the 5 days of testimony, and there is almost nothing that is going to change their direction.

The **Chairman**. The Senator from Pennsylvania. And before the Senator begins, we are going to try to, because of Rosh Hashanah, stop by 5:30. We have two very distinguished people remaining, Governor Thompson of Illinois, and Mr. Frank of Arizona, and so, if we can stay within the 5 minutes or close to it, I would appreciate it.

Senator **Specter**. Thank you very much, Mr. Chairman.

Mr. Cutler, I join my colleagues in thanking you for being here and noting your public service. Yesterday, Mr. Cutler, we had a number of authors testify, and I think it was Mr. William Styron who raised a question about what to expect. They put the issue pretty much in terms of appointing someone who is going to tell people what they can write. That is, of course, not quite the issue, but that is the way they saw it.

They pointed to a statement made by Judge Bork a long time ago, his statement that "There is no basis for judicial intervention to protect any other form of expression be it scientific, literary . . .".

What assurance can be given to people like William Styron and others—this is just one issue—that where there is a change of position that their rights to freedom of speech, freedom of expression will be adequately protected?

Mr. **Cutler**. Well, I think there are two assurances you could give, Senator Specter. One is Judge Bork's own statement before you, which in that particular instance tracks earlier public statements he has made, that he had long ago abandoned the notion that the first amendment speech protection should be limited to political speech, and that he now agreed that moral discourse, literature, scientific discussion, et cetera, was well within the so-called highest rung of the first amendment. That is one.

The other is that the Court, the majority of the Court has established, and for a very long time now, that those classes of speech are protected at the highest rung of the first amendment. There is this penumbra about obscenity and pornography, of course, which the Court always has and always will have trouble sorting out. But barring that everything else is clearly protected, not only in Judge Bork's view, as he testified to you, but by a very solid line of Supreme Court precedent that I would not think he would wish to overturn, and that he could not overturn even if he wanted to.

Senator **Specter**. Well, aside from authors, let me turn to another group of litigants—Senators—and the background and Judge Bork's writings in that field. We know that Judge Bork has written saying that the War Powers Act is probably unconstitutional, he has taken a dim view of executive powers under Independent Counsel and many other lines, and then he has written categorically that we should, he says, renounce outright the whole notion of congressional standing.

Now, if you take the War Powers Act, it is a matter of considerable concern. When Judge Bork was here last Friday, I asked him a question about the War Powers Act which the Senate had taken up the previous afternoon. It hasn't recurred now for a whole four days. It is back on the floor this afternoon in the light of what has happened in the Persian Gulf.

And here you have an act which, as you well know, was constructed because Congress has lost the authority to declare war, given modern circumstances, and a war in Korea, and a war in Vietnam, but no congressional declaration. And that balance was altered, so many people thought, in the War Powers Act, and there is a real battle between the executive and the legislative branches, Article I and Article II authorities, and we really need, in my judgment, to look to a resolution of the issue.

Now, if you have a man, Judge Bork, who is predisposed to the executive to start with, and then has the view that he does on standing, his vote might well be the decisive one, unlike some of the other issues which you have raised.

I have a two-part question. I will repeat them both because my time will be up before the second part comes—maybe it is already.

One part is, considering the customary deference which is stated should be given to a President's nominee, should the Senate give that deference when a critical issue may turn on the executive versus legislative standing and power, a constitutional issue?

And, second, is it wise for the Senate to confirm a judge who has given a clearcut indication that he is not going to decide this kind of a critical question; and, if he does reach it, he is likely—highly likely to be on the executive side?

Mr. CUTLER. If I may, Mr. Chairman, I would like to give at least a brief answer within the 5 minutes.

The CHAIRMAN. No. You take the time.

Mr. CUTLER. In the first place, as you know, Senator Specter, these questions of standing, case or controversy, and political question sort of blur into one another. It is very hard to sort out any boundaries among them. And when the Court doesn't want to hear a case, it can rely on any one of the three.

The Supreme Court, as far as I know, has never resolved the issue of the standing of the Senate or the House or the Congress as such to challenge Presidential actions, or for that matter, the right of the President to challenge legislation passed over his veto, let us say, by the Congress.

There is the subsidiary issue of the standing of an individual member or a minority of the Senate or House which lost a battle in the legislature and seeks to overturn the majority result by going to court and saying what the majority did is unconstitutional for one reason or another. Those are very delicate questions for the judicial branch to get into, and the judicial branch has always been very wary of them.

Some of them cannot be evaded. An example I have used before, for example, is the right of the person convicted in an indictment brought by an Independent Counsel, a Special Prosecutor, to challenge the constitutionality of the Independent Counsel statute, which I happen to strongly support. He has that right, and he can vindicate the interest of Members of Congress who challenged that law.

You referred to the fact that Congress on the war powers resolution—I have to confess, as a former counsel to a President—every administration as far as I know, Democratic and Republican, since the War Powers Act resolution was passed has reserved as to its constitutionality. Not only as to the legislative veto issue, which you will concede I think is a substantial issue, but also as to the Commander in Chief's function to defend against attack.

On the biggest single war issue of all, technology has taken the power away from the Congress. That is just a matter of fact. And I am referring to the nuclear button, the so-called football. There is just no way in the modern context of a believed nuclear attack on the United States that Congress, any more than possibly one or two Members who happen to be in the command center at the time, could play a role in the decision as to whether to push that button or not.

The President didn't take that away from you. Technology took it away from all of us. You have all of your powers, except that one, perhaps, there is no way of recalling what he does. But you have all of your powers to stop anything else he does.

You refer to Vietnam. The Tonkin Gulf resolution, I believe, was passed by a vote of 88 to 2, and those who voted for it or declared themselves in favor of it included at least two Senators on this committee who were Members of the Congress at the time. And I daresay, if there were any others of you who were Members at the time, you also voted for the Tonkin Gulf resolution.

This is a very sticky area, and I would think the last thing the Senate ought to do is make its judgment on a nominee on the basis of whether he would or would not support the standing of the Senate, the judicial standing of the Senate, on an issue which has never been resolved by the Supreme Court.

Senator SPECTER. Thank you very much, Mr. Cutler. I have a great many more questions but no time to ask them.

Thank you, Mr. Chairman.

The CHAIRMAN. The Senator from my second favorite State, New Hampshire, Senator Humphrey.

Senator HUMPHREY. Mr. Cutler, I think the public are most acquainted with your record of service to President Carter in the capacity of White House Counsel for a number of years. You have had a long and distinguished and continuing career in the law. Going back to the origins, from which school did you obtain your law degree?

Mr. CUTLER. From Yale.

Senator HUMPHREY. And after your 3 years at Yale, what was your standing in your class?

The CHAIRMAN. Better get it right. [Laughter.]

Mr. CUTLER. Mr. Chairman, I never bothered to check. And I said to you earlier, before the hearing began, when I wished you good luck and expressed my sympathy, I said most of us could say there, but for the grace of God, go I.

On a 3-year average, I believe I was narrowly the first in my class.

Senator HUMPHREY. You stood first.

Mr. CUTLER. But I was not first every year.

Senator HUMPHREY. Yes.

Mr. CUTLER. That is my best recollection. [Laughter.]

Senator HUMPHREY. I am not trying to poke fun at the chairman or be sarcastic, either. I am trying to establish your bona fides.

Now, you describe yourself as a liberal Democrat, do you not?

Mr. CUTLER. I do.

Senator HUMPHREY. With that background, Mr. Cutler, do you believe that, as some of Judge Bork's opponents claim, that he would, if confirmed, turn back the clock?

Mr. CUTLER. I do not.

Senator HUMPHREY. I know you have written on this next point in the New York Times, but not everyone is able or disposed, for that matter, to read the New York Times daily at least.

Do you regard Robert Bork as an extremist in either his jurisprudence or his personal life?

Mr. CUTLER. I do not.

Senator HUMPHREY. As a racist?

Mr. CUTLER. I certainly do not.

Senator HUMPHREY. As a sexist?

Mr. CUTLER. I certainly do not.

Senator HUMPHREY. How do you feel about the use of these charges, or at best, innuendo?

Mr. CUTLER. Well, I said at the beginning of my statement, Senator Humphrey, I would like to be taken as speaking my views in good faith, and I am prepared to accept everyone else's views in good faith. I don't, myself, believe in personal invective or personal attack or extreme remarks, but I don't criticize others for doing so.

Senator HUMPHREY. But you are willing to criticize them where they make errors in fact, because in your prepared testimony which addressed the so-called committee consultant's report—by the way, they were not consultants to the committee; they were consultants to the chairman, and not the committee.

The CHAIRMAN. The chairman is the committee at this point, I think.

Senator HUMPHREY. No, the Chairman——

The CHAIRMAN. That is a joke, Senator. That was supposed to be funny.

Senator HUMPHREY. The chairman is not the committee, and I resent the use of my name and that of the minority in the distribution of this report.

In any event, you take to task the consultants for an error they made in their report. You take them to task in your testimony. You addressed two canards, and the second of which is contained in this—"canards" being your word—the second of which is contained in this consultant's report in which you find three grounds for refuting the charge that Robert Bork criticized a Supreme Court decision holding unconstitutional a law providing for the sterilization of habitual criminals.

That is a very serious charge to make, as the opponents do, that Robert Bork criticized a Supreme Court decision holding unconstitutional a law providing for the sterilization of criminals. And as you point out, the critics, the consultants are wrong on three grounds, and this refers, of course, to the case of *Skinner* v. *Oklahoma*.

And you make the point, I won't go into all of the grounds. They are there for anyone to see in your prepared statement. But you make the essential point that this case never got to the constitutional question. It was rather a question of discrimination between various kinds of criminals. A kind of discrimination which has existed in other contexts.

Am I correct in all of that?

Mr. CUTLER. I would like to correct slightly what you have said. I do think that the staff report misinterpreted, or mischaracterized might be a better word, the holding in *Skinner* v. *Oklahoma*.

Senator HUMPHREY. Yes.

Mr. CUTLER. There is no doubt the Court in *Skinner* v. *Oklahoma* did hold unconstitutional a statute which happened to provide for the sterilization of certain classes of criminals. The implication of the staff's statement might be that they held it unconstitutional on the ground that you can't sterilize criminals. That was not the holding.

The holding was that you could not sterilize one class of criminals, namely, robbers, but not a more white-collar class of criminals, namely, embezzlers. That that was not a legitimate due process choice.

There is no doubt that Judge Bork did criticize the line of cases to which *Skinner* belongs because he could find no rational explanation of the inconsistency between holding that particular classification to be an improper one and holding other classifications to be proper, such as that women could not act as bartenders unless they were in the family of the male bartender, or that pilots on the Mississippi and Louisiana could not get a license unless they were the relatives of existing pilots. That is all he said.

And he said nothing in criticism of the two concurring Justices, Chief Justice Stone and Justice Jackson, who wanted to tackle this fundamental constitutional issue of whether a statute could provide generally for the sterilization of, say, three-time or recidivist criminals.

Senator HUMPHREY. But it never reached the constitutional question?

Mr. CUTLER. Well, they reached a constitutional question but not that fundamental question.

Senator HUMPHREY. Not the constitutional question of sterilization itself.

Mr. CUTLER. As such, yes. Indeed, as I believe someone pointed out, there is an outstanding Holmes decision holding that sterilization of insane people, mentally deranged people, in a family of—generations of deranged people could be sterilized. It would never survive today.

Senator HUMPHREY. Alas, my time has expired. I wonder if the chairman would permit me 2 minutes additional.

The CHAIRMAN. Surely.

Senator HUMPHREY. The Senator from Massachusetts—I regret he is not here—but he is not alone in the charge he tries to make that Bork is never joined consistently by other eminent jurists. Apparently he did not read carefully the list of cases that you provide in your attachment, seven or eight cases which you regard as modern civil rights cases, landmark cases, in which Justice Stewart joined in every one save *Roe* v. *Wade*, and he virtually dissented in *Roe* v. *Wade*. Although he submitted a concurring opinion, he did so only on the basis that he felt that the privacy issue had been settled in *Griswold* in which he was a dissenter.

So, there is one case, at least in these cases you cited—one example in the cases you cited of an eminent jurist, hardly a conservative, who is with Bork in every—with whom Bork is with in every one of these cases you have cited except not quite technically *Roe* v. *Wade*, but practically speaking.

Mr. CUTLER. I would only quarrel with your description of Justice Stewart as not a conservative. I believe one could fairly call him a moderate conservative.

Senator HUMPHREY. I am more than happy to give you the last word.

Mr. CUTLER. Thank you.

The CHAIRMAN. Thank you. And thank you for correcting the—for pointing out that the *Skinner* case was a case that dealt with, ultimately, the constitutional question whether you could discriminate in sterilizing a chicken thief who committed three other crimes, or two other crimes, and not a bank embezzler who did it three times.

Having said that, is it not also true that on that constitutional issue Judge Bork said, "All law discriminates and thereby creates inequities. The Supreme Court has no principal way of saying which non-racial inequities are impermissible."

He not only criticized the decision, but criticized the rationale and said that the State of Oklahoma, if it wanted to sterilize chicken thieves, it could, and it didn't have to apply the same law to bank embezzlers.

Is that not correct?

Mr. CUTLER. I believe the last part is not correct, Senator Biden.

The CHAIRMAN. How is it not correct?

Mr. CUTLER. I think Judge Bork made very clear that a statute providing for the sterilization of criminals, at least today, as he put it, could not withstand scrutiny, constitutional scrutiny, because of the lack of evidence that criminality is an inherited trait.

The CHAIRMAN. But at the time he said the law should stand in Oklahoma, and the rationale being——

Mr. CUTLER. No, I don't believe he said that law should stand. What he was criticizing, and this is on pages 11 and 12 of "Neutral Principles," was the inconsistency between the Supreme Court decisions saying this particular classification is a legitimate one, the Mississippi river pilot classification, whereas the distinction between embezzlers and chicken thieves is not a legitimate one.

He didn't say he thought that one particular distinction was a correct one and the other one was an incorrect one. He said once you get into this game there is no principle to the decisions, and he gives an example, these rather obvious inconsistencies.

The CHAIRMAN. And therefore, you shouldn't get into the game, and the State should be able to do it that way.

Mr. CUTLER. No. I suppose that is a fair characterization, but that doesn't mean the States should get into the business of sterilizing.

The CHAIRMAN. No, I am not suggesting that——

Mr. CUTLER. He was very clear the State would have a great burden establishing its right to sterilize.

The CHAIRMAN. Well, you understand why--I know you do, to state the obvious—understand why some of us have incredible difficulty.

Separate and apart, let us assume it wasn't sterilization. Let us assume he said you could send, you know—you know, cut off chicken thieves left finger but you couldn't cut off the left fingers of bank embezzlers.

Mr. CUTLER. But the Court had a terrible time, for example, in this *Mississippi Nursing College* case, where I think it is three or four of the Justices saw nothing wrong with a classification of at least one Mississippi school for women nurses only, if women preferred to go to that school, and having another—different Mississippi school where men and women could go together.

The majority said you could not have that classification, but several of the present Court, including Justice Powell, had great difficulty with that, and objected to it.

The CHAIRMAN. Don't you think there is a slight difference? I know Judge Bork doesn't because he says all gratifications are equal. But don't you think there is a common sense difference between whether or not you are going to take someone's ability to procreate and whether or not they can go to a school? I mean, gee whiz.

Mr. CUTLER. Let us stick to *Mississippi Nursing* for a minute, if we can.

The CHAIRMAN. Sure. Let us compare them.

Mr. CUTLER. There is a case where my own guess is Judge Bork would have gone with the majority, based on his opinions in the court of appeals, that you could not have this discrimination. And Judge Powell was in the minority, saying you could have this discrimination. And yet everybody is so worried that if Judge Bork gets on the Court he is going to depart from these very liberal principles of Mr. Justice Powell.

The CHAIRMAN. Well, you are a very, very good lawyer and you are begging the question, as you know. But I don't have time because I may get picked up at some point at the airport in Illinois and Chicago and need the Governor's help. And if I keep him waiting any longer I will be in deep trouble.

So I want to thank you very, very much, Mr. Cutler. It is a pleasure having you—did you want more questions? I am sorry.

Senator THURMOND. I just want to thank you for your appearance here, and you made a most effective witness and I think you have answered many questions to clear up this entire confirmation matter.

The CHAIRMAN. Thank you very much, Mr. Cutler.

Now, our next witnesses we will bring up together are Mr. John Frank, a lawyer from Phoenix, AZ; Governor Thompson, of IL, one of the best known and I guess most often elected statewide officials and a national figure in American politics.

It is a pleasure to have you here, Governor. It is a pleasure to have you here, Mr. Frank.

Governor, why don't we begin with your testimony?

TESTIMONY OF PANEL CONSISTING OF JAMES THOMPSON, JOHN FRANK, AND FRED FOREMAN

Mr. THOMPSON. Mr. Chairman, thank you, and thank you for those distinguished words of greeting, and most gratifying words of greeting. All gratifications are not equal. I depart from Judge Bork on that. And, you, Mr. Chairman, will never have any problems at an airport in Illinois or anyplace in Illinois because you and I are friends and always will be.

Mr. Chairman, I come here today for a good cause, I believe, the confirmation of Judge Bork to a seat on the Supreme Court, but on a narrow issue; in fact, much narrower than you have been discussing, you and your colleagues, over the past few days. I make no pretense at being a scholar who can plumb the depths of issues like original intent or protection or due process. I have my own gut feelings about those issues and about results of cases as we all do.

The CHAIRMAN. Governor, I apologize for interrupting. I am so accustomed to taking witnesses at their word, I always forget to swear you all in. Would you mind standing while I swear you both in?

Do you swear that the testimony you are about to give is the whole truth and nothing but the truth, so help you God?

Mr. THOMPSON. I do.

Mr. FRANK. I do.

Mr. FOREMAN. I do.

The CHAIRMAN. I apologize, Governor.

Mr. THOMPSON. Before I launch off again, Mr. Chairman, I should introduce Mr. Fred Foreman, who is the current president of the National District Attorneys Association and who is a prosecutor in Lake County, just north of Chicago.

I come to you as a man who has been many things. When I was in law school at Northwestern my judicial heroes were men by the name of Black and Douglas. I was a liberal, an out-and-out liberal. I used to drive Fred Imbo, who was my criminal law professor and later colleague and later coauthor—a man who was very active on the side of the police and the prosecution—crazy.

If you examine my law school writings, which were in the Journal of Criminal Law, Criminology and Police Science, of which I was the editor in chief—I didn't make Law Review. I didn't get that high in the class—you would find a consistent liberal, pro-defense flavor, and I wanted nothing more in life than to be a criminal defense lawyer, to hang my shield at 26th and California.

Professor Imbo conspired I think to get me a job in the prosecutor's office of Cook County, where I served for 5 years. One year under a Republican, for whose reelection I campaigned vigorously; 4 years under a Democrat, now Mr. Justice Ward of the Supreme Court of Illinois. And I became exposed to what Professor Imbo in later years has called the real world of criminal justice, and my views changed.

After serving as a prosecutor in the trial courts and in the Supreme Court of Illinois, I became a law professor at Northwestern and joined my friend Fred Imbo as a professor of criminal law and wrote two books with him on criminal justice and criminal procedure, and my views changed again. In fact, you can find us dissenting from each other in the casebook on particular points.

And then I became assistant attorney general, responsible for creating a criminal justice division, a civil rights division, an antitrust division, environmental division, in the office of the Illinois Attorney General which before that time had not had one. I suppose my views moderated again.

And then I became U.S. attorney for the northern district of Illinois and served in that office 5 years, and was a prosecutor again. And I have been for the last 10½ years the Governor of a great diverse State, and I know, Mr. Chairman, it is also one of your favorite States and you had planned to get there a little later in the season.

I suppose I have been exposed to about as many experiences as one could be in the criminal justice system, on both sides, culminating in my service as a Governor of a State with 11.5 million people of very different opinions, who live from near the Wisconsin border down to closer to Mississippi than they do to Chicago, in Cairo, IL.

And taking all of these experiences into account, I believe Robert Bork would be a fine Justice on the Supreme Court; and more, I believe he would do equal justice under the law, the words carved on the Court, which I passed today to come here to testify. I believe he has a fine, inquiring mind, and I believe he is a fair-minded person who will listen. And I would just like to relate one experience with Judge Bork to illustrate that point of his open-mindedness and willingness to listen even under extreme circumstances.

When I was a U.S. attorney, I inherited the prosecution of the Conspiracy 7 defendants. I didn't try that case, my predecessor did, Tom Ferren, but I had to handle the appeal. We lost. We also lost the contempt cases which arose out of that trial before Judge Hoffman, a very contentious proceeding.

But the seventh circuit sent the contempt cases back, both of the defendants and their lawyers, for a retrial. Before that retrial could occur before Judge Gineau, sitting by designation, from Maine, the Saturday Night Massacre intervened. Solicitor General Bork became the Acting Attorney General of the United States.

Because of the controversy that the Saturday Night Massacre stirred up in the nation, the senior officials of the Department of Justice, and the Criminal Division, and the Deputy's office, told me they wanted the contempt prosecutions dismissed because they feared continuing criticism of the Justice Department in light of the resignations, the Attorney General and the Deputy.

And I argued that all the judges of this nation, all the litigants of this nation, and all the lawyers of this nation had the right to know what was appropriate and reasonable conduct in the trial of cases and what was not. There was more at stake here than men by the name of Dellinger or Hoffman. More at stake here than the personal feelings of Judge Hoffman.

They wanted to dismiss the cases to get rid of the criticism of the Justice Department, and I appealed to Acting Attorney General Bork to at least listen to me, a young prosecutor from Chicago. And I came down to Washington on a Saturday morning.

I am the last guy he had to hear from given what was going on at that time, but he let me come down here, and he let me make my case. I spent more than 6 hours with him on that day, and he did listen to me and he became persuaded that the case was important to the fair administration of justice in this nation no matter how you felt about the individual defendants or trial judge or the movements they represented.

We did retry those cases before one of the most distinguished federal judges in the nation, Judge Gineau, sitting by designation, from Maine. Some of the defendants were acquitted, some of the defendants were convicted. Those who were convicted, their convictions upheld.

And that incident always impressed me. That man was in the pressure cooker at the time, and he could have shuffled me off to these senior Justice Department bureaucrats, but he did not. He had a willingness to listen to a young prosecutor. Had a belief in him and let him go forward.

The only other thing I wanted to say, Mr. Chairman, is that I have read the opinions of Judge Bork, insofar as they relate to the criminal justice system, that he has authored while on the court of appeals, and I find him to be a reasonable and reasoning person. He has affirmed convictions. He has reversed convictions.

Out of all of the decisions which have been discussed over the many days that this inquiry has taken, the discussions in the press, very little attention has been paid to the criminal justice opinions of Judge Bork, and I think for good reason. They are practical, reasonable, moderate opinions. And yet, nearly a third of the business of the Supreme Court falls within the area of criminal justice and criminal procedure, and there has been the smallest amount of attention paid to Judge Bork's views on one of the most important issues to consistently come before the Court which not only involve the protection of the public, but individual rights as well.

I just wanted to add those words of my feeling for Judge Bork.

The CHAIRMAN. Thank you very much.

Mr. Frank.

TESTIMONY OF JOHN FRANK

Mr. FRANK. Mr. Chairman, members of the committee, I am delighted to have been asked by the committee to appear. I hope I may be of service to it. I am confining my remarks to a discussion of Judge Bork's record on the court of appeals.

By way of introduction, you have a statement which, because of the hour, I will abridge. The usual qualifications are set forth. I will note merely that I practice law in Phoenix. I am a DeConcini Democrat from way back. I am the author of some 10 books in the field of constitutional law. I have written extensively on Supreme Court appointments. You have had me here as a witness, again at your request. I was a major witness in the Haynsworth matter, Judge Thurmond may recall, and that will perhaps be qualifications enough for this discussion.

I have read the opinions of Judge Bork, as he has sat on the court of appeals and have submitted to you a paper on that subject. The first element that is striking about the work of Judge Bork is that he is the extremest judicial activist I have personally observed in a lifetime study of judges.

I have never before in my life appeared here to oppose an appointment to the Supreme Court. I have been of the view that this is largely a matter of Presidential prerogative. But on the basis of Judge Bork's record, I find him so extreme in his conception of the judicial power that I have had to conclude that it is unsuitable to ask him to undertake even higher duties.

Let me give just a few illustrations to make my point, and I do abridge because I know you must get done. But take just one case, *Crowley* v. *Shultz*. It is an extraordinary matter. Judge Bork wrote the opinion of the court. A certain issue was at the heart of the case, he decided it in a unanimous court.

There was a second issue, an important one, which was, in fact, not presented to the court because the case had gone off on narrower grounds below, it was not briefed, it was not argued. Judge Bork, thereupon, having given the opinion of the court, proceeded to write a separate opinion concurring with himself and deciding the issue which had never been briefed, never been argued, never been presented to the court, but Judge Bork wrote an opinion on it.

That is a very extreme example of someone reaching out to throw his weight around on a legal subject in a matter in which I, at least, cannot think of an analogy anywhere in the American law.

Another instance of extreme policymaking involves his treatment of an act of Congress. There must have been much talk here about the Food Coloring Act of 1960 case. That is the case in which the Congress said that anybody adding color additives to food had to clear it with the Food and Drug Administration within 2½ years. Judge Bork upheld an extension of time for 22 years for the use of Red Dye No. 9, which the National Cancer Institute regards as a carcinogen.

Under the Bork opinion, despite a very clear statute, the general public will continue to eat Red Dye No. 9. As the dissent I think correctly points out, this is simply totally ignoring the will of this body and its statute.

In another example Judge Bork, in the field of public power and rate regulation, and again, please, I put this in a lawyer-like way in the statement but you need an oral abridgement, so I am highlighting this. If you are interested, please look at my text.

In the public utility case, Judge Bork is dealing with a case in which a company built a nuclear plant which was a failure and they lost $397 million on that plant. Judge Bork's opinion holds not merely that they can recover the $397 million, which is fair enough, and is I think a proper conclusion, but also permits proceedings by which they can make a profit on it and get their percentage over passed on into the rates for the consumers, on a plant which is totally useless.

The statute says the rate shall be calculated on the basis of those works which are "used and useful," and here is the utility enabled to make an enormous profit at the expense of ratepayers where something is by definition not used and totally useless.

You are all acquainted, you have had much discussion of the fact that Judge Bork really is writing the Sherman Act out of existence.

An extreme instance is the case of *Rothery Storage Company* in which the question is whether some big company will be found to be in violation of the Sherman Act because of a boycott.

Judge Bork's opinion holds that there is unquestionably a boycott of a small businessman, but he also holds in that opinion that the test is not whether there is a boycott, but whether the boycott makes the business more efficient.

Senators, Standard Oil of New Jersey in John D. Rockefeller's time when the Sherman Act was passed was doubtless very efficient. That was not the sole value of this Congress at the time, and it should not be the sole value now. I repeat, this is an extreme illustration of an activism which radically undercuts a socially useful statute, the antitrust laws.

Another leading example of an extraordinarily activist opinion is one which is much talked of here, the case of *Lebron*. That is the one about the political advertising in the District of Columbia rapid transit system. In that case, near its end you will see that Judge Bork in a line which has not I think been adequately discussed here casually observes that the doctrine which prohibits prior restraint shall not apply where the statement in question is "false."

The whole object of Chief Justice Hughes in creating the prior restraint rule in the 1930's was to prevent interference with the press by tying up publications and arguments in advance about truth or falsity. Judge Bork's opinion tosses all of that into the wastebasket.

Let me say a word about opinions concerning minorities and women, and again I will refer to my text. And here I address myself in part to Senator Humphrey, who has been interested.

In situations involving minorities, Bork's opinions have only one integrating factor I see in his opinions: one way or another, the minorities regularly and routinely and invariably lose. I am acquainted with the eight cases that Senator Humphrey discussed with Judge Bork the other day, in which Judge Bork was cited as having voted with somebody with a claim of discrimination. There are 18 other cases which were not mentioned in which Judge Bork also participated, and 16 of which he voted against the claim of discrimination.

I am not going into the matter of that cluster of 26 cases. I restrict myself to the cases in which Judge Bork wrote the opinion, and the answer is that in the whole kit and caboodle the minority always loses. I have given you the details of particular cases in the text which I have supplied you. I do not detail them orally simply to protect your time.

But for blacks, for Chicanos, for the Haitian refugees, just endlessly, the minority groups are the losers in the jurisprudence of Judge Bork.

On the matter of nuclear safety, you have heard of a good many of the cases. In one of them, the important matter of nuclear safety in Massachusetts, Judge Bork holds that the Attorney General cannot appear and cannot be heard to represent the people of Massachusetts because the people of Massachusetts have no legitimate interest in nuclear safety in that State despite the fact that there have been repeated accidents. Again, an extraordinary reach of judicial power.

The extremists of these cases is the one of *San Luis Obispo Mothers for Peace* in which Judge Bork holds that the NRC may take into account by way of emergencies the possibility of a 100-year flood near a nuclear plant, but need not take into account the possibility of an earthquake despite the fact that the particular plant is only 3 miles away from the Hosgri fault area. I am speaking of the El Diablo nuclear plant in that State.

In the field of communication and speech, I simply cite to you the language of Judge Wald, whom you all respect, and Judge Wald had said that the opinion of Judge Bork in that case "presents risks to our basic freedoms more deadly than any terrorist blows."

The most remarkable aspect of Judge Bork's work in the speech area is his, as I say, virtually knocking in the head the great doctrine of Chief Justice Hughes having to do with the matter of prior restraint. There has been talk about the sterilization matter. We know some of you have been interested and you have talked about the fact that Judge Bork held in the *American Cyanamid* case that an employer could require sterilization as a condition of employment. I find that, indeed, a remarkable conclusion.

Again, I will skim over the balance of what I have to say and simply come to a conclusion. The situation as to Judge Bork is that it is possible to evaluate his judicial work from the standpoint of a different set of values than we have been talking about, not doctrine, not theory, something else.

Senator Heflin, as you know, I was Judge Black's law clerk, his biographer and his close friend, and I don't know if this is an Alabama way of speech or not. But, when Justice Black was really distressed about what he felt was an injustice in a situation, just a plain injustice, it certainly concerned Justice Black. And when he was really bit overwrought on such a thing, he would say, "You can't do people that way." I do not know whether that was simply his peculiar colloquialism or whether, perhaps, other Alabamians would have used the same phrase.

But let me express the most serious concern I have. You take the total judicial work of Judge Bork and it has obviously never concerned him that maybe you just can't do people that way. If you pull together his whole career as a judge, there is a remarkable void. The life of no average American who works for a living, or his family, is better, richer, happier, safer, or in any way more secure because of Judge Bork's opinions in his years of judicial service.

I realize that it would not occur to Judge Bork to think that this was relevant, but I would hope that this committee thinks that it is relevant because it is part of the task of the office even of the highest court in the land to do justice among people, and I don't think that thought has ever crossed Judge Bork's mind.

He is an extreme judicial activist. A loose cannon in an area where care is required. He clearly regards it as his proper function and duty to make law, either precedents or acts of Congress notwithstanding. In a profoundly intellectual sense, Judge Bork is a profoundly willful man.

Thank you for letting me come, Mr. Chairman.

The CHAIRMAN. Thank you.

[The statement of Mr. Frank follows:]

STATEMENT OF JOHN P. FRANK

TO THE SENATE JUDICIARY COMMITTEE
SEPTEMBER 23, 1987

CONCERNING THE RECORD OF JUDGE ROBERT H. BORK OF THE U. S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Introduction

I am delighted to have been asked by the Committee to appear and hope I may be of service to it. The precise topic I have been asked to discuss is Judge Bork's record at the Court of Appeals and I restrict myself to it.

I appreciate that these statements all need to begin with a background description of the witness. I have my BA degree and my MA degree concentrating in Supreme Court appointments from the University of Wisconsin. My JSD degree is from Yale, for which I did a more extensive writing on the matter of Supreme Court appointments. I have an LLD degree from Lawrence University. I have been a practicing lawyer for more than thirty years in Phoenix, Arizona, was a professor of law prior to that time, have lectured principally on procedure and Supreme Court matters throughout the United States, and am the author of some ten books largely on constitutional law and matters relating to Supreme Court history. This Committee invited me to appear as a principal witness on the nomination of Judge Clement Haynsworth. My 1941 articles in the University of Wisconsin Law Review are a principal source of Supreme Court appointments prior to that time and I am just completing a book now on some other Supreme Court appointments.

My researches concerning Judge Bork have been confined to a reading and analysis of all of his opinions, and this will be my presentation here. Excluded are opinions picked up by the computer after early July and some concurrences. In the course of my researches on my current book, I am including the statement of Senator Howard Baker of May 15, 1970 on the proper role of the Senate in connection with Supreme Court confirmations.

The Law and Judging As Seen By Judge Bork

Since he has been on the United States Court of Appeals for the District of Columbia, Judge Bork has written a little over a hundred published opinions. He is not a big or fast producer, and there is a real question about his ability to cope with the Supreme Court workload. Nonetheless, there is enough work here so that he has made a record through which it is possible to understand his views and his philosophy of the job.

Activism

Bork is a judicial activist beyond anything Earl Warren ever dreamed of. The difference between Judge Bork and his predecessor, Justice Powell, is very dramatic; Justice Powell was a conservative judge who restricted his necessary lawmaking to new situations. Judge Bork, quite truly, makes law as though precedent were meaningless and the Congress were in permanent recess. A small but remarkable illustration is Crowley v. Shultz, 704 F.2d 1269 (D.C. Cir. 1983), in which Judge Bork wrote the opinion of the Court. The claim was by State Department employees who indisputedly had been illegally dealt with in connection with their employment. The sole question presented to the Court was whether, under a particular savings clause, they were entitled to a certain benefit. Judge Bork in the opinion for the Court held that they were not, thus deciding the only matter which had been briefed and argued. Having decided the case in an opinion for the panel on the only question before him, Bork proceeded to write a separate opinion, concurring with himself, declaring that even without the savings clause, the employees would not have been entitled to the benefit in question. In short, he was so anxious to make law on this subject that he proceeded to decide a case and write an opinion on a matter which nobody had presented to him. If there is a parallel situation in contemporary law of remarkable judicial outreach, I am unacquainted with it.

Another illustration of extreme policymaking is McIlwain v. Hayes, 690 F.2d 1041 (D.C. Cir. 1982). In the Food Coloring Act of 1960, Congress instructed the Food and Drug

Administration to require concerns which put color additives in food to demonstrate within two and one-half years that the color additive was harmless. The legislative history shows that Congress was concerned that without some such requirement, food processors might go as long as twenty years without ever insuring that an additive was harmless. In McIlwain, Bork upheld an FDA extension which by that action is lasting for twenty-two years to a concern that used red dye No. 9, which the National Cancer Institute regards as a carcinogen. Under the Bork opinion, despite a very clear statute, the general public will continue to eat red dye No. 9. As Judge Mikva said in his stinging dissent, "The majority has ignored the fact that Congress has spoken on the subject and allows industry to capture in court a victory that it was denied in the legislative arena."

In the case just cited, Judge Bork's opinion nullifies an important act of Congress. In Jersey Cent. Power & Light Co. v. FERC, 810 F.2d 1168 (D.C. Cir. 1987), en banc, he does the same thing to a well established legal precedent. There has been no topic more hard fought since at least 1890 than the establishment of the constitutional standard for determining utility rates. This subject was finally laid to rest with long-acknowledged procedures for determining what should be a "just and reasonable rate." In this case, a power company had lost $397 million on an abortive nuclear plant. The question was what rate consequence this should have. The Federal Energy Regulatory Commission allowed the company to receive back its investment, but did not allow it to receive a return on that investment; in other words, it could recoup its loss but not make money on it. In so doing, the Commission followed long practice that there should be no returns on utility property which was not "used and useful," and this was neither. Under the Bork opinion, all that case law was swept aside. In form this was merely a procedural ruling remanding the case for further hearing, but unless the "used and useful" formula is abandoned, there is nothing to hear. The result is that consumers will take it in the pocketbook by Judge Bork's opinion, which opens the way to converting a utility plant which never operated into a profit making investment. Bork thus shifts all risk of loss to the consumer, a striking case of judicial activism in the light of forty years of precedent.

As is well recognized from his nonjudicial pronouncements, Judge Bork wants to write the Sherman Act out of existence. He got a chance to take a long step in that direction in Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986), a case in which a national van line terminated independent agents who did not transfer their independent operations to separate and distinct companies when the national line demanded that they do so. Judge Bork held that even though this was a boycott, it was not an antitrust violation because the boycott "increases efficiency." Doubtless nothing was ever any more efficient than the original Standard Oil Company monopoly created by John D. Rockefeller, Sr. which caused the passage of the Sherman Act in the first place. As Judge Wald's opinion shows, Judge Bork is writing his extremely limited vision of the Sherman Act as expressed earlier in his life into court decisions. When small businessmen can be boycotted by national concerns in the name of "efficiency," judicial activism reaches a remarkable height.

Two other illustrations demonstrate the scope of the Judge's activism in the constitutional field. In Lebron v. Washington Metropolitan Area Transit Authority, 749 F.2d 893, and see particulary 898, (D.C. Cir. 1984), Judge Bork wrote an enthusiastic though obvious free speech opinion holding that the D.C. Transit Authority, if selling space for ads, could not refuse to accept ads critical of President Reagan. Presumably any court in the land would have come to this fairly obvious conclusion. He extols the rule that there cannot be "prior judicial restraint" of political speech, a concept which took its firm place in our law in the famous opinion of Chief Justice Hughes in Near v. State of Minnesota, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931). The rule against prior restraint as there announced by the Chief Justice has been repeatedly adhered to and is one of the real bulwarks of the First Amendment jurisprudence.

The remarkable feature of Judge Bork's opinion is that having extolled the Hughes rule against prior restraint, he then proceeds to knock it in the head. He writes, "In extreme situations prior judicial restraint on the basis of falsity may be appropriate." There is no credible authority for this proposition because there is none. The speech involved in Chief Justice Hughes' great opinion was probably false. The great Chief Justice gave us the rule that it was more important to let speech come out and either counter it or argue later about the legal consequences of its inaccuracies than to tie speakers up with injunctions. With his casual and nonsupported phrase about "extreme situations," Judge Bork strikes at the vital heart of the free speech concept.

Probably the best known example of Judge Bork's extremism is Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984). The issue there was whether the Navy could exclude homosexuals, and the answer is an obvious yes. Under well established regulations and law, the court could easily reach a unanimous result. Judge Bork chose the occasion for a wholly gratuitous discourse on all of the Supreme Court's privacy opinions of the last twenty-five years, criticizing the Supreme Court as "unprincipled." Nothing could better illustrate the difference between Judge Bork and Justice Powell than the fact that Justice Powell at the Supreme Court level took the opposite view in the privacy cases denounced by Judge Bork. As the concurring judges said, it is not the proper function of the lower federal courts "to conduct a general spring-cleaning of constitutional law. Judicial restraint begins at home." Judge Bork obviously does not think so.

Minorities

In situations involving minorities, Judge Bork's opinions are too diverse to permit much generalization. I do not take into account here the eight cases in which Judge Bork joined in the opinion of some other judge which have been presented in his behalf as illustrations of decisions favorable to minorities nor do I take into account the eighteen other decisions in that area in which sixteen of Judge Bork's conclusions were adverse to minorities or women; these comments are restricted to published opinions by him. There is only one single integrating factor: one way or another, the minorities regularly and routinely lose. A rapid-fire series will show both the diversity of the cases and the integrating factor. In National Latino Media Coalition v. FCC, 816 F.2d 785 (D.C. Cir. 1987), a statute says that the FCC can have lotteries for telecommunications licenses but must give significant preferences to minority owners. The FCC announced that it would use the lottery but would not give the preference where applications were substantially similar. The Latin American Media Group challenged the validity of this rule; the Court, in an opinion by Judge Bork, refused to decide the case.

Judge Bork also rejected a challenge by a black group that the FCC's broadcast renewal application procedures were discriminatory. Black Citizens for a Fair Media v. FCC, 719 F.2d 407 (D.C. Cir. 1983). The FCC decided against that group and Judge Bork's opinion affirms.

Finally, in ICBC Corp. v. FCC, 716 F.2d 926 (D.C. Cir. 1983), the question was whether a black-oriented AM radio station should be allowed to expand into the night time to give more minority coverage. This required an exception to an FCC regulation which the FCC denied and Judge Bork's opinion affirmed.

The problem of fairness in the administration of the criminal law is acute in the District of Columbia where there are both many crimes and a large black population. In Carter v. District of Columbia, 795 F.2d 116 (D.C. Cir. 1986), a black man and woman were sitting in a car in front of the woman's house when secret police, wholly unmarked, threatened them, shot at them, captured them, did them physical violence, and cursed them with racial epithets. Both persons were taken to jail. The unmarked men were, in fact, members of what is known as the District of Columbia "Rip Team." The arrests were made without probable cause and all charges against the man and woman were dismissed.

The claim in the case was for damages against the police and specifically against the District of Columbia. To collect such damages, the plaintiff must show that there is a "municipal policy or established custom of deliberate indifference to police misconduct." The evidence showed death of another prisoner in 1983 by a police "choke hold" while in custody; seven other deaths in a two-month period by police action; another episode of kicking a handcuffed suspect; another for hooking a belt around the neck of a prisoner and taunting him. The chief of police declared he was unaware of between thirty and fifty civil suits against him. He had administered either the most modest or no discipline in the cases mentioned. In another cluster of twenty-six cases in which the appropriate police board had cited twenty-six officers for using weapons unjustifiably, the chief took official action against only one officer and merely reprimanded the others.

Judge Bork looked at all the evidence, found it "disquieting" but of no legal consequence, and holding that there was no "established custom of deliberate indifference in police misconduct," approved a directed verdict against the plaintiffs.

Another way to skin the cat is to hold that for one reason or another a given case cannot be decided. National Latino Media Coalition, supra, 816 F.2d at 785 is of that type. Judge Bork frequently finds that cases cannot be decided where other persons might come to the opposite conclusion. An illustration is Haitian Refugee Center v. Gracey, 809 F.2d 794 (D.C. Cir. 1987). This was a challenge by a nonprofit membership corporation organized to assist Haitian refugees stopped at sea by United States vessels. Judge Bork held that the plaintiff group lacked standing to challenge this policy and that, therefore, the issue could not be decided on its merits. He held that to have standing the plaintiff must show "both" the "purpose of the law or government action was to prevent the relationship between the litigant and the third-party and a convincing demonstration of a 'substantial probability'" that the relationship would otherwise exist.

Judge Edwards wrote a sharp dissent demonstrating that the Government had stopped 1800 refugees and barred every single one of them. The plaintiff organization had aided or worked with 20,000 Haitians. Whatever the merits of the case, there would appear to be clear standing within the rule of Havens Realty Corp. v. Coleman, 455 U.S. 363, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982), which upheld the right of an independent group to sue a real estate company for blocking black housing.

Nuclear Safety

The use of limitations on which case will be decided is, of course, not restricted to minority situations. Judge Bork is not inclined to extend himself much in favor of nuclear safety, and the standing doctrine was a handy tool in Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983). This was an application by a Massachusetts nuclear power company to have a restriction on its license modified. The issue before the Court was whether the Attorney General of Massachusetts was a "person whose interests may be affected" so that he could intervene in the proceedings in behalf of the people of Massachusetts and express their point of view. Judge Bork's opinion holds that the attorney general should be excluded because there is insufficient interest in behalf of the people of the state to permit him to participate. As Judge Wright's dissent points out, there had been a series of safety breakdowns in the plant over a period of two and one-half years and "the plant had been operating far below those safety levels that the Commonwealth of Massachusetts and its residents had a right to expect." Yet the agency and Judge Bork held that there was no public interest in letting the people be heard.

The most remarkable of Judge Bork's nuclear safety opinions also does not involve minorities or standing but is included here simply to wind up the topic just mentioned. In San Luis Obispo Mothers for Peace v. NRC, 789 F.2d 26 (D.C. Cir. 1986), the Court, en banc, dealt with the regulations issued by the Nuclear Regulatory Commission after the Three Mile Island accident had shown that very serious nuclear accidents could happen. These were emergency regulations -- i.e. regulations on how to deal with emergencies and what precautions needed to be taken in respect to them -- and the NRC included the possibility that a Three Mile Island type accident might coincide with a severe blizzard or a hundred year flood; but it excluded any consideration of earthquakes. The El Diablo nuclear plant in California is three miles from the Hosgri fault area in that state. Judge Bork's opinion affirmed an NRC ruling that the emergency regulations need not take an earthquake into account. Judge Wald's dissent for four of the nine judges is extremely persuasive.

Communication and Speech

Finzer v. Barry, 798 F.2d 1450 (D.C. Cir. 1986), represents Bork's most meditated judgment on free speech. Of Judge Bork's opinion in this case, Judge Wald's dissent, page 1478, said, "Substantial restrictions on free speech" in the Bork opinion "present risks to our basic freedom more deadly than any terrorists' blows." The case arose under a District of Columbia ordinance which prohibited hostile picket signs within 500 feet of an embassy (in this case Nicaragua) and also prohibited groups from congregating within 500 feet of an embassy when ordered to disperse. The issue was not whether picketing or congregating near embassies can be prohibited; as a matter of international law, it clearly can. The vice in this ordinance is its permission to the police to make the judgment that this picketing is "hostile" and that is not; that one group must disperse and that another can stay to applaud. In short, the ordinance gives the police extraordinary authority to decide who can communicate and where.

To uphold such an ordinance takes an extraordinary restriction of First Amendment freedoms because, as the dissent stresses, this "a content-based restriction." Our free speech law has been very emphatic in putting strong limits on content-based restrictions.

The prior restraint (Lebron, p. 4, supra) and embassy cases are two of the most restrictive free speech opinions in any court since 1930.

Another significant speech case is Telecommunications Research and Action Center v. FCC, 801 F.2d 501 (D.C. Cir. 1986). The language at page 508 of that opinion clearly shows that if Judge Bork gets the power as a Supreme Court justice to do so, he will junk the rule that radio and television must allow reasonable access for use of a broadcasting station by legally qualified candidates for federal elective office. He is very clear they will be allowed to monopolize the media to express only the viewpoints which their owners desire. He sharply criticizes those cases declaring that broadcasters have a fiduciary duty to the whole public and not simply to their own interests. Again, this is a very extreme form of judicial activism; Congress has been emphatically clear on the sharing principles and Judge Bork simply disagrees with them.

A possibility that economic power may control communication even that the public may be deluded as to who is sending the messages does not trouble Judge Bork. An extreme illustration is Loveday v. FCC, 707 F.2d 1443 (D.C. Cir. 1983). The case arose from an initiative campaign in California directed at tobacco interests, and the organization which was conducting the anti-initiative campaign was 100% paid for by the tobacco industry. Nonetheless, the FCC did not require identification of who was sponsoring the messages, although its regulations and statutes would appear to require this. Bork's decision for practical purposes nullifies the right of the public to know who is behind the propaganda they receive.

Miscellaneous

Bork is a paradox on a number of issues. For illustration, as a judge who is said to be anti-abortion, Bork wrote the opinion upholding a requirement by the American Cyanamid Company that women could not work in certain branches of its operation unless they first accepted sterilization. This was because the chemicals in that part of the operation were dangerous for childbearing. The issue was whether this requirement violated the Occupational Safety and Health Act. The company kept on the job only those women who chose to be sterilized. The statute requires that employers furnish a place of employment free from "recognized hazards" that might cause "serious physical harm." Bork had no trouble with holding that the way to make the plant safe was to deprive women of their childbearing capacity; Oil, Chemical and Atomic Workers Intern. Union v. American Cyanamid Co., 741 F.2d 444 (D.C. Cir. 1984).

Though Bork has had realistic legal experience, he is, at times, extraordinarily impractical, either taking no account or being indifferent to the realistic consequences of his actions. For an illustration, one of his opinions upholds a Federal Trade Commission order prohibiting certain cigarette advertising as false and misleading. However, the opinion rejects another part of the order requiring prior FTC approval of certain advertising as to the truth or content, thus exempting the companies from the necessity of demonstrating the truth of their assertions. This is done on a kind of a mechanical theory that the FTC has the burden of proof. It ignores the realistic fact that the FTC does not have the staff or capacity to check every assertion about tar content which a company may wish to make, while the company has the information as to what it has put into its product. On the other hand, this may simply be part of a spirit which wishes to nullify public health and safety regulations; FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35 (D.C. Cir. 1985).

In a criminal case in which Judge Bork gave a particularly mechanical implication to the question of whether an early ruling in the matter had become "law of the case" at some later stage, half of the entire Court felt that the decision was wrong. The case is a good example of dealing with criminal matters as though they were simply puzzles or games and not problems of individual responsibility and individual liberty; United States v. Singleton, 763 F.2d 1432 (D.C. Cir. 1985).

Conclusion

There have been, after all, only about a hundred opinions and many of them are routine; the District of Columbia Court of Appeals has a very special jurisdiction. The only labor case off the beaten track, Restaurant Corp. of America v. NLRB, 801 F.2d 1390 (D.C. Cir. 1986), involved the question of whether an employer was discriminating in applying his own restrictions against solicitation on plant property. The two employees were disciplined for making union solicitations, whereas six social solicitations for various events were found by Judge Bork to be outside the rule. The social solicitations, he concluded, cause an "increase in employee morale and cohesion"; apparently union solicitations do not, an incidental revelation of Judge Bork's values. There is a strong dissent.

It is possible to evaluate Judge Bork's judicial work in terms of another set of values. Pull together his whole career as a judge and it is a remarkable void: the life of no average American who works for a living, or his family, is better, richer, happier, safer or in any way more secure because of Judge Bork's opinions in his years of judicial service. Judge Bork would not think this relevant to the decision now before the country. A reasonable citizen might disagree with him.

What emerges from so small a sample cannot be a full picture, but some clear delineations appear. Judge Bork not only has no passion for freedom of speech, he is the most restrictive writer in this field in many years. He is sharply restricting the Sherman Act. He does not perceive minority problems.

Most important, he is an extreme judicial activist, a loose cannon where care is required. He regards it as his proper function and duty to make law, either precedents or Acts of Congress notwithstanding. In a profoundly intellectual sense, he is a profoundly willful man.

John P. Frank
September 23, 1987

Appendix A

Statement of Senator Howard Baker
May 15, 1970
On Policy Considerations
In Supreme Court Confirmations

Mr. BAKER. Mr. President, I commend the distinguished junior Senator from Kentucky on his excellent discussion of the role of the Senate in the exercise of its constitutionally mandated function to advise and consent to the nomination of a Supreme Court Justice. I believe that Senator COOK has demonstrated great diligence in his efforts on the Judiciary Committee and on the Senate floor on questions involving recent nominations.

As we all are aware, four of the last six nominations to the Supreme Court that have been submitted to the Senate by Presidents Johnson and Nixon have become embroiled in serious controversy. Throughout this period of time there has been considerable discussion as to the role of the Senate in the performance of its advise and consent function. Dispute has arisen with regard to the limits of authority of the Senate in confirming or rejecting a nomination of the President.

Of course, the Constitution provides that it is the right and duty of the President to submit to the Senate a nominee of his choosing. If the Senate believes that it is not wise or advisable that a nomination be confirmed it has the constitutional responsibility to reject the nominee. For the Senate to do otherwise would be an abdication of its constitutional responsibility, a responsibility that was intended to be real, not nominal or apparent.

I believe that it is important that we consider in conjunction with the remarks of the junior Senator from Kentucky the underlying reasons for the failure of the Senate to confirm the nominations of Fortas, Thornberry, Haynsworth, and Carswell. In rejecting these nominees was the Senate motivated merely by bitter partisan political prejudice? I am sure that some of that was present with regard to each of the nominations.

Was the Senate involved with regional or sectional prejudice? I am sure that some of that was involved, but it was not determinative.

I respectfully submit that they were not the underlying reasons. There is one other reason that is of even greater importance.

I believe that it is clear that in recent years the Supreme Court has demonstrated a spirit of activism and has at times competed for the role of the legislative branch of our Government. Supreme Court decisions have altered our country's course and have directly affected the way that each of us lives. In this situation I do not find it surprising that the Senate, in the exercise of its advice and consent power would carefully scrutinize the men who have been nominated to sit in judgment on decisions that directly affect the life of every American.

In making a careful examination of each nominee, I do believe, however, that we must take great care to avoid political and regional bias and to avoid the application of double standards.

May I be so bold as to suggest that if the Supreme Court has moved into the area of social conduct with greater activism, then the Court, I happen to think, has inadvertently assumed the role of at least a quasi-legislative department of the Government.

I think it is not unlikely, nor even unreasonable, that the Senate of the United States as one of the departments of the legislative branch should then consider the nominees for that Court and that branch of the Government in a little different way than it has in the past.

We tend, I believe, to view nominees to the Supreme Court now as at least quasi-legislators rather than as judges.

I once again reserve the right to say whether that is good or bad, as the case may be. I do not say whether that is good or bad, but I suggest that it is an underlying and principal reason for the way in which we in the Senate now view the nomination of any man for the Supreme Court of the United States.

I think it is important that the Senate carefully consider the consequences of reviewing nominees on some basis other than the Haynsworth test advocated by the Senator from Kentucky. Viewing the court as quasi-legislators is undertaking a most ambitious task, because it is sailing them free of any fix on any star. It has laid aside precedent, the implied mandate of the Constitution itself, and has taken on the responsibility of judging whether a nomination is right or wrong.

I suggest that that test is one that does not devolve on the judiciary, who under the rule of law, judge on the theory of stare decisis, and on precedent. When the Senate begins to judge on something other than rule of law or precedent and starts to judge whether it is desirable or undesirable that a person sit on the Supreme Court in terms of probable legislative, quasi-legislative or sociological impact, we have taken on a great task indeed. It may be that the Senate is capable of discharging that responsibility but I think it is imperative we know what we set about because it is urgently important that we provide men of competence and ability to sit on the court, and that we recognize that if we are to exercise the great undertaking of judging rightness or wrongness of a nomination on some basis or other than the rule of law, we must comport ourselves on the same basis, and I respectfully suggest we have not.

I commend the distinguished Senator from Kentucky. I have said privately and I now say publicly that if I were called upon to choose the most effective Members of the Senate, I would include him in that number. I thank the Senator for yielding.

The **Chairman**. Thank you.

Senator Thurmond.

Senator **Thurmond**. Mr. Chairman, Fred Foreman, president-elect of the National District Attorneys Association is here and, on account of the shortage of time, he may not be able to testify and I ask permission to put his statement in the record.

The **Chairman**. Without objection, it will be placed in the record.

[The statement of Mr. Foreman follows:]

TESTIMONY

OF

THE HONORABLE FRED L. FOREMAN, PRESIDENT- ELECT
THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION

BEFORE

THE SENATE JUDICIARY COMMITTEE

FRIDAY, SEPTEMBER 18, 1987

WASHINGTON, D.C.

MR. CHAIRMAN, the 7,000 state and local prosecutors represented by the National District Attorneys Association appreciate the opportunity to appear before this committee on this momentous occasion to testify in favor of the confirmation of Judge Robert H. Bork as Associate Justice of the Supreme Court of the United States.

The inordinate publicity, and in some instances near hysteria, surrounding the nomination of Judge Bork as an Associate Justice of the Supreme Court, threatened to severely obscure the crucial question that this body was obliged to address; that is, does Judge Bork have the professional integrity, substantive qualifications, and judicial temperament to sit on the highest court in the land?

An ideal Supreme Court nominee should possess certain credentials: practical experience as a lawyer, experience in the public sector, outstanding academic credentials, and judicial experience. These hearings have established that Judge Bork fits this ideal profile extraordinarily well. He was a renowned law professor at Yale Law School where he occupied two endowed chairs. He was a highly successful litigator in a well-known law firm. He performed with distinction as this nation's Solicitor General. For the past five years Judge Bork has built an impressive record as a judge on the U.S. Circuit Court of Appeals for the District of Columbia.

Judge Bork's career as a judge shows without question that he is within the mainstream of judicial thought in this country. This past week's testimony produced uncontroverted statistics which show that he has voted with the majority in 94% of the 426 cases on which he has had occasion to sit during his judicial career. In fact, Senator Simon, Judge Bork has agreed with the distinguished jurist from Illinois, Judge Abner Mikva, in 82% of their opinions. You have also heard uncontroverted statements that NONE of Judge Bork's majority opinions have been reversed by the Supreme Court. In fact , NONE of the 401 majority opinions authored or joined by Judge Bork has been reversed by the Supreme Court. I would submit to the members of this committee that this is the uncontroverted record of a distinguished mainstream jurist, not a right wing extremist who would return us to some of the darker, less proud days in our history.

Judge Bork's writings, as well as his testimony before this distinguished panel, also reflect that Judge Bork follows a judicial philosophy that dictates adherence to the words of the statutory or constitutional provision before the court. This approach subordinates a judge's personal policy and philosophical preferences, conservative or liberal, to the values and rules that can be drawn fairly from the statutory or constitutional provision being examined. I would submit to you that this approach demonstrates quite clearly a philosophy of judicial restraint and integrity. Testimony before this committee should have convinced everyone who listened that Judge Bork possesses the self restraint to resist the powerful temptation to substitute his own view of wise public policy for that laid down by our elected representatives.

It is also clear that Judge Bork is acutely sensitive to the appropriate separation of powers between the federal and state governments, as well as the separation of powers between the branches of the federal government.

Judge Bork has withstood the intense scrutiny of this committee. He is extraordinarily well qualified to become an associate justice of the highest court of this country. We have seen revealed, Senator Heflin, a man who will balance society's need for law and order with individual rights and personal freedoms. We have, indeed, seen revealed a man who is neither predisposed nor committed to turning back the clock on individual equality and personal liberties. Judge Bork has the proper respect for the principle of stare decisis and will not engage in a "result-oriented rush to a predetermined outcome." The hearings have proved that Judge Bork is intelligent but not an ideologue or zealot; who is principled and without prejudice; who is competent but not close-minded; who is, deferential to the jurisdiction of elected bodies.

We are convinced, Senator Heflin, that Judge Bork is acutely sensitive to the fact that "judicial opinions have real consequences for real people;" that the Supreme Court is "the peoples court" and deals with their rights, liberties, property, and their means of redress and resolution of conflicts.

We agree, Senator Heflin, that these hearings are about JUSTICE; about the rights of individuals and the rights of society as a whole. We are convinced that Judge Bork shares your view that the very essence of justice is EQUALITY UNDER THE LAW.

The National District Attorneys Association is proud to join the American Bar Association, former President Gerald Ford, Elliott Richardson, and many other distinguished Americans in their support of Judge Bork's confirmation.

We urge that you vote to confirm this distinguished jurist as Associate Justice of the Supreme Court of the United States.

Senator THURMOND. Governor Thompson, we are glad to have you here.

Mr. THOMPSON. Thank you.

Senator THURMOND. We are glad to see you again and hope you and your lovely wife are doing nicely.

Mr. THOMPSON. Thank you, sir.

Senator THURMOND. I want to ask you this question. I am not going to take a lot of time. You know Judge Bork, you have dealt with him. Does he have the character, the courage, the capacity, the compassion, the judicial temperament and the professional competence to be a U.S. Supreme Court Judge?

Mr. THOMPSON. In my view, he does, Senator.

Senator THURMOND. Do you know of any reason why this committee should not recommend his confirmation? Is there anything against him from any standpoint, personal or professional that you know of, that should deprive him of being on the Supreme Court?

Mr. THOMPSON. No, sir, unless you believe that you must cast a vote based on whether or not you always agree with the nominee on a particular result on a particular case, and none of us ever do that.

Senator THURMOND. You heard Mr. Lloyd Cutler testify here this afternoon——

Mr. THOMPSON. Yes, sir.

Senator THURMOND [continuing]. Who was counsel to President Truman, who characterized himself as a liberal Democrat, and he has answered questions on almost every facet that has been brought out here, first amendment and all the rest of the issues, and he feels confident, according to his statement, that the Judge would make a good Judge on the Supreme Court of the United States. Do you agree with that?

Mr. THOMPSON. Yes, sir, and I will tell you what I told Lloyd Cutler, is if I ever got in trouble he would be my lawyer in the Supreme Court.

Senator THURMOND. Do you feel he would be fair and reasonable and do justice under the law if he was appointed to the Supreme Court, if he is confirmed for the Supreme Court?

Mr. THOMPSON. Yes, sir.

Senator THURMOND. Now, Mr. Frank, how long have you known Judge Bork?

Mr. FRANK. I have never met Judge Bork.

Senator THURMOND. You have never met him?

Mr. FRANK. I do not know him.

Senator THURMOND. Who do you think is in a better position to judge him, Governor Thompson, who worked with him closely, Chief Justice Burger, who knows him and worked with him closely, and also Lloyd Cutler, who has worked with him closely? Who do you think is in a better position to judge him, those three people or you?

Mr. FRANK. Senator, I believe that the only judgment I can give you is one based on reading every opinion of Judge Bork I can find, and I have carefully tried to say that I am necessarily immune to his personal charm. I have never met him and I understand him to be a lovely fellow. I know only his intellectual output, and my judgment is limited to that.

Senator **Thurmond**. Well, if you did not know anything about him at all, after hearing those three people testify, do you not have confidence in them? You know Justice Burger, do you not?

Mr. **Frank**. I have the——

Senator **Thurmond**. You know Mr. Lloyd Cutler, do you not?

Mr. **Frank**. They are close friends and we have worked together, Lloyd and I are colleagues, on certain——

Senator **Thurmond**. If you did not know him at all, would you not be willing to take their opinions about him, since they know him well, and Governor Thompson, who knows him well?

Mr. **Frank**. Senator, if I had not read the opinions of Judge Bork, I might support him, too.

Senator **Thurmond**. Well, do you not think, after hearing Mr. Cutler talk this afternoon, that you might maybe ought to go home and reflect on the matter, that you might change your mind? [Laughter.]

Mr. **Frank**. Senator, may we josh a little together. You have been very kind to me over the years and——

Senator **Thurmond**. Well, I do not have any other questions.

Mr. **Frank** [continuing]. I will say that Mr. Cutler did speak to me about this matter in advance and I can only wish that I could persuade him.

Senator **Thurmond**. Thank you very much.

The **Chairman**. Senator Metzenbaum.

Senator **Metzenbaum**. Governor Thompson, I was interested in your comments that you would have confidence in Judge Bork if he were to go on the Supreme Court. You know that almost every major women's organization in the country, every civil rights organization in the country has come out against his confirmation.

Mr. **Thompson**. Yes, sir.

Senator **Metzenbaum**. Do you think, if you can put yourself in the position of a woman and knowing of Judge Bork's writings, his speeches, his decisions, do you think if you were a woman you would have confidence if Judge Bork went on the Supreme Court?

Mr. **Thompson**. The short answer is yes, sir, but it should be elaborated, I think. You and I are both politicians and we have run for office and we have very diverse constituencies. Our States are much alike. For every women's group who has opposed Judge Bork, I could probably find you a women's group subscribing to different philosophies who would support Judge Bork.

I went through a terrible time in my reelection campaign in 1982 because, although I was a supporter, a fervent supporter of the Equal Rights Amendment and did my best to get it ratified in Illinois, my running mate was not, he was opposed to it. We had a three-fifths rule in both the Senate, which was Democratic, and the House, which was Republican, for ratification. I got blamed by the women's groups supporting ERA for the inability of the legislature to pass the amendment, even though as the Governor I had nothing to do with the process and I got picketed everywhere by women's groups, including the wife of one of my cabinet members who picketed the Governor's mansion, and the leading feminist in my family was then 4 years old and she charged up to the fence and she said, "You ought to get out of here, you're bothering my daddy and he can't work." She has modified her views since she became 9. [Laughter.]

But even women are divided on this, sir, and I do not think they can be characterized.

Senator **Metzenbaum**. You said that women's groups are divided.

Mr. **Thompson**. Yes.

Senator **Metzenbaum**. I said that I didn't know that women's groups were divided. Would you tell me which national women's group has come out for Judge Bork's confirmation?

Mr. **Thompson**. Well, I think the Eagle Forum would support Judge Bork.

Senator **Metzenbaum**. Come now, the Eagle Forum is a right-wing extreme group. Let us talk about some women's groups as such. I mean let us talk about the National Organization of Women, let us talk about the National Association of Women Lawyers, let us talk about some of the women's groups who do not identify themselves as Republicans or Democrats. Can you tell me any of those that have come out for Judge Bork?

Mr. **Thompson**. Well, I think in fairness, Senator, most of the organized women's groups have opposed Judge Bork's nomination, but that is not the same thing as saying that all women would oppose Judge Bork's nomination, because most women are not organized into political action groups.

Senator **Metzenbaum**. I understand that and I do not mean to suggest that the telephone calls that I am getting at my office do not indicate that there are indeed many women who support Judge Bork's confirmation. But it is my perception that there are a larger number who oppose it, but that may only be my opinion.

Let me ask you, if you were black, would you think that you would be that comfortable with Judge Bork on the Supreme Court, in view of the fact that he has time and time and time again criticized Supreme Court decisions and come out publicly to indicate his taking issue with laws having to do with public accommodation, poll taxes, one man-one vote, and many other issues. Do you think that as a black you could see yourself supporting him? Second, do you know of any groups that speak for minorities in this country that have come out for his confirmation?

Mr. **Thompson**. First, Senator, I am not sure I could always precisely put myself in the position of a black person. I think that is a unique experience. I heard my friend, Prof. John Hope Franklin, testify and, frankly, his testimony was chilling, although I do not know that the experiences that he endured in his life could be related to Judge Bork.

I know black police officers and black prosecutors who have supported and do support Judge Bork, members of the National District Attorneys Association, members of the law enforcement groups who testified here the other day, 350,000 law enforcement officers in this nation, by the official vote of their groups, support Judge Bork's nomination.

Senator **Metzenbaum**. I noticed that the National Black Police Officers Association was not one of the law enforcement groups that supported him.

Mr. **Thompson**. That is right.

Senator METZENBAUM. Let me have just one more question of Mr. Frank. First, I say it is a pleasure to see you here today and I appreciate your making the trip in.

My distinguished colleague, Senator Thurmond, I think, asked you about how you could have come to the conclusion that your opinion is better than that of Justice Burger and a couple of other people who also have testified. I would ask you whether you heard the testimony of William Coleman, a former Republican Cabinet member, Barbara Jordan, a former Member of Congress, Andrew Young, a former U.N. Delegate, and presently mayor of Atlanta, and whether in view of their testimony you do not feel that your position opposing Judge Bork's confirmation is strongly reinforced.

Mr. FRANK. Senator Metzenbaum, I did hear Bill Coleman, a close friend, I did hear Barbara Jordan and was deeply moved. Let me deviate only for an instant. I did the historical work for Thurgood Marshall in response to the Supreme Court's request in the case of *Brown* v. *Board of Education.* I have been caught up in the civil rights movement in the deepest possible way in some of the most important litigation in the history of the country and, of course, I was captured by what they had to say. I did not hear what Mr. Young had to say.

I cannot simulate or be in the position of a black person, but if I were I would be scared stiff by the possibility of this confirmation.

Senator METZENBAUM. I am sorry, I could not hear you. Would you——

Mr. FRANK. I am sorry. Forgive me for dropping my voice. I am saying that I did hear the testimony to which you refer largely, and if I were a black person I would be scared stiff at the possibility of this confirmation.

Senator METZENBAUM. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. With the indulgence of the three of my colleagues, I will skip to Senator Specter as he has an——

Senator DECONCINI. Mr. Chairman, I hate to object to Senator Specter, but I have got appointments, too, and I think we all do and I only have a couple of short questions and I would object to skipping over four members, in all due respect.

The CHAIRMAN. Well, we will go that side. We will go to Senator Specter and then back to you, as we would anyway.

Senator DECONCINI. Thank you, Mr. Chairman.

Senator SPECTER. Well, the hour is late. Suffice it at this point just to thank Professor Frank and Governor Thompson for coming in.

The CHAIRMAN. Thank you. That takes care of that.

Senator DeConcini.

Senator DECONCINI. Mr. Chairman, thank you. I realize that there are particular important procedures and circumstances for some members here, and my questions are not going to be long but I think we all have those certain times that we have to be some place and I am not going to extend my questions beyond a couple of minutes.

First, I want to thank the Governor for being here and also the president of the National District Attorneys Association, and I wish I had time to ask questions.

Mr. Frank, I do have one question I want to convey to you. I read your testimony and I have talked to you about this subject matter and it concerned me that you could find nothing constructive in any of Judge Bork's decisions, and in that effort I reread a couple of his decisions, one being the *Dronenburg* v. *Zech* case, as I am sure you are familiar with it, and——

Mr. **Frank**. Yes.

Senator **DeConcini** [continuing]. When I read that case a couple of times, I was greatly concerned about what appeared to me to be great judicial activism after he came to the conclusion that the government had the authority to do what it was trying to do there for discipline purposes in national security, and then went on I think for 10 or 11 pages.

I asked Judge Bork about that, because of his position being presented here of being a moderate and nonactivist, and he came back with what I thought was a very appropriate answer. I do not know if you were able to see his testimony, but he said that the reason he did that and the reason he does that in cases, if he does it, is because those cases and examples have been brought to the court in the arguments by the appellants, the appellee and the appellant, and that is why he answered them in the length and the detail that he did.

Now, my questions to you are, first, doesn't that seem to be a valid procedure for a judge? and; second, did you read any of those arguments made in that case or any of his other cases to see whether or not that is accurate?

Mr. **Frank**. Senator DeConcini, I have not read the briefs in *Dronenburg*. The issue in *Dronenburg* is whether the Navy has to have homosexuals in it, and the answer to that question is a clear no. When that question had been answered no, there really was no point except the desire to be an active expounder of a doctrine for Judge Bork to write the book that he did on all the other subjects that he took up.

As a practicing lawyer, I am keenly aware that we advance many arguments and that when some of the cases are decided and those arguments are irrelevant, as they were there, the court does not feel it necessary to address themselves to the irrelevant and extraneous matters.

Senator **DeConcini**. So, would you not agree, Mr. Frank, that judges often do that?

Mr. **Frank**. I would say, Your Honor, that within my personal experience—and I have read thousands of cases—I have never in my life seen an opinion like *Dronenburg*, in which the judge of a court of appeals simply said "and now, while I have the microphone," or the pen or whatever it is, "I am going to tell you what I think about all of the opinions of the Supreme Court of the United States on a number of facts which interest me." That was a perfectly extraordinary exercise.

Senator **DeConcini**. Well, I came to that same conclusion after reading your observation of that case and going back and reading it, and then when I presented it to Judge Bork I was quite satisfied that those points were brought up or he would not say under oath that they were, and then I talked to a number of judges, sitting judges today, about whether or not that is a valid approach, to answer, and almost unanimously they concluded yes, not making a recommendation on Bork or not, and I wondered if you thought that maybe at least in that particular case he was not being an activist, that he could have been truly responding to the arguments that were made.

Mr. **Frank**. I can only say, Senator, that there is no law that says that a judge has to respond to every argument made, and in this case the matter was closed. I rest on the fact that neither you nor I, both of us with long experience, have ever seen an instance like that.

Senator **DeConcini**. I thank you, Mr. Frank.

Thank you, Mr. Chairman.

The **Chairman**. Senator Simpson.

Senator **Simpson**. Thank you, Mr. Chairman.

Mr. Thompson, it is good to have you here. I have come to know you. You are a remarkable leader in the United States and I have great pride to have you here involved in the proceedings and for me to be a member of your party, too. I have been very proud of some of the things you have done. You have been a leader in many causes.

Mr. **Thompson**. Thank you, sir.

Senator **Simpson**. I thank you for coming.

Mr. Frank, I do not know you that well, but I have read your statement. First, I would like to say that there are some women's groups in the United States that are very concerned about this and very pro-Robert Bork, such organizations as the Concerned Women for America, purports to be the largest, 500,000 members, Pro-America, under the guidance of Joan Kuder, and Women for Bork, with Joan Billings. So that is just three, in addition to the ones that were mentioned, so that we just kind of maybe can get away from this prospect of every woman in America being opposed to Judge Bork. It is just not the way it is.

I looked at these remarks of yours, Mr. Frank, and you must have used the word "extreme" on every page somewhere almost. I see why now, you use it a great deal. It is an exaggeration, but it is there a lot. Because as I look at your statement, it seems to me at least to be harsh and hostile, tough, and even—this is my own opinion—mean spirited. I do not know why that is. I do not know what your background is. You have never met Judge Bork, but apparently you do not want to or you would be charmed by him.

You have a remarkable background. You were co-counsel in the Miranda case——

Mr. **Frank**. Yes.

Senator **Simpson** [continuing]. Which has certainly been one that commands the attention of all of us in the United States, and when I practiced law I remember that. So, I have looked at this and it is curious to me that you are the first one now to come before us to say anything about Judge Bork's opinions. I do not know if anyone contacted you to maybe come and speak about his opinions, but that matters not—you are here and you are speaking on his opinions.

The only thing about it all is that it is so funny to me as a lawyer that you talk about his opinions. One judge doesn't reach a decision, you have other judges join you in opinions, and that is the curious distortion of everything you have said. Other people have joined with Judge Bork in these opinions. Would you say that is true?

Mr. FRANK. In every case in which he was in the majority or prevailed, he had at least one other vote, Senator.

Senator SIMPSON. One other vote?

Mr. FRANK. At least one other, and maybe two if it was unanimous.

Senator SIMPSON. But when you are writing opinions, you either get a majority or you do not have an opinion.

Mr. FRANK. Yes, we are together on this.

Senator SIMPSON. I mean I think that is something we would not want anybody to forget here, that Judge Bork did not just write an opinion against all the blacks and women and all of that in the United States. I mean that is a bazaar proposal. You have got some of the finest liberals and conservatives in America on that court, and there are plenty of them, and I did not hear anything about, and I never hear any more about the fact that they have gone through the nonunanimous decisions of this man, that Judge Bork has agreed with or vice versa, his liberal colleagues have either agreed with him or he with them, Ruth Bader Ginsburg, 91 percent of the cases, Patricia Wald, 76 percent of the cases, Skelly Wright, 75 percent of the cases, Abe Mikva, 82 percent of the cases, and Harry Edwards, 80 percent of the cases, and that is a fact.

So, every time you have brought up one of these statements in your own way in this forum saying that he is not a big or a fast producer, and there is a real question about his ability to cope with the Supreme Court workload, no one has testified to that before and you do not know him, so that is very curious.

Mr. FRANK. I would be glad to respond if you care to have me.

Senator SIMPSON. Yes, I would. I surely would.

Mr. FRANK. May I make a preliminary comment? I am sorry you find my analysis mean spirited. I must say in response that, while you do not recall it, we have dealt together from time to time on matters before this committee and you have always been wonderfully gracious and helpful and I feel indebted and thank you very much, and I am sorry that my reading of the cases does not give you a similar feeling simply of style.

On the matter of the 75 percent of the cases, we all understand as lawyers that roughly 75 percent of the cases are going to go one way or another, almost regardless, that is to say they are going to be affirmed or reversed, open and shut. The bulk of them are. The friction arises as to those marginal cases, the other quarter in most intermediate appellate courts because they are not selecting their docket and the bulk of the stuff is routine.

With precise regard to the workload, if you look at the statistics of the District of Columbia Court of Appeals, you will find that until a few months ago Judge Bork was in fact a consistent low producer. Your staff can give you those numbers, not a bottom producer. Another judge, whose name I need not mention, is worse. But he has been a low producer, for whatever reason, so that my statement is accurate.

What he did in the few months since his name has been before the country has been to do an enormous flushing out job and gotten out a great number of opinions, and it is a good thing to do, because if he is going elsewhere he should leave a clean desk. But the figures are as I tell you, sir.

Senator **SIMPSON**. Well, we want to see those and I am not aware of anyone commenting on that before.

Mr. **FRANK**. But I looked at this more thoroughly. If I may, on the other point, the other comments, I believe I am the first witness you have had, although I am less than certain—you heard them all and I did not—who has looked closely at all of the opinions.

Senator **SIMPSON**. No, I am not commenting on that. I am commenting on statements like "Judge Bork makes law as though precedent were meaningless and the Congress were in permanent recess," that is a quote——

Mr. **FRANK**. Yes, I stand on that sentence. That is a pretty good sentence.

Senator **SIMPSON** [continuing]. And the general public will continue to eat Red Dye No. 9.

Mr. **FRANK**. And it is doing so under his decision.

Senator **SIMPSON**. Striking act of judicial activism—I want to share with you, if I may, and I ask the chairman, I defer to Senator Specter and he can jump there, and he said I could have a couple of extra minutes here, because I really want to develop this. The counsel——

Senator **METZENBAUM** [presiding]. I just want to say to my colleague that we have a roll call on and two other members want to be heard and I thought that the Chair wanted to finish about 6 and it is 10 to 6.

Senator **SIMPSON**. That is the limitation, but I want to put in the record the statement of the counsel in the New Jersey case that you cited here, because you said the result is that consumers take it in the pocketbook by Judge Bork's opinion, and I think that is a harsh statement, because here in the Washington Post, on September 22, is a letter to the editor from the counsel in that case: "The precise issue before the court was only a procedural one. The challenge was there. Judge Bork ordered the FERC to afford Jersey Central a hearing on its allegations, and that is all that Judge Bork's decision required FERC to do. The hearing that was ordered has not been held, hence consumers have not yet been billed one nickel because of Judge Bork's decision, much less than $400 million."

[Article follows:]

Washington Post 9/22/87

■

On Sept. 15, People for the American Way ran a full-page ad in The Post which contained the following description of one of Judge Bork's decisions: "Billing consumers for power they never got. Judge Bork supported an electric utility that wanted consumers to pay for a nuclear power plant that was never built. Thanks to Judge Bork, consumers got a bill for $400 million."

I represented Jersey Central in that case, an appeal from an order of the Federal Energy Regulatory Commission. The facts are.

1) It has long been an established principle at FERC that consumers must pay for prudent investments in power plants that are not completed. Thus there was never any issue before Judge Bork over whether consumers had to pay for the investment in the plant; there was and is debate over whether consumers should pay a "return" on this investment during the time that the consumers pay for it.

2) The precise issue before Judge Bork was a procedural one: Jersey Central had alleged that it needed the rate level requested in order to maintain its financial integrity. FERC denied Jersey Central's rate level request without a hearing. Judge Bork ordered FERC to afford Jersey Central a hearing on its allegations, and that is all that Judge Bork's decision required FERC to do.

3) The hearing that was ordered has not yet been held, hence consumers have not yet been billed one nickel because of Judge Bork's decision—much less $400 million.

Let us hope that the debate on Judge Bork can be resolved on accurate facts—not the type of distortion evidenced by this example.

LEONARD W. BELTER
Washington

Senator SIMPSON. I mean if we are going to go for precision, and that is the touchstone of our profession, then let us keep with that. The Sherman Act, out of existence. Not one person has ever come in here and said that. He wrote the book on antitrust.

Mr. FRANK. Well, it is a tombstone book, Senator. I would stand on that.

Senator SIMPSON. That is fine. You can stand on those things, but I get to have a little time, too. One way or another——

Senator METZENBAUM [presiding]. In fairness to the Senator from Wyoming, there is a roll call on and I have got to cut you off and I do not mean to be rude at all.

Senator SIMPSON. No, you never have been. When you say you cannot do people that way, and that was your quote, "you can't do this guy that way," either, sir, that is not the way we do it.

Senator METZENBAUM. Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

I did note on the slowness issue that was raised in the report of the ABA witnesses and they said they considered those reports in arriving at their evaluation. My good friend from Wyoming has been complaining all day that no opponent has testified on Judge Bork's judicial record. I would hope that he is not changing his views on that. We have had testimony here on his record.

Governor Thompson, I am glad to see you. I am glad to see the president of the National DA's Association. I want to mention that at one time I was in line to become president of the National DA's Association and gave up the power of that position to the security of the Senate, in on the year that I would have been next in line. I have always questioned whether that was a wise decision or not.

Let me just put two very quick questions, one to you, Governor. There is not a great deal in Judge Bork's record about criminal justice. He has not written a lot about it. Do you have a strong feeling of what there is in his record that might affect the Supreme Court in the criminal justice area?

Mr. THOMPSON. I think his record is one of common sense opinions, with a willingness to strike down the government when they overstep, just as much as there is a willingness to make sure that trials are a search for truth. I think in fairness, if Judge Bork became Justice Bork and the issue of the exclusionary rule were to come before the Court, he would at least permit a reexamination to see if the conclusion of the Court in *Mapp* was right, but I think there are other Justices now sitting on the Court who have been praised who would at least be willing to reopen that question, and I do not think that is a radical view at all.

Senator LEAHY. If you were to send a signal to the law enforcement community, would you sort of put the exclusionary rule as the number one issue to watch, that is, whether there may be a change?

Mr. THOMPSON. No, I think the law enforcement community would take Judge Bork's whole record in the criminal justice area and say there is a man who has got commonsense. I will tell you what they say to me, Senator, that I never had satisfactorily answered, police officers and lawyers, even some defense lawyers, they say how in the world could the Senate unanimously confirm Judge Scalia and yet have all this controversy about Judge Bork, when everyone assumes that Judge Scalia is more conservative than Judge Bork. They do not think that is fair.

Senator **Leahy**. Thank you.

Mr. Frank, we have had a lot of discussion here—I have spent a number of times around questioning Judge Bork—about his position on first amendment cases. Supporters have said that the *Lebron* case puts him in the forefront of first amendment doctrine. From your statement, you do not feel that is so. Would you tell me why you feel that his decision in *Lebron* does not put him in the forefront of first amendment rights?

Mr. **Frank**. Two reasons, Senator: First, the holding in *Lebron* is simply that if one is going to have advertising, one cannot discriminate amongst the advertisers on the basis of their political points of view in a public subway. That is a decision that any court in America, with any acquaintance with first amendment rights and equal protection, would have reached. It may be the biggest event in Judge Bork's life, but it is a very minor ripple in the history of the first amendment.

The bad feature of the *Lebron* case is the passage near the end to which, above all others, I commend the attention of this committee, and that is the passage in which he proceeds to praise the doctrine of Chief Justice Hughes, which has been adopted by the whole Court, against prior restraint of speech, and then proceeds to nullify it with the throw of a line to the effect that, of course this does not count if the speech is false.

That means for a newspaper it can be enjoined and put to trial before there can be a publication to determine truth or falsity, and the story will be stale indeed before it ever gets out. That is why Chief Justice Hughes prevented that sort of thing in connection with the Minnesota newspaper.

If I were to select just one single line, for those of you interested in free speech, that should give you profound trouble in the work of Judge Bork, it would be that paragraph in the *Lebron* case. It is really serious.

Senator **Leahy**. Thank you very much. I yield to Senator Heflin.

Senator **Heflin**. Well, we have got a vote on and it is time to bring this to a close. Rather than ask any questions, I think it would be very appropriate for Mr. Foreman, to take about 3 minutes to make any statement that he would like. He is the president-elect of the National District Attorneys Association. Mr. Foreman, if you will speak for about 3 minutes, then we will adjourn this until Friday.

Mr. **Foreman**. Senator Heflin, with your permission, I will speak for less than that. I know you have a vote. I found that my best closing arguments as a prosecutor have been the shortest ones, so let me just say this.

I know that many of you that are presiding today are former prosecutors. In my opinion, the others would make excellent prosecutors. I represent many minorities. I represent many women and many minorities that I think would be in favor of Judge Bork, and these are crime victims, a very important group that we have all overlooked.

I am a street fighter when it comes to constitutional warfare. As you know, Judge, we fight our battles on the Constitution, as Senator Leahy knows, because he is a former local prosecutor, on the streets, and what we see in Judge Bork as prosecutors is the opportunity to do what we should do as attorneys and that is seek the truth, particularly when it comes to the exclusionary rule.

Our constituents ask us why evidence is suppressed and people such as drug dealers go free. They ask us why capital punishment is not carried out when it is in fact the law. They ask us why people who confess to vicious crimes sometimes get away with it.

So, we would only ask fairness, truth and justice and that is why we are here.

Thank you.

Senator **Leahy**. There is a roll call vote on. Senator Grassley, have you had a round? Did you——

Senator **Grassley**. My staff said you wanted to adjourn. Is that right?

Senator **Leahy**. We are going to try to adjourn so that those of us who have not voted can go vote. If you want to have a round, I will recess for 10 minutes and then come back.

Senator **Grassley**. No, I am not going to do that.

Senator **Leahy**. Senator Humphrey, did you wish to——

Senator **Grassley**. We want you to recess, if you would.

Senator **Humphrey**. I would be willing to chair.

Senator **Leahy**. We will recess for 10 minutes and then be back.

[Short recess.]

The **Chairman**. The committee will be in order.

Senator Humphrey says he has a couple of minutes. Fire away, Senator.

Senator **Humphrey**. Thank you, Mr. Chairman.

Before I begin, I want to make it clear that, from my point of view, I said that any staff and others, including witnesses, who wished to leave for the observance of the holiday, the religious holiday, are perfectly free to do so and I would be very kind in my next couple of minutes, as kind as I can be and there will not be any difficulty.

I just want to say, by the way, Governor Thompson, you are absolutely right, the great issue that has been unfairly ignored in this hearing is criminal law and the importance of the law enforcement system, including the courts, to protect the law-abiding citizen. I think they have not been fully succeeded in that.

Nonetheless, I wanted to address Mr. Frank's testimony and I have certainly no ill will towards Mr. Frank. I do not know him from Adam. I just met him during this brief recess. I like the man. You cannot help like a man who wears big bow ties and knows how to tie them. It is not a clip-on, it is a real one.

[Laughter.]

I just want to say that——

Mr. **Frank**. Senator, may I interrupt to say I appreciate it and my wife appreciates it if she is hearing this dialogue.

Senator **Humphrey**. Did she tie it for you?

Mr. **Frank**. No, I do that, but I collect bow ties and it is great fun.

Senator **Humphrey**. I really have to say, however, in response to your testimony or at least in response to the charges you make, that these 18 or so cases you document in your testimony constitute an indictment of Judge Bork on the grounds of racial insensitivity or some such thing, insensitivity to civil rights that I really think is a gross distortion of the facts. I will give you a chance to respond to this, without rebutting your response.

As Senator Simpson noted, each of those cases you cited, in each of those cases Judge Bork was joined by at least one other member of the D.C. Circuit Court, and in the case which you chose in your oral presentation to single out, the *San Luis Obispo* case, that was an en banc decision in which Judges Abnor Mikva, who is a very liberal man, at least he was when he was a Congressman, and Harry Edwards, who happens to be a black member of the bar, a black judge, both concurred with Judge Bork, and in any event these were not cases involving substantive civil rights claims. They were often regulatory claims and, in any event, as has been pointed out, Judge Bork was joined in his opinion by at least one and sometimes other justices, many of whom I think you would regard as quite liberal.

Now, having said that, you may respond. I will not try to rebut anything you said, but I do wish to ask, Mr. Chairman, at this point that I may have the right to provide a detailed rebuttal of Mr. Frank's written testimony at an appropriate place in the record.

The CHAIRMAN. Without objection.

Mr. FRANK. Senator Humphrey, let me sharpen the point, because I was trying to be terribly brisk because you are obviously out of time, and I have attempted to intrigue your interest with my oral statement, but what I really stand on is the written statement.

Senator HUMPHREY. Yes.

Mr. FRANK. What I am saying about Judge Bork in the civil rights area is this: First, I am not saying that this is a man with hostilities or biases. I do not know him. He may love his fellow man.

All I am saying is that when you take all of his published opinions, which involve minorities, which are his opinions, thus distinguishing them from the group that you were talking about on another day, I simply say the minorities always lose, one way or another. You cannot make it a common integration of reasons or philosophy, it is just how it comes out, and I stand on that.

Now, if there are others you will doubtless correct them in the rebuttal you contemplate, but really—and I am still wincing a little, because I admire Senator Simpson so and I feel badly when he thinks I have been ungracious, if he does—but, you know, you may think this is silly sentimentality, but I was nurtured by Justice Black and I do not think it is silly sentimentality.

When a fellow always in all cases, no matter what the circumstances, as I assert, is invariably ending up on the side against the individual who has the claim of some sort or the minority group that has a claim of some sort, I just conclude that this is a fellow who does not have a lot of motivation in his spirit of concern for his fellow man, and I feel very, very deeply that it is up to a judge to do justice and that this is not a theoretical game and it is not just a playing out of a machine, but that there ought to be fair and reasonable results.

So, when I find a judge who simply never comes out for the Latinos and never comes out for the blacks and so on in his opinions, I get troubled about that fellow's sense of justice. You think just once in a while he would fine one. Now, you can charge me as a bleeding heart, if you wish, but that is the witness you have got for today.

Senator HUMPHREY. I said I would not respond except in writing, but my written response will point out that these are not substantive civil rights cases, that where there have been substantive civil rights cases he has come down in favor of the minority person or a woman.

Mr. FRANK. And please do, I look forward to seeing this and doubtless will learn something. Thank you for your courtesy.

Senator HUMPHREY. Thank you very much.

Senator SIMPSON. Mr. Chairman, I have known this man who speaks to us and it is just as disappointing to me when I see what you have written here, Mr. Frank, because I do know you, as it is disappointing I guess for me to judge you, and the disappointment is that all of these opinions that you have cited were joined in by a majority of the Court, and this is one of the most unique courts in America. And to say that Judge Bork is doing these things on his own, sir, is terribly disappointing when Judge Wald and Robinson and Mikva and Edwards and Ginsburg and Starr and Silberman and Buckley and Williams and Ginsburg have all assisted in writing these opinions and in voting for his opinions, and none of them have ever been appealed by the Supreme Court, that is a distortion.

Mr. FRANK. May I respond?

Senator LEAHY. You may.

Mr. FRANK. That is a pretty grave charge, or should I cease?

Senator LEAHY. Obviously, Senator Simpson would want you to respond.

Senator SIMPSON. I am sorry——

Senator LEAHY. I would hope we can conclude soon, because a number of members of the staff and a number of people covering this do have religious observances that are extremely important to them and we have reached a time that I would want that to be possible, but naturally on something like this, and I am sure Senator Simpson joins me in this, he would want you to respond.

Mr. FRANK. Senator Simpson, what you are overlooking is that there are isolated instances here where there are concurrences. Necessarily, if there is a Bork opinion, somebody had to concur with it, we understand that. You will find from Judge Wald, whom I respect from the bottom of my heart as one of the ablest judges in America, the statement in one of her disagreements with Judge Bork, in a very important case, that the constitutional views of Judge Bork are more of a menace to our Constitution than are the terrorists. That is a direct quote.

You have alluded to Judge Mikva. You will see in one of the dissents of Judge Mikva the observation that Judge Bork has totally rewritten an act of Congress and utterly frustrated the intent of this body. If you look at this case, I suspect, Judge Simpson, knowing you, you will think maybe that is true, it was a dreadful decision.

Now, there will be isolated agreements, this cuts both ways. Senator Humphrey has very fairly pointed out that in a handful of cases Judge Bork has gone along with one of his more liberal brethren, coming to some kind of result in some case or other, not often but occasionally, so he does it, too, and sometimes they go with him, and not every case is worth arguing about and we understand that.

But please do not try to convey the notion that this is a court of solidarity. Judge Wald, Judge Mikva and some of the others, Judge Edwards, have consistently and I think rather effectively departed from some of the views of Brother Bork.

Senator **SIMPSON**. Mr. Chairman, read the opinion of Justice Scalia in the *Ollman* case to see what he thought about Judge Bork's opinion, that was pretty tough, too. That is the way judging is done, just like we do our work here. It does not mean you are any lesser of a person, but I am just saying to you, sir, that it is not a court of solidarity. But it is not a court of singularity, either, and everybody was helping in every one of these decisions and that is the way it is in real life.

Senator **LEAHY**. Could I note just for the record that one of the problems we have is we use statistics, rather than looking at the individual cases. I have seen accounts in the press in determining who was going to vote which way on this, that such and such a Senator opposes the administration on judicial nominations, such and such a Senator supports it. And yet, if you do the statistics up and down here, you will find that the statistics for every Senator in here voting for nominees of this administration, the numbers would run between 98 percent and 100 percent or 99 percent and 100 percent. Out of hundreds and hundreds of nominations, only once or twice is there even disagreement. Virtually every nomination—not virtually, but 98 or 99 percent of the nominations of the administration have passed this committee unanimously, and the administration before that and the administration before that. So, with statistics, we can get too bound up in them, but I——

Mr. **FRANK**. May I say briefly a last word on that related subject, because it is time to quit, but I would like the record to be clear: I appeared here in support of Judge Haynesworth. I assisted Senator DeConcini in support of the confirmation of Chief Justice Rehnquist. Should Judge Bork not be confirmed, which is my deepest hope and I recommended to the Democratic minority that it recommend to the President a very conservative Western judge eminently satisfactory to Senator Hatch. That is because I believe the President has a wide range of prerogatives.

The view I have submitted to you, Senators, is simply that in my view, respectfully, having read the opinions, I find Judge Bork to be so far off the reservation that he is beyond the limits of reasonable Presidential discretion.

Thank you for letting me say so.

Senator **LEAHY**. Without objection, we will now adjourn until Friday. Hearing no objection——

Senator **SIMPSON**. At least you are the first one who said that about his written opinions, so you are the only one in America with regard to his written judicial opinions. Others have said that about his writings, so I want to be sure that you are on record as the only one yet in 7 days of testimony.

Senator **Leahy**. We have given Senator Simpson the last word. Gentlemen, I thank you all very very much. We stand in recess.

[Whereupon, at 6:18 p.m., the committee adjourned, to reconvene on Friday, September 25, 1987.]

NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

FRIDAY, SEPTEMBER 25, 1987

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:06 a.m., in room SR-325, Russell Senate Office Building, Hon. Joseph R. Biden, Jr. (chairman of the committee) presiding.

Also present: Senators Kennedy, Metzenbaum, DeConcini, Leahy, Heflin, Thurmond, Hatch, Simpson, Grassley, Specter, and Humphrey.

The CHAIRMAN. The hearing will come to order.

I apologize for starting a few minutes late, but on the way down this morning, a freight train derailed, knocking out all the wires between Baltimore and Washington. This is my week for derailments, and I hope I have gotten all of them out of the way in 1 week.

I do want to welcome our panel, and I urge everyone, particularly my colleagues if they are back in their offices listening, that if we can keep to the 5-minute rule, we have some chance of sometime this year having this nominee before the Senate. I am being a little facetious, but we have a lot of witnesses left, all distinguished people, both for and against, and I think it is important that we move along as rapidly as it is reasonable to do.

Our first panel this morning includes three distinguished members of the bar. First, Chesterfield Smith. Mr. Smith was president of the American Bar Association in 1973 and 1974 and is currently a partner in the Miami law firm of Holland & Knight. Second, Robert Meserve. Mr. Meserve was president of the ABA in 1972-73 and is currently counsel to the Boston law firm of Palmer & Dodge. The third member of the panel is Robert Kaufman, current president of the Bar Association of the city of New York. Mr. Kaufman is also a partner in the New York City law firm of—and I am going to mispronounce it—Proskauer Rose Goetz & Mendelsohn—I hope I pronounced that correctly, Mr. Kaufman; I apologize.

Gentlemen, welcome. We are most pleased to begin our morning with such a distinguished panel. And if you would introduce the woman to your left, Mr. Kaufman, for the record, please.

Mr. KAUFMAN. Yes. I am pleased to introduce Sheila Birnbaum, who is a vice president of the Association of the Bar of the City of New York, and who led our review group on the Bork nomination.

The CHAIRMAN. Welcome, Madame Vice President.

Ms. BIRNBAUM. Thank you.

The CHAIRMAN. Mr. Smith, would you please begin with your testimony? We will put your entire testimony in the record as if read. To the extent that you can summarize, it would be useful.

Excuse me—I should swear all of you in—if you would please stand.

Do you swear the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. SMITH. Yes.

Mr. MESERVE. I do.

Mr. KAUFMAN. I do.

Ms. BIRNBAUM. I do.

The CHAIRMAN. Mr. Smith.

TESTIMONY OF PANEL CONSISTING OF CHESTERFIELD SMITH, ROBERT MESERVE, AND ROBERT KAUFMAN, ACCOMPANIED BY SHIRLEY BIRNBAUM

Mr. Smith. Mr. Chairman, members of the committee, I am a trial lawyer from Florida who practiced law in small towns and did pretty well and went to the largest city. I now have, by Florida standards, a large law firm. I basically do now the kind of law practice I want, and I take the positions I want to take on things.

I wanted to come up here and talk about the nomination of Judge Robert Bork to the U.S. Supreme Court. I want to give you my perspective. I do not speak, of course, for anybody but myself. Usually when I am introduced nowadays, they say, "He used to be . . .," and they hardly ever say, "He is . . ." But I am one who cares very deeply about the Supreme Court as an institution, and that is why I am here.

I think that, from my own perspective, the reason that the American Constitution is so unique and so uniquely successful and so different from those constitutions in other nations which read almost the same, is for two primary reasons. One is because those who drafted it long ago decided that tough questions had to be answered by an independent federal judiciary who could not be swayed by temporary, transient majorities, but who stuck by what they thought the Constitution did and meant.

The second thing is that they made it very difficult to change those opinions of the Court, to change the Constitution. To amend the Constitution, of course, we can do it, but it takes action of the States. It is very, very difficult to do; it takes a long time. And we have found in our history that what are majorities for a while, by the time they get around to amending the Constitution, are no longer majorities. So it has given us a very stable government.

I therefore think that the Supreme Court, insofar as preserving individual rights and freedoms, is far the most important segment of our government. Yet the Supreme Court is, only because the people like it, believe in it, trust it, revere it.

You should not have on the Supreme Court people, it seems to me, who large segments of the population distrust, disbelieve, feel have fixed opinions, feel that will not listen judiciously and try to decide the facts of a particular case as applied to the law and the Constitution.

Now, with all of that, I oppose the nomination of Judge Bork.

I believe that in America, quite properly, there are large segments of the people who believe that he has a knee-jerk reaction. One of my friends told me, "He has answered questions that never have been asked, that never will be asked, and that nobody needs to know."

While I do not believe that it is wrong to put somebody on the Supreme Court who has expressed opinions, but as a trial lawyer, I would like to have a Court up there with two good conservatives like Justice Scalia and Justice Rehnquist on one hand, two good liberals like Justice Marshall and Justice Brennan on the other, and I would like to feel like there is somebody there in the middle that I could talk to, I could tell about, that I would not feel knee-jerk already, was going to decide things in a certain sort of way.

I am not worried about people overturning decisions that have already been made. They are going to stay there, I think, because the people want them. But what I do not like is the fact that those decisions are coming back up again for implementation in all of the areas.

For example, I think the greatest single act of government that ever happened in our nation was *Baker* v. *Carr*. I think that when that Court, that Supreme Court, decided one man, one vote, they gave the States an opportunity to be revitalized, to free themselves from the special interests that totally controlled them, to get out to the people where they could be concerned about civil rights, civil liberties, economies. They changed the South, as Senator Heflin certainly knows. He could never have achieved judicial reform in Alabama if he had not had *Baker* v. *Carr* before then to come and give us one man, one vote.

I saw our State take power away from Washington and move it back down to Tallahassee and meet the needs of the people, because the Court was willing to act. Well, I have heard what Judge Bork has said about that decision. I do not know how he would do it in the future. I assume that he would uphold that case.

But when we start extending it, I want to know that there is somebody that cares about an evolving document like the Constitution, that wants to make that Constitution meet the needs of the people. That is why I—things like that are the reason that I am up here testifying before the committee.

Thank you.

The CHAIRMAN. Thank you very much, Mr. Smith. I appreciate your testimony.

Mr. Meserve.

TESTIMONY OF ROBERT MESERVE

Mr. MESERVE. I am pleased to have this opportunity to address this committee in opposition to the nomination of Judge Bork to be a Justice of the Supreme Court of the United States.

I want you to be clear that I do this with no reluctance nor reservation, but I want to explain some things about my background and to state areas in which I have nothing to add to the voluminous comments that you have already heard concerning Judge Bork.

I do not believe I have ever met the Judge, and as you will soon understand, I have respect for his personal integrity, his judicial experience and his sincerity in advocating that the Supreme Court follow a course which I consider to be both unwise and contrary to the current of our history as a nation.

As has been stated, I was president of the American Bar Association in 1972 and 1973, at the beginning of the Watergate matter. I experienced the trauma and shock the legal establishment suffered at that time, and you will be glad to hear I plan to say no more about it, or Judge Bork's part in its aftermath.

I am a graduate of Tufts College, Harvard Law School, a member of Phi Beta Kappa, and a former associate editor of the Harvard Law Review. I have been a practicing lawyer for 53 years next month, and apart from a period of approximately 3 years in the military service of this country, I have been a litigator and a partner in three Boston law firms, and I now am of counsel to one of them, as the Senator observed.

I acquired my trial skill, if any, as an assistant U.S. attorney in Boston. I have taught part time at Boston College and Harvard Law School.

I was the second chairman, after Mr. Bernard Segal of Philadelphia, of the modern American Bar Association Committee on the Federal Judiciary, and I served with Mr. Segal as chairman for 2 years before I succeeded him. I remained as Chair during the latter part of the Presidency of John Kennedy and the first part of that of Lyndon Johnson.

As a past chairman, I have remained to some degree active and acquainted with the work of that committee, and I am more than generally acquainted with its procedures and objectives. I have often appeared before this committee of the Senate with respect to federal judicial appointments.

Of all former ABA presidents, except perhaps Mr. Segal, I have had most to do over the years with the process of judicial selection. I have served as president of various other organizations that I shall not list. I guess I am one of those referred to by the late Whitney North Seymour as a "former living president."

I should like to emphasize, however, as with Mr. Smith, that I speak to you today in no official capacity. I speak only for myself as an American citizen and a lawyer. I know that your action on this nomination may affect the world in which my 5 children and 10 lovely grandchildren will live, and in that sense, I speak on behalf of my posterity and yours and those of all Americans.

As a lawyer, I am proud of my craft, and I am more than proud of its progress in the last 30 years of Supreme Court history under the Chief Justiceships of such different persons as Chief Justice Earl Warren and Chief Justice Warren Burger.

To speak frankly, I have been called a liberal. I will accept that shorthand label. But my closest friend on the Court has been Lewis Powell, a true conservative and true Southern gentleman, whom I succeeded by several removes as president of the ABA and who succeeded me as president of the American College of Trial Lawyers shortly before Lewis' appointment to the Court.

May I just make it clear that I think that your committee if it were to approve this appointment would in fact be establishing for a long time a majority on the Supreme Court which will carry that Court which we all revere in the opposite direction from that in which it has been going during the period of which I am so proud. In that sense, you will make to the full Senate a recommendation which may well influence the lives of my grandchildren and yours, and even their successors. I am sure that such a duty will be approached by you with the seriousness to which it is entitled and that, if you will look at the present candidate's position, you will see that in almost every important legal problem of our times, he has at one time or another publicly disagreed with the decisions of our Supreme Court, even when most of the conservatives on that body have written or joined in those opinions.

Let me cite a few examples, and I am sure they have already been brought to your attention in these lengthy hearings.

Judge Bork condemned as "pernicious Constitutional doctrine" the unanimous decision of the Supreme Court, including the second Mr. Justice Harlan, a great conservative, in *Oregon* v. *Mitchell*, which upheld Congress' power to ban the use of literacy tests in voting, Congress having found that such tests were pervasively used as tools to disenfranchise blacks and other minorities. Judge Bork believes there is no warrant for precluding courts from enforcing racially restrictive covenants and real estate deeds, contrary to the unanimous decision of the Supreme Court, including my former teacher, Mr. Justice Frankfurter, in *Shelley* v. *Kraemer*.

Judge Bork has opposed as "improper and intellectually empty" application of the equal protection clause to discrimination on the basis of gender or any other nonracial criteria, and even though the Supreme Court, including then Justice Rehnquist, unanimously concluded that the equal protection clause of the 14th amendment is not limited to racial discrimination.

He would seek to reverse a long line of decisions protecting the privacy of individuals and their families, in which the most respected advocates of judicial restraint, Justices Frankfurter and Harlan, have joined, and he would seek to punish all advocacy of nonviolent civil disobedience, contrary to the Supreme Court's unanimous decision in the case of *Brandenburg* v. *Ohio*, which established as law Mr. Justice Holmes' statement of the clear and present danger rule, a principle that Judge Bork has publicly stated to be "deficient in logic and analysis as well as in history."

I could continue. But having in mind the ground that has already been plowed over in these hearings, I do not see much point in it. The fact is that on every important constitutional issue involving human rights, including the use of contraceptives and abortion, the Judge is just not with the present decision or decisions of the Supreme Court.

To paraphrase the language of the old song, "They are all out of step but Bob."

Let me make it clear again that I do not oppose Mr. Bork's appointment because of any question to his integrity, as to his legal and judicial experience, or as to his qualifications as a student of constitutional law, even though I may disagree with some of his conclusions.

When my good friend, Ralph Lancaster, of Portland, ME called me on behalf of the ABA Committee on the Federal Judiciary, I told him that I would have to agree that Mr. Bork was well-qualified in every other sense, but not in what I am calling the political sense, and that the consideration of that was a function and determination reserved to your committee. But I said then, and I repeat, that if I were on your committee, I should vote against confirmation.

I am still of that opinion, and if I were on the ABA Committee, having in mind my own idea of the advisability of that committee refraining from political judgments, I should probably have voted with the majority. But as a lawyer, as an American, and as a student of politics, I agree whole-heartedly with the minority of that committee as I understand its position on the ultimate issue before you.

In your constitutional capacity, I should vote to refuse to consent to this appointment of a doctrinaire person who has demonstrated his lack of compassion for and understanding of the lot of the underprivileged, because of his firm and oft-repeated belief that in interpreting our Constitution, we should disregard two centuries of American history. It is my firm belief that much of that history is now part of our Constitution, that we cannot go back, for example, over ***Marbury*** v. ***Madison,*** to determine if we could how the founders stood on the Court's power to declare an act of Congress unconstitutional.

I think I can skip my other prepared remarks in view of the fact that my time has elapsed and tell you that we should oppose this appointment. I do not want this country to repeat the mistakes it made in the era of the "nine old men" or in the era of the Roger Taney court, which did exactly what this nominee would do and helped bring on the great War Between the States which in our grandfathers' time placed brother against brother and class against class in one of the bloodiest wars ever fought, as a result of the *Dred Scott* decision, and I am proud that Benjamin Curtis, a Justice from Massachusetts, dissented eloquently from that opinion.

With all his real intelligence, I am convinced that Mr. Bork's lack of compassion, his intellectual nitpicking, would not help produce by Supreme Court decisions the kind of country in which I want my grandchildren to live, and I hope, the kind of country that each of you would want your grandchildren to live in.

I urge you to recommend the defeat of this nomination.

[Prepared statement follows:]

REMARKS OF Robert W. Meserve of Boston, Massachusetts to the Senate Judiciary Committee on the nomination of Robert H. Bork to the Supreme Court.

I am pleased to have this opportunity to address the Judiciary Committee in opposition to the nomination of Judge Bork to be a Justice of the Supreme Court of the United States.

I do this with no reluctance nor reservation, but I want to explain some things about my background and to state areas in which I have nothing to add to the voluminous comments that you have already heard concerning Judge Bork.

I do not believe that I have ever met the Judge and, as you will soon understand, I have respect for his personal integrity, his judicial experience and his sincerity as an advocate that the Supreme Court follow a course which I consider to be both unwise and contrary to the current of our history as a nation.

As has been stated, I was President of the American Bar Association in 1972 and 1973, at the beginning of the Watergate matter. I experienced the trauma and shock to the legal establishment suffered at that time.

I am a graduate of Tufts College, Harvard Law School, a member of Phi Beta Kappa and a former Associate Editor of the Harvard Law Review. I have been a practicing lawyer for 53 years next month, apart from a period of approximately three years in the military service of this country. I have been a litigator, and a partner, in three Boston law firms and am now "of counsel" to one of them, Palmer and Dodge, and I acquired much of my trial skill, if any, as an assistant United States attorney in Boston. I have taught, part time, at Boston College and Harvard Law Schools.

I was the second chairman, after Mr. Bernard Segal of Philadelphia, of the modern American Bar Association Committee on the Federal Judiciary and I served (with Mr. Segal as Chairman) for two years before I succeeded him. I remained as Chair during the later part of the presidency of John Kennedy and the first part of that of Lyndon Johnson. As a past Chairman, I have remained, to some degree, active and acquainted with the work of that Committee and I am more than generally acquainted with its procedures and objectives. I have often appeared before this Committee of the Senate with respect to Federal judicial appointments.

I have served as President of various other organizations. Before I became Chairman of the American Bar Association I was President of the Boston Bar Association and of the American College of Trial Lawyers. Since that time, I have been President of the American Institute of Judicial Administration, the American Bar Foundation and, outside the field of law, President of the Phi Beta Kappa Associates. I guess I am one of those referred to by the late Whitney North Seymour as a "former living President." I have also been Chairman of the Board of Trustees of Tufts College, President of Boston's Floating Hospital and Vice-President of the New England Medical Center Hospitals, as well as a Trustee of Vermont Law School. In part, I mention these offices to evidence that of all ABA Presidents except, perhaps, Mr. Segal, I have had most to do over the years with the process of judicial selection.

I should like to emphasize, however, that I speak to you today in no official capacity. I speak only for myself as an American citizen and a lawyer: I know that your action on this nomination may affect the world in which my five children and ten lovely grandchildren will live and, in that sense, I speak on behalf of my posterity and yours and those of all Americans.

As a lawyer, I am proud of my craft and more than proud of its progress in the last thirty years of Supreme Court history under the Chief Justiceships of such different persons as Chief Justice Earl Warren and Chief Justice Warren Burger, each of whom appointed me to Rules Committees of that Court and to other Committees of the Federal Judiciary. To speak frankly, I have been called a liberal and I accept that short-hand label, but my closest friend on the court has been Lewis Powell, a true Southern conservative, whom I succeeded by several removes as American Bar Association President and who succeeded me as President of the American College of Trial Lawyers shortly before Lewis' appointment to the Court.

May I just make it clear that I think your committee, if it were to approve this appointment, would, in fact, be establishing for a long time a majority on the Supreme Court, which will carry that Court, which we all revere, in the opposite direction from that in which it has been going during the period I have mentioned. In that sense, you will make to the full Senate a recommendation which may well influence the lives of our grandchildren, and even their successors. I am sure that such a duty will be approached by you with the seriousness to which it is entitled and that, if you will look at the present candidate's position you will see that, on almost every important decision of our times, he has, at one time or another, publicly *disagreed* with the decisions of our Supreme Court even when most of the conservatives on that body have written, or joined in, those opinions. Let me cite a few examples, which I am sure you have already had brought to your attention in these lengthy hearings.

1. Judge Bork has condemned as "pernicious" constitutional doctrine the unanimous decision of the Supreme Court (including the second Justice Harlan, a great conservative) in *Oregon v. Mitchell*, which upheld Congress' power to ban the use of literacy tests in voting, Congress having found that

such tests were pervasively used as tools to disfranchise blacks and other minorities.

2. Judge Bork believes that there is "no warrant" for precluding courts from enforcing racially restrictive covenants in real estate deeds, contrary to the unanimous decision of the Supreme Court (including Justice Frankfurter) in Shelley v. Kraemer.

3. Judge Bork has opposed, as "improper and intellectually empty" application of the equal Protection Clause to discrimination on the basis of gender or any other non-racial criterion, even though the Supreme Court (including then-Justice Rehnquist) unanimously concluded that the Equal Protection Clause of the 14th Amendment is not limited to racial discrimination.

4. Judge Bork would seek to reverse a long line of decisions protecting the privacy of individuals and their families, in which the most respected advocates of "judicial restraint" (Justices Frankfurter and Harlan) have joined.

5. Judge Bork would permit states to punish all advocacy of nonviolent civil disobedience, contrary to the Supreme Court's unanimous decision in the case of Brandenburg v. Ohio which established as law Mr. Justice Holmes statement of the "clear and present danger" rule, a principle that Judge Bork has

publicly stated to be "deficient in logic and analysis as well as in history".

I could continue, but having in mind the ground that has already been plowed over in these hearings, I do not see much point in it. The fact is, that on every important constitutional issue involving human rights, including the use of contraceptives and abortion, the Judge is just not "with" the recent decision or decisions of the Court. To paraphrase the language of the old song, "they are all out of step, but Bob".

May I again make it clear that I do not oppose Mr. Bork's appointment because of any question as to his integrity, as to his legal and judicial experience, or as to his qualifications as a student of constitutional law, although I would hasten to say that I disagree with most of the conclusions he has publicly expressed on constitutional questions (at least before he testified at this hearing). I don't regard myself as an expert on details of constitutional procedure as distinguished from substance.

When my good friend Ralph Lancaster of Portland, Maine called me on behalf of the ABA Committee, I told him that I would have to agree that Mr. Bork was well qualified in every other sense, but not in the political, and the consideration of that was a function and determination reserved to your Committee. But I said then that, and I repeat, if I were on *your* Committee I should vote against confirmation. I am *still* of that opinion, and if I were on the *ABA* Committee, having in mind my own idea of the necessity of *that* Committee to refrain from *political* judgments, I should probably have voted with the majority, but as a lawyer, as an American, and as a student of politics, I agree whole heartedly with the minority of that committee as I understand its position, on the ultimate issue for you. In *your* constitutional capacity, I should vote to refuse to consent to this appointment of a doctrinaire person, who has demonstrated his lack of compassion for, and understanding of, the lot of the underprivileged, because of his firm and often repeated belief that, in interpreting our Constitution, we should disregard two centuries of American history. It is *my* firm belief that much of that history is now *part* of our Constitution--that we cannot go back of *Marbury* v. *Madison*, for example, to determine, if we could, how the founders stood on the Court's power to declare an act of the Congress unconstitutional.

That this Committee *must* consider what I loosely call political considerations is, of course, no news to it. As Senator Thurmond said in opposing Mr. Fortas's nomination to be Chief Justice, "To contend that we must merely satisfy ourselves that Justice Fortas is a good lawyer and a man of good character is to hold to a very narrow view of the role of the Senate, a view which neither the Constitution itself nor history and precedent have prescribed." I agree with that statement and in my remarks here I intend to direct my argument to what may be termed, in the broadest and non-pejorative sense, political considerations. As to his views, I rely, for the most part, on written statements of the candidate, generally made a matter of record for us before this hearing before this committee began.

The recent decisions of the Supreme Court of which I am most proud are those which give equality of educational opportunity to the black people of this country (who have been represented here so ably by my good friends Bill Coleman and Barbara Jordan) and the decisions which have implemented and enforced that decision. I am also proud of our Court's decisions in the area of personal privacy and the rights of women, and I think I may record Mrs. Meserve as more than sharing my views in that area. I am in accord with the Court's decision in Baker v. Carr, and its progeny, in the "one man, one vote" area. As I understand Mr. Bork's position, he feels that Griswold, Baker and Wade, at least, were all wrongly decided. I think he is historically, legally and humanly wrong, and I think that he speaks not only apart from the current of recent Court history from a liberal perspective, but also contrary to the views, in many of those cases, of such true conservatives as my good friends, former Chief Justice Burger, Felix Frankfurter, John Harlan, Lewis

Powell and many other members of the Supreme Court who would probably differ less from *me*, with regard to many of the specific decisions of the past three decades--in some of which they joined--than they would with a true radical of the right such as Mr. Bork.

When I first came to the Bar, at least four seats on the Supreme Court were occupied by gentlemen whose philosophy on the whole might be regarded as "right wing reactionary." They were the nucleus of the "Nine Old Men" and their stubbornness and reactionary decisions--over vigourous dissents by liberal Justice Brandeis (and Justice Cardozo) and by Mr. Justice Holmes, a true conservative, but never a reactionary--held up our recovery from the Great Depression for many years. I don't want to go back, by this nomination, to that period in time.

But that court spoke primarily to *economic* issues. For the last three decades or more the Court has dealt particularly with personal rights of American citizens--of state sterilization, of a woman's right to control of her body, of the right of bedroom privacy, of restrictions on the right to vote, on equality of educational opportunity and its implementation, on separation of Church and State--and on *all* of these matters Mr. Bork would limit or change the Court's actions and decisions--which were often joined in by conservative justices--in a manner unwarranted by the

Constitution. I don't want my grand children (and perhaps their grandchildren, too) to have to grow up with decisions of a Court which is less than generous in its acceptance of the constitutional personal rights of men and of women.

The acceptance of this nomination is publicly urged by the President to encourage the possibility that steps in these areas will be backward rather than forward, that the restrictive policies of this administration will be preserved so that my grandchildren--and yours--may live in a country which discriminates in its equal treatment of all its citizens. And I speak as one who has, so far as I know, never myself been the victim of discrimination because of my color, my religion or my political beliefs.

As Renata Adler said recently in the New Yorker, the Senate is being asked "not to confirm a man but to establish in the Court a doctrine and a set of concrete decisions, most of which are reversals of established law and precedent." This you should not do!

We are told by the nominee that we should look at the original intent of the persons who created our constitution. It seems to me that most such studies, 200 years after the event, are going to be unproductive, contradictory and extremely difficult to apply in the light of present conditions. I have in mind that one man, Chief Justice Roger

Taney, by virtue of the decision he wrote in the Dred Scott case (which, by the way, did exactly what the nominee would have us do as to original intent) was a major responsible cause of the war between the states, which, in our grandfather's time, placed brother against brother and class against class in one of the bloodiest wars ever fought. I am proud that Benjamin Curtis, a Justice from Massachusetts dissented eloquently from that opinion.

I don't want to regress and I don't want this country to repeat mistakes. With all his real intelligence and glibness, I am convinced that Mr. Bork's lack of compassion, his intellectual picking at straws, would not help produce, by Supreme Court decisions, the kind of country which I want my grandchildren to live in, and, I hope, the kind of country that each of you would want your grandchildren to live in. I urge you to defeat this nomination.

The CHAIRMAN. Thank you, Mr. Meserve.
Mr. Kaufman.

TESTIMONY OF ROBERT KAUFMAN

Mr. KAUFMAN. Thank you, Mr. Chairman, and members of the committee. We appreciate very much the opportunity to appear before you today.

The Association of the Bar of the City of New York is the oldest bar association in the United States, and at present consists of almost 17,000 members, many of whom are from other parts of the country.

And I might say that there are certainly a number among them who do not agree with the position of our executive committee.

The association was founded in 1870, because of the serious concern with the quality of the judicial selection process. It has, over the entire time of its existence, focused particularly on the issues of judicial selection, the quality of the courts, and the obligation of the bar to speak on those issues.

The constitution of our association provides, as a major portion of its purposes—and I quote: "Facilitating and improving the administration of justice."

Our association's periodic consideration of how it is meeting its basic purpose led to review of the scope of its judicial-review function. Its long-range planning committee, early in 1987, made a strong recommendation that the association expand its review of judicial offices, to regularly include federal courts at levels beyond those previously reviewed by the association, and that recommendation included review of nominees for the Supreme Court of the United States.

The executive committee of the association, its governing body, approved that policy in May 1987, at a time when no nominations to the Supreme Court were pending, nor I might say, were any nominations anticipated.

The policy was implemented with the first nomination for the Supreme Court subsequent to the adoption of that policy, though I should also point out that the association has in the past commented on Supreme Court nominations from time to time, when it was deemed appropriate by association leadership.

Its review of the qualifications of Judge Robert H. Bork led the executive committee of the association to adopt a policy statement which has been submitted to you, and which reads as follows:

> The Association of the Bar of the City of New York opposes the appointment of Judge Robert H. Bork to the United States Supreme Court. The constitutional jurisprudence of our country embodies fundamental individual and civil rights which have evolved over decades through decisions of the United States Supreme Court.
>
> Judge Bork's fundamental judicial philosophy, as expressed repeatedly and consistently over the past 30 years, in his writings, public statements, and judicial decisions, appears to this Association to run counter to many of the fundamental rights and liberties protected by the Constitution.
>
> Judge Bork has publicly expressed the view that a number of Supreme Court decisions involving such fundamental issues as voting rights, literacy tests, poll taxes, restrictive covenants, and the scope of anti-discrimination legislation, and the right of privacy are, quote, "unprincipled," were, quote, "wrongly decided and should be reserved."
>
> Moreover, his concept of standing and justiciability would substantially deny access to the courts to individuals seeking judicial relief. While the quality of Judge

Bork's intellect and professional experience is not in dispute, this cannot be the end of inquiry for our Association, or the Senate of the United States.

The Senate, in addition to considering the professional competence of a candidate, has both a right and a constitutional duty to consider the judicial and constitutional philosophy of a nominee to the Supreme Court, particularly a nominee's judicial approach to individual and civil rights.

The Senate's broad role is especially appropriate at this point in time, when the nominee under consideration, if approved, would have a significant effect on the future course of the Court, and constitutional interpretation.

In reaching this conclusion, members of the Association's executive committee, with the advice and participation of members of its judiciary committee, who have a particular experience in evaluating judicial candidates, undertook a major review of available data. Among the materials studied by the group were all of Judge Bork's decisions on the circuit court; all of the dissents written by Judge Bork; articles written by Judge Bork; testimony by Judge Bork before various Committees, including this one; reports concerning Judge Bork's record and writings prepared by various groups, including the Justice Department; and articles commenting on Judge Bork's judicial and constitutional views published in various media.

A request to Judge Bork to be interviewed by the Association was declined, but more than thirty lawyers, judges, and law professors who are, or were colleagues of Judge Bork, who had appeared before him were interviewed.

Ms. Birnbaum, the vice president of the Association who headed the review panel, is hereto answer any questions you may have about that process.

The extensive research and careful consideration of Judge Bork's record, undertaken by the executive committee, convinced the majority of its members, that the appointment of Judge Bork to the United States Supreme Court would detrimentally affect the rights of individuals and groups that the Supreme Court has recognized and protected, and that access to the courts may be seriously curtailed.

Now, Mr. Chairman, that concludes my formal statement, but I'd like to add a brief personal note.

I spent 3 years of the most rewarding years of my life working on this very floor in this building. More than 25 years ago, I was legislative assistant to Senator Jacob K. Javits of New York. That wonderful experience left me with the greatest respect for the Senate, as an institution, and for its Members, and it leaves me with the certainty that this committee, and the entire Senate, will act on this nomination with the greatest concern for the best interests of the United States.

Thank you very much.

[Prepared statement follows:]

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET
NEW YORK 10036-6690

ROBERT M. KAUFMAN
PRESIDENT

(212) 382-6700

Statement of
Robert M. Kaufman, President
The Association of the Bar of the City of New York

On the Nomination of Robert H. Bork
To the Supreme Court of the United States

I am Robert M. Kaufman, President of the Association of the Bar of the City of New York. I am accompanied by Sheila Birnbaum, a Vice President of the Association who led our review group on this issue. We appreciate the opportunity to appear before you today to add our views to the others that we know will be receiving careful consideration by this Committee. As you may know, the Association of the Bar is the oldest bar association in the United States and at present consists of almost seventeen thousand members many of whom are from other parts of the country.

The Association was founded in 1870 because of the serious concern of leading members of the profession with the quality of the judicial selection process then present in New York City. It has over the entire time of its existence focused particularly on the issues of judicial selection, the quality of the courts and the obligation of the Bar to speak on those issues. The Constitution of the Association provides as a major portion of its purposes "facilitating and improving the administration of justice."

Our Association's periodic consideration of how it is meeting its basic purposes lead to a review of the scope of its judicial review function. In a report issued by its long-range planning committee early in 1987, there was a strong recommendation that the Association expand its review of judicial and similar offices to regularly include, among other offices, federal courts at levels beyond those previously reviewed by the Association. That recommendation included review of nominees for the Supreme Court of the United States.

The Executive Committee of the Association, its governing body, approved that policy in May 1987, at a time when no nominations to the Supreme Court were pending, nor, I might say, anticipated. The policy was implemented with the first nomination for the Supreme Court subsequent to the adoption of that policy, though I should point out that the Association has in the past commented on Supreme Court nominations from time to time when it was deemed appropriate by Association leadership. Its review of the qualifications of Judge Robert H. Bork led the Executive Committee of the Association to adopt the policy statement which has been submitted to you and which reads as follows:

STATEMENT BY THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

ISSUED BY THE EXECUTIVE COMMITTEE 9/11/87

The Association of the Bar of the City of New York opposes the appointment of Judge Robert H. Bork to the United States Supreme Court.

The constitutional jurisprudence of our country embodies fundamental individual and civil rights which have evolved over decades through decisions of the United States Supreme Court. Judge Bork's fundamental judicial philosophy, as expressed repeatedly and consistently over the past 30 years in his writings, public statements and judicial decisions apppears to this Association to run counter to many of the fundamental rights and liberties protected by the Constitution. Judge Bork has publicly expressed the view that a number of Supreme Court decisions involving such fundamental issues as voting rights, literacy tests, poll taxes, restrictive covenants, the scope of anti-discrimination legislation, and the right of privacy are "unprincipled" or "wrongly decided" and should be reversed. Moreover, his concept of standing and justiciability would substantially deny access to the courts to individuals seeking judicial relief.

While the quality of Judge Bork's intellect and professsional experience is not in dispute, this cannot be the end of the inquiry for the Association or the Senate of the United States.

The Senate, in addition to considering the professional competence of a candidate, has both a right and a constitutional duty to consider the judicial and constitutional philosophy of a nominee to the Supreme Court, particularly a nominee's judicial approach to individual and civil rights. The Senate's broad role is especially appropriate at this point in time when the nominee under consideration, if approved, would have a significant effect on the future course of the Court and constitutional interpretation.

In reaching this conclusion, members of the Association's Executive Committee, with the advice and participation of members of its Judiciary Committee who have particular experience in the evaluation of judicial candidates, undertook a major review of available data. Among the materials studied by the group were all of Judge Bork's decisions on the Circuit Court, all of the dissents written by Judge Bork, articles written by Judge Bork, testimony by Judge Bork before various Congressional committees including his testimony before the Senate Judiciary Committee in connection with his appointment to the Circuit Court, reports concerning Judge Bork's record and writings prepared by various groups including the Justice Department, and articles commenting on Judge Bork's judicial and constitutional views as published in various newspapers and magazines.

A request to Judge Bork to be interviewed by the Association was declined. However, more than thirty lawyers, judges and law professors who are or were colleagues of Judge Bork or who had appeared before him were interviewed.

The extensive research and careful consideration of Judge Bork's record undertaken by the Executive Committee, convinced a majority of its ~~members th~~at the appointment of Judge Bork to the United States Supreme Court would detrimentally affect the rights of individuals and groups that the Supreme Court has recognized and protected, and that access to the courts may be seriously curtailed.

The CHAIRMAN. Thank you very much, gentlemen. I will attempt to confine myself to 5 minutes, as I would ask all my colleagues to do.

I have two questions. The many questions I have I would love to hear you expound on, but I have two that I would like to try to cover relatively quickly, and Mr. Smith, I would like to begin with you and Mr. Meserve. Each answer the same question, if you would.

There has been a great deal made about the fact that Judge Bork, as a circuit court of appeals judge, has turned out to be a person very different than Judge Bork, the professor, who was essentially being provocative, and we are admonished to look only to his—or at least primarily to his judicial renderings.

Can you tell me what your view is as to that argument.

Mr. MESERVE. Senator, I have a very strong feeling that Mr. Justice Bork, if he were confirmed, would be, or might be a quite different person than Judge Bork.

In the court of appeals——

The CHAIRMAN. Would you mind pulling that very much closer.

Mr. MESERVE. In the Court of Appeals for the District of Columbia, he has himself acknowledged the fact that he is subject to and subordinate to the decisions of the Supreme Court of the United States, which he must enforce until overruled, and therefore, he has not been a person who, in many areas, has been charged with the duty of developing governmental policy and answering the questions of the type which my dear friends, Bill Coleman and Barbara Jordan talked to you about, which others might talk to you about, about individual privacy, and so forth.

The rules have been made for him, and he has been enforcing them.

Now you are considering his appointment to a Court where he will make the rules, and I think that is quite different, and I suspect that Judge Bork's future actions can be determined by the whole body of what he has said, including what he said as a professor, making due allowance for his function as a Socratic gadfly. I have been a sort of professor myself, off and on, and I understand that, but I think he has gone well beyond that status. I think he has committed himself to a doctrinaire legal position.

I know that he has publicly stated his withdrawal from some of the positions he has taken. I remind you of an adage which I know Senator Kennedy will be familiar with. It is current in my State, for my lifetime, and goes something like: "When the devil was ill, the devil a saint would be, and when the devil was well, a devil a saint was he," and I think——

The CHAIRMAN. Who said that?

Mr. MESERVE. I have not any idea. I said it most recently, Senator.

The CHAIRMAN. All right. Okay.

Mr. MESERVE. Who said it, originally, I do not know, but I acknowledge, sir——

The CHAIRMAN. As far as I am concerned, it is all right.

Mr. MESERVE [continuing]. That I am quoting somebody else, and I think in all honestly, that Judge Bork's testimony here is somewhat colored perhaps by the possibility that he might be approved by your committee if he took certain positions. I do not know that.

The CHAIRMAN. Mr. Smith.

Mr. SMITH. Generally, I agree with that answer. I would make a few observations about it. I think that Judge Bork is a—though I have not been around him at all in recent years—I find him a delightful, and perhaps even brilliant lawyer, and I liked him very much. I think that he obviously is a talented person.

But I think he is guilty of what I will call—because I cannot think of anything else—constitutional gabbiness. He talks all the time. And when you say something, I think that professors ought to wander around the lot. I believe in the Socratic method. I think they ought to expand the mind, but not when they are right.

I say all kinds of things orally, but when I write, I do the best I can do. I think and I edit, and I work, and if I publish it in a law review, it is the very best that is in me, and it is just as good as I am, and that is what I think.

The CHAIRMAN. A question for the three of you, beginning with Mr. Kaufman, and my time will be up.

In a sense, Mr. Meserve has already answered this question, or spoken to it.

Judge Bork has come forward to elucidate positions that are, if not new, have matured before this committee on a number of the areas of concern, although in fairness, in one area he has not. He has not on the right to privacy. But on others he has—speech, and others.

Have any of you had a chance to, knowing of his writings and what he has said in his rulings—have you had a chance to observe what he has said in these hearings, and how do you read them? How do you put them together? The Judge Bork we saw before us, and the Judge Bork who has written and spoken prior to being here.

Mr. Kaufman.

Mr. KAUFMAN. Well, Senator, I have been losing sleep almost every night for the last 2 weeks watching the replay every evening on cable, so I have watched both your questioning of Judge Bork and of other witnesses.

I think that you have to take 30 years of a statement of philosophy very seriously, and it is very easy to say that somebody will follow a particular precedent. That is not how the law of the Supreme Court is made in most cases, by overturning a precedent. It is made by distinguishing the next case, and the next case has new facts, and there is no reason to believe, either on the basis of the prior record, or what was said in this committee, that when Judge Bork sees new facts in a new case, no matter how close it may be to an old one, that he will not apply his principles to that new case. And I think that is what everybody is concerned about.

I do not think he is going to come in here, and say that I want to overrule—whatever case it may be—perhaps even *Griswold.* But the next case is going to be slightly different, and the philosophy that he is going to apply I think is going to be the philosophy that he wrote for 30 years as being his philosophy.

And by the way, I take that very seriously. I do not think those are the exercises of an academic. Most academics that I know are very serious about what they write, and what they say as being their beliefs, and I think he has to be given credibility as to what he said for those 30 years.

Mr. **MESERVE**. I will pass.

Mr. **SMITH**. Well, I basically concur in that. It seems to me that Judge Bork is entitled to explain and elucidate, but I am entitled, when I decide whether I want somebody to be on the Supreme Court, to read and look at anything, and if I think he is kind of fuzzy on all of these things that are vital and important to me, I do not have to worry about any one particular thing.

I suppose that what I worry about in Judge Bork is that he tries to, it seems to me, to make everything simple, when, if there is anything I know in a law suit, all of them are different, and constitutional principles get changed and shaped because of facts before the Court at a particular time, and that is what I think will happen.

It worries me that he is fuzzy.

The **CHAIRMAN**. I thank you all. I understand, Mr. Smith, why you are such a good trial lawyer. I am not being facetious, I mean that seriously, because I think——

Mr. **SMITH**. I charge a lot. [Laughter.]

The **CHAIRMAN**. God willing, I will never need you. [Laughter.]

I yield to my colleague from Wyoming, another fine trial lawyer.

Senator **SIMPSON**. Mr. Chairman, I did enjoy trial work, but I tried to avoid it because it is so consuming, and when it would come in my practice, I did it, and it might be a week or two, and I was pretty successful at it. But then they would say why don't you do that, why don't you continue that, but, boy, I tell you, that ain't my bag. That is a tough, consuming thing. When you finish one of them, they hand you a bunch of stuff and give you a new bunch of stuff, and say go for another one.

The **CHAIRMAN**. At $10 an hour, you said you charged. I can understand why you did not do it.

Senator **SIMPSON**. Well, for heavy work, we did 20 bucks an hour. Chesterfield Smith, do you remember coming to Cody, WY?

Mr. **SMITH**. Yes.

Senator **SIMPSON**. We had a lot of fun. And I admire you all, and as a member of the American Bar for many years—I took great pride in that organization, and served on some of its committees with regard to municipal work.

I was interested, and I did not know that you had served with Jake Javits who was a lovely friend of mine and a great counselor for me. I was very privileged to give one of the eulogies at his funeral service.

Mr. **KAUFMAN**. I was there that day, Senator, and it was a very touching occasion.

Senator **SIMPSON**. Well, it was for me. And so because of that great regard for the bar, I was a bit surprised the other day when we had the two witnesses who spoke, and tried to tell us what they could of the selection process. The puzzling thing for me was the fact that this judge, this very judge that we speak of today, received a recommendation as exceptionally well-qualified in 1982, unanimously.

And then it seems to be lost in the process that this time, he has received the highest recommendation that the American Bar Association can give, but you would not know that, because the vote was 10 in favor of the highest recommendation he could possibly receive from your group, your association, and 4 saying no, and 1 not opposed.

That has been lost in the shuffle here. So, by over 2 to 1, he receives the highest recommendation of the American Bar, and I think that I just cannot help but see how that keeps slipping away. And Chesterfield Smith, you said that he seemed to be trying to make things more simple. Well, if that happened all over the world, we lawyers would be out of business.

I think that is one of the remarkable things about him. He tries to make it readable. His stuff is readable. But the thing that disturbs me—and I think should disturb you—is that almost all of the terrible objections about Robert Bork have come in some way from a writing done in 1963 about civil rights, at a time when 27 United States Senators voted against the Civil Rights Bill—forget the political pressures—and an Indiana law review article, which was prefaced—and I heard one of you say that if you were going to do a law review article, it would be a piece of work.

Well, he did a law review article, and he did not ever say it was a piece of work. His whole preface to the article was that it was a general theory, it was ranging shots, an attempt to establish some theories. The style is informal, the remarks were originally lectures which he pieced together. It was tentative. It was exploratory. Yes, he had given it a lot of thought.

If he was going to convert the speculations of the article—and that is what he called it—and arguments into a heavily researched, balanced, and thorough presentation, that would result in a book.

That I think is important if we are going to be what I call, a terrible thing called, "fair." Fair. That is one thing we know as lawyers, that there is always another side. And so I know that, Mr. Kaufman, you bring the impact of the bar, and I would like to put in the record a statement by members of the Association of the Bar of New York repudiating your activities.

It is signed by some 27 members of your bar. They say: "The charter and by-laws of the Association do not give to the executive committee any authority to speak for the membership in such an action, or to pass on the qualifications of United States Supreme Court nominees."

I would insert that in the record.

The Chairman. Without objection.

[The information follows:]

JOHN W. BARNUM
1747 PENNSYLVANIA AVENUE, N. W.
WASHINGTON, D. C. 20006

September 22, 1987

The Honorable Alan K. Simpson
United States Senator
261 Dirksen Office Building
Washington, DC 20510-5001

Dear Alan:

Your contributions to the Bork hearings on Tuesday morning and Saturday were wonderful -- perceptive, pungent, practical and politic (four "P"s, to crib from somebody famous).

Secondly, I think the New York City Bar Association's opposition is substantively outrageous and unsupportable procedurally (I reject the right of its executive committee to make such a political statement on behalf of the Association). I understand that its president, Robert Kaufman, is going to testify before your Committee. You and your colleagues should know that many members of the Association with whom I have spoken agree that the Association's executive committee is off base on both counts. A copy of my letter of resignation from the Association is enclosed.

Sincerely,

John Barnum

John W. Barnum

Enclosure

JOHN W. BARNUM
1747 PENNSYLVANIA AVENUE, N. W.
WASHINGTON, D. C. 20006

September 22, 1987

Robert F. Kaufman, Esq.
President
Association of the Bar
of the City of New York
42 West 44th Street
New York, NY 10036

Dear Mr. Kaufman:

I hereby resign my membership in the Association because of the Executive Committee's decision to oppose the appointment of Judge Bork in the name of the Association. I do not wish to be associated with a bar association where the executive committee is willing to claim that a person is not qualified to be a Justice because his judicial philosophy "appears to this Association to run counter" to what is only the Committee's view of the Constitution. While the Senate's role may be broader, I believe that a bar association should limit its role to appraising the candidate's judicial competence. It should not be making what I perceive to be a political statement, ill disguised in an unfair summary of Judge Bork's views. Genuine disagreement on the meaning of the Constitution is not a basis for rejecting for judicial competence.

When you testify before the Senate Judiciary Committee I hope you will describe accurately just who you are speaking for. I have trouble believing that your views fairly reflect the views of the membership of the Association and I hope you will not claim that they do. I also hope that the Senate Committee will appreciate that some members are so disgusted with your enlisting the City Bar in such a political cause that they have resigned.

I take this action with considerable regret because I have long had a great respect for the Association and its leadership. I have been a member of the Association for almost 30 years and was briefly the chairman of one of its committees. I have also been a partner in two New York City firms (Cravath from 1963 to 1971 and White & Case since 1978) that have supported the Association in many, many ways, but that familiarity with the Association only increases my disappointment with the Executive Committee's September 11 decision.

Yours truly,

/S/ JOHN W. BARNUM

John W. Barnum

September 22, 1987

STATEMENT BY MEMBERS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK REPUDIATING THE UNAUTHORIZED ACTION OF ITS EXECUTIVE COMMITTEE IN OPPOSING THE NOMINATION OF JUDGE ROBERT H. BORK TO THE SUPREME COURT OF THE UNITED STATES

Fourteen of the twenty-two members of the Executive Committee of the Association of the Bar of the City of New York recently issued a statement indicating that the Association is opposed to Judge Bork's nomination to the Supreme Court.

The undersigned members of the Association, some of whom support and others of whom oppose the nomination, hereby express their strong disapproval of the statement as being unauthorized by the membership, irregular, and political in nature. We do so because the statement will certainly be misconstrued by the public and by elected officials as representing the view of a majority of the 17,000 member Association. On the contrary, it was not even submitted for approval to any of the standing committees of the Association.

The Charter and By-Laws of the Association do not give to the Executive Committee any authority to speak for the membership in such a matter or to pass on the qualifications of United States Supreme Court nominees. The Committee on the Judiciary is the only committee that has any responsibility to evaluate the fitness of candidates for judicial office. The responsibilities of that Committee are limited to certain courts, not including the Supreme Court, and its evaluation of candidates has been traditionally based on their intelligence, integrity and judicial temperament. Moreover, Article XIX, Section 2 of the Association's By-Laws expressly states that in evaluating qualifications of candidates for judicial office the Judiciary Committee shall "endeavor . . . to prevent political considerations from outweighing fitness in the selection of candidates for judicial office."

The Executive Committee's statement was issued pursuant to its own recent resolution "authorizing" it to speak for the entire Association in evaluating the qualifications of nominees for the United States Supreme Court. We believe the resolution was without authority in the Association's By-Laws. Moreover, the Executive Committee, conceding that "the quality of Judge Bork's intellect and professional experience is not in dispute," has failed to apply the Association's own standard for evaluating judicial candidates, and has based its opposition solely on the political judgment of a majority of its members.

The undersigned believe that the President and fourteen members of the Executive Committee of the Association, in causing the statement regarding Judge Bork to be issued, have exceeded their authority, and have thereby improperly attempted to utilize the Association to influence the Senate Judiciary Committee's evaluation of the candidate.

Nathaniel H. Akerman
Winthrop J. Allegaert
Eugene R. Anderson
Michael F. Armstrong
Dudley B. Bonsal
Thomas J. Cahill
Bruce F. Caputo
Michael Q. Carey
John P. Carroll, Jr.
Frederick C. Carver
John W. Castles
John S. Clark
John P. Cooney, Jr.
Paul J. Curran*
Thomas A. Dubbs
J. Richard Edmondson
Thomas E. Engel
Frank W. Ford, Jr.
Stephen Friedman
Arthur F. Golden
Thomas P. Griesa
John M. Hadlock
Grant B. Hering
Joseph F. Johnston, Jr.
Edmund H. Kerr
Lydia E. Kess
William Lee Kinally, Jr.
Alan Levine
Michael J. McAllister
John J. McCarthy, Jr.
Denis McInerney
Steven S. Miller
William Hughes Mulligan
Robert Neuner
Richard E. Nolan
John W. Osborn
Milton Pollack
Edward S. Reid
Victor Rocco
Jonathan L. Rosner
Herbert F. Roth
Thomas Sheridan, III
Richard B. Smith
John E. Sprizzo

---

* Resigned from the Association over this issue on September 16, 1987.

Nicholas John Stathis

Laurence N. Strenger

Richard T. Taylor

George G. Tyler

John M. Walker

Gerald Walpin

John J. Walsh

Robert F. Wise, Jr.

Dennis R. Yeager

D:S097038WJA

VIA TELECOPIER

September 24, 1987

The Honorable Alan K. Simpson
United States Senate
Capitol Hill
Washington, D.C.

Dear Senator Simpson:

I am a Senior Partner in the law firm of Burl[illegible]am Underwood & Lord in New York City and I have been a me[illegible] of the Association of the Bar of the City of New York f[illegible] thirty-three years.

On Friday, September 25, Mr. Robert M. Kaufman, P[illegible] [illegible] the City Bar Association will testify in opposition to the nomination of Judge Bork for Justice of the Supreme Court. Mr. Kaufman will say that he speaks for the Association a[illegible] [illegible]s members. He does not.

The opposition of Mr. Kaufman and the Executive [illegible]ee of the Association is not, as they concede, based [illegible] the qualifications of Judge Bork, or his competence, [illegible]tellect or ability. It is based purely on philosophical differences. The [illegible]rship of the Association happens to be in the hands of th[illegible] [illegible]ith a liberal persuasion. However, there are thousands of members with a different point of view and Mr. Kaufman does not speak for us.

(*) It is ironic that Mr. Kaufman in opposing Judge Bork's nomination is adopting one aspect of Judge Bork's philosophy by imposing the majority view - at least as expressed by the Executive Committee - upon the rest of the membership of the Association.

I urge that Judge Bork's nomination be confirmed.

Sincerely yours,

Kenneth H. Volk

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August 7, 1987

Mr. Benjamin C. Bradlee
Executive Editor
The Washington Post
1150 15th Street, N.W.
Washington, D.C. 20071

Dear Sir:

I am Immediate Past Chairman of the Section of Antitrust Law of the American Bar Association. I write this letter on behalf of myself and the previous Chairmen of the Section listed below.* We write to take issue with Colman McCarthy's criticisms in his article of July 12, 1987 stating that Judge Robert Bork's views on antitrust law are "over the edge" and anticonsumer.

To the contrary, Judge Bork's writings in this area have been among the most influential scholarship ever produced. While not all of us would subscribe to its every conclusion, we strongly believe that The Antitrust Paradox, which he published in 1978, is among the most important works written in this field in the past 25 years.

It is indicative of the value of Judge Bork's contributions that The Antitrust Paradox has been referred to by the United States Supreme Court and by the U.S. Circuit Courts of Appeals in 75 decisions since its publication.

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* The opinions expressed herein are those of the individuals listed below and are not intended to represent those of the Section of Antitrust Law or the American Bar Association.

Perhaps the clearest evidence of its influence is that it has been cited approvingly by no fewer than six majority opinions written by Justices commonly viewed as having widely varied judicial philosophies: by Justice Brennan in Cargill v. Monfort of Colorado, Inc., 107 S.Ct. 484, 495 n. 17 (1986); by Justice Powell in Matsushita Electrical Industries v. Zenith Radio Co., 106 S.Ct. 1348, 1357 (1986); by Justice Stevens in Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 105 S.Ct. 2847, 2858 and n. 29, 31, 2860-61 n. 39 (1985) and NCAA v. Board of Regents, 468 U.S. 85, 101 (1984); and by former Chief Justice Burger in Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1978) and United States v. United States Gypsum Co., 438 U.S. 422, 442 (1978). Justice O'Connor also relied on The Antitrust Paradox in her concurring opinion in Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 36 (1984), as did Justice Blackmun in his dissent in National Society of Professional Engineers v. United States, 435 U.S. 679, 700 n.* (1978). It should also be noted that every member of the present Supreme Court joined one or another of these opinions.

In light of the fact that six of the nine present Justices have cited Judge Bork's book and that all of them have joined opinions citing it, Mr. McCarthy's claim that Judge Bork's antitrust views are "so far on the fringes of irrelevant extremism that [Bork] disqualifies himself from the debate" demonstrates more clearly than anything we could say that Mr. McCarthy does not know what he is talking about.

Mr. McCarthy is also quite wrong in his suggestion that Judge Bork's antitrust writings are anticonsumer. To the contrary, the central thesis of Judge Bork's book, as summarized in chapter 2, is that:

> (1) The only legitimate goal of American antitrust law is the maximization of consumer welfare; therefore,
>
> (2) "Competition", for purposes of antitrust analysis, must be understood as a term of art signifying any state of affairs in which consumer welfare cannot be increased by judicial decree.
>
> R. Bork, The Antitrust Paradox 51 (1978).

It is true that Judge Bork has also stressed that protection of consumer welfare is sometimes inconsistent with protection of some businesses from legitimate competition. The key point, here, however, is that Judge Bork advocates pro-competitive policies which promote the very efficiency that makes the enhancement of consumer welfare possible.

Thus, we fear that it is Mr. McCarthy, and not Judge Bork, who is out of touch with the center of legitimate judicial and economic thought about the proper direction of antitrust analysis. Fortunately, the mainstream view, which no one has helped promote more than Judge Bork, is that the proper antitrust policy is one which encourages strong private and government action to promote consumer welfare rather than unnecessary government intervention to protect politically favored competitors.

Sincerely,

James T Halverson

James T. Halverson
Shearman & Sterling
New York, New York
Immediate Past Chairman
Section of Antitrust Law
American Bar Association

On behalf of himself and:

Richard A. Whiting
Steptoe & Johnson
Washington, D.C.
Section Chairman, 1984-85

Richard W. Pogue
Jones, Day, Reavis & Pogue
Cleveland, Ohio
Section Chairman, 1983-84

Carla A. Hills
Weil, Gotshal & Manges
Washington, D.C.
Section Chairman, 1982-83

E. William Barnett
Baker & Botts
Houston, Texas
Section Chairman, 1981-82

Harvey M. Applebaum
Covington & Burling
Washington, D.C.
Section Chairman, 1980-81

Earl E. Pollack
Sonnenschein, Carlin,
Nath & Rosenthal
Chicago, Illinois
Section Chairman, 1979-80

Allen C. Holmes
Cleveland, Ohio
Section Chairman, 1978-79

Ira M. Millstein
Weil, Gotshal & Manges
New York, New York
Section Chairman, 1977-78

Edwin S. Rockefeller
Schiff Hardin & Waite
Washington, D.C.
Section Chairman, 1976-77

John Izard
King & Spaulding
Atlanta, Georgia
Section Chairman, 1974-75

Julian O. von Kalinowski
Gibson, Dunn & Crutcher
Los Angeles, California
Section Chairman, 1972-73

Richard K. Decker
Of Counsel
Lord, Bissel & Brook
Chicago, Illinois
Section Chairman, 1971-72

Frederick M. Rowe
Kirkland & Ellis
Washington, D.C.
Section Chairman, 1969-70

Miles W. Kirkpatrick
Morgan, Lewis & Bockius
Washington, D.C.
Section Chairman, 1968-69

Senator **Simpson**. Another letter by Kenneth Volk, repudiating the material. There were 53 signers to that. Fifty-three. I have the material on that, and several other letters saying that you were not authorized to speak for these members.

Mr. **Kaufman**. Senator, I would really like to comment on that.

Senator **Simpson**. Yes. I would like that.

Mr. **Kaufman**. We have an association of 17,000 members, Senator.

Senator **Simpson**. How big is the executive committee?

Mr. **Kaufman**. The executive committee is 22 members who are elected. The vote on the executive committee was 14 to 4, and I might say that of those members, of the 4 who expressed any view, they said that they would vote against Mr. Bork if they were Members of the Senate, but that they thought the review process ought to be, even for us, what Mr. Meserve has described for the American Bar Association.

I have no doubt that there are more than 53 members of the association who disagree with that, but I would add to it, that their view of the constitution of our association is contrary to fact, and that there is a long history, going back to the year 1870, that a principal function of our association is to review judicial candidates and to express views with respect to judicial candidates.

Senator **Simpson**. Well, my time has expired, but I was disturbed——

Mr. **Meserve**. If I may, Senator.

Senator **Simpson**. Yes, sir.

Mr. **Meserve**. I would like to comment on your remarks, if I may, briefly.

Senator **Simpson**. But may I just add one, because I had just one thought for you.

You said that this man was qualified in every sense but the political sense——

Mr. **Meserve**. Precisely.

Senator **Simpson** [continuing]. Which really disturbs me greatly, because that is against all the rules of the bar.

Mr. **Meserve**. Well, it is not against my personal rules, and I made it very clear, Senator, that I appear here for myself, and for the American people, just as you do. I do not appear here for the American Bar Association.

Senator **Simpson**. But you are a former president of the Bar Association.

Mr. **Meserve**. I am, indeed, and proud of it. And I would like to say, Senator, if I may——

Senator **Simpson**. Go right ahead.

Mr. **Meserve**. That my remarks, which perhaps you did not hear, dealt with the question of the American Bar's action, and I feel very strongly, that it is clear to me, at least, that the American Bar committee is not attempting, as an American Bar committee, to indulge itself in your function as politicians, in the nonpejorative sense of that word.

I think you have a right to be political. Senator Thurmond, you will recall, at one time, in connection with the Fortas nomination, said: "To contend that we must merely satisfy ourselves that Justice Fortas is a good lawyer and a man of good character is to hold a very narrow view of the role of the Senate, a view which neither the Constitution itself, nor history and precedent have approved."

I thoroughly agree with that, and I am addressing myself, now, to your political views, not to your views of Mr. Bork as a person, as a lawyer, but only as to his political views in the broadest and nonpejorative sense.

I think that that also is an answer to your question as to why, some years ago, the committee found Judge Bork exceptionally well qualified for the circuit, where he was not making judicial policy for the United States generally.

I think the situations are quite different, and that a distinction on the part of this committee, between Judge Bork as a nominee for the circuit and Judge Bork as a nominee for the Supreme Court of the United States is completely warranted, and I appreciate very much your giving me the opportunity to answer your question as far as I could.

Senator SIMPSON. Well, Mr. Chairman, and as you all know, we all have voted for many people of Democrat and Republican faith here, regardless of their philosophy. I have done that many times with Carter's appointments. It did not cause me a bit of concern. I just wanted to clarify that. Thank you, Mr. Chairman.

The CHAIRMAN. Did you wish to comment at all, Mr. Smith, on anything that was said?

Mr. SMITH. Maybe I am kowtowing a little to Judge Simpson, but if I had been on the ABA committee, I would have done just like you wanted me to.

Senator SIMPSON. Would you have an affidavit to that effect. [Laughter.]

I will buy the next time.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman. I, too, want to extend a very warm welcome to our panelists today. I have had the good opportunity to know both Chesterfield Smith and Bob Meserve for a number of years. I also welcome Robert Kaufman. I think all of us know of the extraordinary prestige and influence of the Bar Association that you are representing here, and we are very delighted to have you here.

Chesterfield Smith's name is synonymous with the rule of law. During the period of the early 1970's, when we were going through the Watergate crisis, Chesterfield Smith was a paragon and a leader in reassuring this country about its roots, anchored in the law. He provided extraordinary service not only to the bar association, but to the American people.

And I am reminded, Mr. Chairman, that Bob Meserve, who has practiced law for 53 years, left a very lucrative position in one of our most important law firms in Boston, so he could be an assistant U.S. attorney. He wanted to do it for $1 a year, but they insisted that he be compensated, and he has donated his salary to Massachusetts charities.

It is extraordinary that after such a prestigious career in the law that he would do this, but those of us who know his commitment to public service never doubted that he would.

I just have one question for each of the panelists. We have talked, Mr. Smith, about the whole role of Mr. Bork at Watergate.

I am not really interested in reviewing the particular details, hour by hour. But based on your service as the president of the Bar Association and your knowledge of the climate in that period of the early 1970's, what could you tell us, about the propriety, of his actions? Would you be willing to make a comment on that?

Mr. SMITH. I have said almost everything that anybody could ever say about the Saturday Night Massacre, so I will comment on it.

I was president of the association. I felt great burdens on me after the Saturday Night Massacre because people all over the United States were calling me and asking me, what are you going to do, and who is going to defend the rule of law? We are in a heck of a mess here. People were scared to death. The FBI had gone in. They said, are we going to have a dictatorship? And I was scared.

But I got everybody around, and I talked to literally hundreds of people, and I finally came out strong, and said that the President could not decide that he was not going to comply with a court order, and he could not fire the prosecutor, and that the Congress and the courts had to do something about it.

Well, I got heavily involved when that hit, and I was right in the thick of a storm. I knew that Judge Bork, of course, was acting Attorney General, and I knew that he discharged Mr. Cox. I was very upset about that, and I wish today that we were trying to confirm Elliot Richardson or Bill Ruckelshaus, because I liked them and liked what they did.

But we had an official position in the ABA at that time, that said that a prosecutor cannot have a conflict of interest. A prosecutor has to be independent. He cannot be appointed or controlled by the guy he is investigating. Well, that was enough for me, and I took off, and I called the board of governors, and the house of delegates, was trying to call the house of delegates then, and I talked to everybody I could, and I was disturbed by the fact that the acting Attorney General and the White House were generally responding slowly to public opinion.

I am sure that any of you who were here got mail then that you have never gotten before or since, and opinion was building. And so about Wednesday, after we had just done all we could do on Sunday, and Monday, and Tuesday, they began to cave a little.

And as I remember, the President said, "Well, I'll turn over those tapes in camera to the judge."

And about Thursday, they announced that they were going to appoint another prosecutor, and I thought that was awful, and wrong. Who in the world cares about justice except the people, and who in the people want a prosecutor appointed by a guy that he is going to investigate?

We went before the Congress, and about two weeks later, I was before the House Judiciary Committee, speaking in favor of the independent prosecutor bill.

I came out. Television was there, and they said, do you know that General Haig just announced that the President has requested Leon Jaworski to be special prosecutor?

Well, I had had a feeling all the way through, as it was building up, that the President, General Haig, Acting Attorney General

Bork and all were going to do something, because the people were demanding.

But my reaction when that was done was that my dear friend Leon—I said the absolute right man but the terrible wrong system. And because if Leon Jaworski, who was a great man, got in there, and he found out that the President or the people connected with the President were guilty, justice was going to be done and the people were going to be satisfied.

But he was a great man. If he had found out that they were innocent, he was also going to tell the people that, and they would not have believed him.

They would have believed that the President and the Acting Attorney General had picked a guy that did not do the job, that to investigate them, that came out with the results. I have often thought since then, that unless that President had been guilty of whatever he was guilty of, Acting Attorney General Bork would not be here today. He was lucky that the President was guilty.

If he had been innocent, the people would not have believed him, because you cannot get in a system like that, and have justice in America.

The perception of justice, in my personal opinion, is perhaps even more important than justice. The people have to believe, and they could not believe, when it is being maneuvered and pushed around. So if I did not tell you like I think it is, they were lucky, is all.

Senator KENNEDY. Thank you, Mr. Smith.

Let me, if I could, for——

The CHAIRMAN. This is your last question, Senator. [Laughter.]

Senator KENNEDY. Could I ask Miss Birnbaum, without getting into very elaborate detail, review for the committee the procedures that were followed. We have heard Bob Meserve describe the criteria that were being used by the American Bar Association. You have indicated that some members of your own association, four members, would have voted against Judge Bork as Associate Justice of the Supreme Court, but nonetheless, were following, apparently, the type of criteria that the ABA has established.

Could you just tell us what the criteria are, and what steps you took.

Senator HUMPHREY. A parliamentary inquiry, Mr. Chairman. Does the 5-minute rule apply to all members, or not?

The CHAIRMAN. Yes, it does.

Senator HUMPHREY. I will not object if the Senator requests additional time, but I do hope that we are going to stay on schedule today.

The CHAIRMAN. Well, I hope so, too, but my friend from Wyoming and from Massachusetts, neither of whom I like to say no to, this is the last question.

But I hope we will not ask any more questions at the bell.

Ms. BIRNBAUM. Senator, I will try to be brief. I can assure you that the process that our committee went through, which was first, a subcommittee of the entire executive committee, made up of nine people, was as complete, informed and far-reaching as it could be.

Every decision of Judge Bork, both majority and dissenting decisions were read, including every writing that he had written, including all the testimony he had given, that we knew was available.

In addition, there were very far-reaching interviews of people that knew Judge Bork, and people that had appeared before Judge Bork, both plaintiffs and defendants, both winners and losers.

And I think that the criteria that was used were criteria similar to that which our judiciary committee always using in reviewing candidates for the judiciary.

In addition, however, we did believe that since we were dealing with a Supreme Court candidate that was going to review constitutional questions, that the judicial and constitutional philosophy of the judge, as expressed in his writings, was of major importance, and was reviewed and considered as well by the members of the committee and reported back to the executive committee.

So the process was in keeping with the process that has been used prior to by the judiciary committee of our association whose members sat on that committee, and the review was as far-reaching and complete as I think any that could be given the judge.

And in fact we asked Judge Bork, and understandably he did not appear before us and express his own views, and we would have been very happy to take that into consideration as well.

Senator KENNEDY. Thank you very much.

The CHAIRMAN. Thank you. Senator Specter.

Senator SPECTER. Thank you very much, Mr. Chairman.

I join in welcoming the very distinguished members of the bar, distinguished lawyers. I try to ask questions which are single in scope and direct. With three witnesses and the 5-minute rule, that is not possible.

And I am even more reluctant to put this question to these distinguished lawyers, but I will try to formulate it in the form of a hypothetical, to make it an appropriate question.

We have heard a great deal in this room in the course of the past 2 weeks, and from one point of view, we have seen a man come forward in writings, campaigning for the job of Supreme Court of the United States. One of the professors criticizes him for campaigning from podium to podium, and I would be interested in your observations, if this question ever comes to an end, as to whether you think that is bad.

I have already said that I do not think it is. If you deal with a group of Senators, and you make an accusation that someone has gone campaigning from podium to podium, it turns out to be a compliment because that is all we do.

And if you take a look at Judge Bork's writings, they are very different from the testimony which he has presented before this committee. And pinpointing, say, three important areas, probably the three critical areas, although there are others—freedom of speech, and the clear-and-present-danger test—he says he philosophically disagrees with *Brandenburg,* but it is settled law in his judgment and he will apply it.

He says that original intent means that equal protection is for race only, later expanded in his writings to ethnics. But appearing before this committee, he says he will accept a settled law, equal protection applying to women, and to indigents, and to illegitimates.

And without getting into the details of the rational test, or the reasonable test, he has associated himself with Justice Stevens and a respectable test for equal protection of the law. He has said that on privacy, he retains some discretion not to follow *Wade* v. *Roe* and to disagree with *Griswold.*

But he has left himself wiggle room, running room, saying, at the same time, that stare decisis will determine it, there are a series of criteria—reliance, and generally accepted principles as to what stare decisis means.

So that there is a sharp divergence between the writings of Judge Bork and the speeches of Judge Bork, and the presentation of Judge Bork, the candidate who appears in this committee room.

Now my hypothetical question for you is: assuming that the only views on Judge Bork were those expressed in this Senate hearing room, would you think it appropriate to confirm him?

Mr. **Meserve.** Senator, if I may address myself first to that issue let me say that I think a certain amount of campaigning—as you have put it—on behalf of anyone who appears before your committee is to be expected.

I would also think that, if I sat in your seat, Senator, and that of the others, I would discount that a good deal. I have already made one comment on it and quoted a proverb which is current in New England on the subject matter.

He is here, he is making statements here, I think he is being honest about it, but I know, I think that he has previously expressed his basic sentiments, and I know that when those cases are—variations of them, as Mr. Smith has said—are before the Court, if Mr. Bork is on that Court, Mr. Bork will let his fundamental nonsympathy with those basic cases influence his decision in cases which relate to them.

Senator **Specter.** Mr. Meserve, let me just interrupt you for a moment and call to your attention a statement made by Chief Justice Burger, which I felt was weighty.

He said that frequently, in the deliberations of the Court—and I thought it was an interesting insight—that the Court finds doctrines applicable that they disagree with, but they apply the settled law even though they disagree with it.

Now it has been widely quoted that Judge Bork has said that he does not want to be disgraced in history, and he takes the oath very seriously.

I call those factors to your attention, hoping you will comment on the question of what our expectation should be as to Judge Bork's applying settled principles in a conscientious and good faith way.

Mr. **Meserve.** I cannot get into Judge Bork's mind any more than you can, Senator. I know what he has said, and if I were sitting in your place, I would be governed by what he said at a time when he was under no pressure and had no personal gain to reap from—to attain—from his answer to the question.

I do not doubt that there is an ecumenical spirit of deliberation amongst the Justices of the Court. I have never been privileged, of course, to share it, and nobody has ever suggested I should. But I think very seriously that they enter that as we would do as human beings, with our preconceptions, and with our doctrinaire approach, if we have one.

Therefore, I say that I think you should consider what he said, surely, and you should also consider the motivations that were his when he testified before you, and you should consider what he has said before and figure out whether or not in those areas in which I am concerned as you are concerned—human areas—he is going to react as you would think a Judge should react to the presentation before him.

May I make one further observation, which——

Senator SPECTER. Yes, you may. But would you first focus with precision on my question.

Mr. MESERVE. I thought I had.

Senator SPECTER. No, you have not. My time is up. Assuming the hypothetical that the only evidence on the record was the testimony of the witness, Judge Bork, in this room, assuming that is all we know about him, that he is going to follow *Brandenburg*, that equal protection applies to women, assuming that all we know about him is what we saw when he sat in your chair, what would you do? What is your verdict?

Mr. MESERVE. I would determine my verdict, sir, on the basis of the credibility I would give to that statement, having in mind the position in which Judge Bork found himself.

Mr. KAUFMAN. Senator, if I might add something to that.

Senator KENNEDY. Very briefly.

Mr. KAUFMAN. I would not, if I were in your position, confirm somebody on a record of 3 weeks. And that is the problem with the question. The words that are used have to be read in the light of other things that he has said. And one of the things with respect to the question about original intent is that when it has been appropriate to him, his view of original intent has been pretty terrible. He has said—and it is in that famous article on "Neutral Principles" that everybody is quoting—a couple of things, and I just want to quote two sentences.

One of them was, he said: "The First Amendment, like the rest of the Bill of Rights, appears to have been a hastily-drafted document upon which little thought was expended."

And with respect to the 14th amendment, he said, "Many or most of them"—talking about the writers—"had not even thought the matter through."

That does not seem to me like someone whose view of original intent is other than what is said about most members of the Court, which is it is their version of it.

Nobody was sitting with the Founders that day who is around now. You have to judge by what the individual Justice or Justice-to-be says about them to evaluate what they are going to do when they sit on the Court.

Senator SPECTER. Thank you very much.

The CHAIRMAN. The Senator from Ohio, Senator Metzenbaum.

Senator METZENBAUM. Mr. Chesterfield Smith, you are past president of the American Bar Association; as a matter of fact, I think your name is almost synonymous with the ABA.

You have heard the charges that the members of the ABA panel who oppose Judge Bork's confirmation are politically motivated. In all your years of service with the ABA, do you know of any instance in which politics played a part in the ABA's review of judicial nominees, or do you have any reason to believe that politics played a role in the ABA's review of Judge Bork's nomination?

Mr. **Smith**. Well, we always have to define the terms. I will start off by saying that I cherish and love the ABA and its processes. I have never been intimately involved with the Federal Judiciary Committee except as an appointing authority and I guess an oversight authority to that extent.

What politics means, I do not know. I try to feel like I am nonpartisan. I am sure everybody else thinks—I was a Democrat because that is all we were in Florida when I was born. I voted for Reagan once and Nixon once and regretted it—but I also voted for Johnson once and Carter once and regretted that. [Laughter.]

So it is hard to know. But I think that those people who dissented on that committee, if the rumors that are in the Washington Times, or wherever it is, legal magazine that I saw—they said four names, that yes, they were—those are four of the best lawyers I know, who cared deeply about justice, and I cannot believe they would subvert the process for partisan reasons as distinguished from political reasons.

I like those people, and they have done so much good in my time to help advance what I believe to be the proper values of lawyers.

Senator **Metzenbaum**. Thank you.

Mr. Meserve, you also have been a distinguished and well-renowned President of the American Bar Association. And as you know, the American Bar Association was not unanimous in concluding that Judge Bork is well-qualified to be an Associate Justice of the Supreme Court.

Now, much has been made of the fact that, well, he did get 10 votes, 4 against him, and 1 was not opposed. Would you care to comment on how unusual such a split recommendation is, and do you know how far back we would have to go before members of the bar association—to a prior instance in which there was a split decision with respect to the recommendation of a nominee to the Supreme Court?

Mr. **Meserve**. Senator, I will have to plead ignorance. I have been acquainted with the decisions on other nominees to the Supreme Court. I simply do not remember any case in which there was a split vote—but there may have been. And my acquaintance is pretty extensive; it goes back to 1961 or 1962. But I must say that I do not remember whether or not there was a split in that body in the determination of the issue.

Senator **Metzenbaum**. My understanding is not since the nomination of Judge Haynsworth has there been a split.

Mr. **Meserve**. I would accept that. I would accept that, Senator. I think that is probably true.

Senator **Metzenbaum**. Thank you.

Mr. **Smith**. I think there was a split on some of the early nominees in the Nixon administration. I could give their names. One of them was Herschel Friday, if I remember, and another was a woman judge from Los Angeles.

Senator **Metzenbaum**. No. I am talking about nominees to the Supreme Court.

Mr. MESERVE. That is what I had in mind. Oh, there were many splits——

Mr. SMITH. I am talking about nominees to the Supreme Court, too.

Senator METZENBAUM. Was there a——

Mr. SMITH. There was a split on the committee, and they were withdrawn by President Nixon as far as I recall. Those are my recollections.

Senator METZENBAUM. Mr. Kaufman, would you care to comment—there has been some suggestion as to whether or not your view of the executive committee reflected the position of the 17,000 members of the association.

Do you have any indicia as to whether or not it did or does or does not?

Mr. KAUFMAN. Well, Senator, the best I can say is two things. One is that the composition of the executive committee, which is elected by the members, is a very broad range of the profession and of the bar in New York, and we believe that it does represent the membership generally.

The second thing that I would say is that Senator Simpson made reference to the 53 members who have submitted a statement to this committee in opposition, and I suspect there are others. The comments that have come to us since the statement was made have been overwhelmingly in favor of the statement, and I must assume, since it follows in the process of the association, that it represents the membership.

I should point out two other things. Two separate committees of the association other than the executive committee have dealt with this issue and made a recommendation to the executive committee, and both of those were unanimous. One was our committee on civil rights, which is very heavily involved in the kinds of issues that are before the Court, and the other was our committee on sex and law, which has a great interest in some of the issues before the Court. They both recommended unanimously that the executive committee oppose the Bork nomination.

Senator METZENBAUM. Thank you very much. My time has expired.

The CHAIRMAN. Your time is up.

Senator Humphrey, from New Hampshire.

Senator HUMPHREY. Thank you, Mr. Chairman.

First, for Mr. Smith, is it correct that you are a member of the executive committee, or were, anyway, in 1986, the executive committee of the National Lawyers' Council?

Mr. SMITH. I do not know. I do not even know what the National Lawyers' Council is.

Senator HUMPHREY. Well, I think I will just drop that one. Apparently—we have information that you were.

Mr. SMITH. I belong to all kinds of things. In a small town, you join everything.

Senator HUMPHREY. I well understand. I am a member of some things of which I am not even aware. It turns out from time to time. So I will not press that one.

Mr. Kaufman, at least 53 members of the New York Bar Association claim that the executive committee, of which I guess you are the chairman, does not have authority to issue the statement which it issues. You claim that it did. But at least 53 members, including 5 sitting federal judges, no less than 5 sitting federal judges, and a retired federal court of appeals judge, claim that the association has no such authority.

Nonetheless, there is not time within 5 minutes to settle that point. I simply wanted to cite the fact that some very credible people claim that you do not have the authority to speak for the New York Bar Association in this matter.

For the rest of my time, I just want to counterpoise for the benefit of those who might be tuning in today for the first time, counterpoise to the testimony of the New York Bar, that some very impressive people feel pretty strongly about the qualifications of Robert Bork, including eight former presidents of the ABA, not the New York City Bar Association, but the American Bar Association, eight former presidents who support the nomination; two sitting Justices of the United States Supreme Court; retired Chief Justice Warren Burger, who said when he appeared the other day, in response to the question is Robert Bork someone whom black citizens and minorities and women need to fear, this way, quote, "If they need to fear him, they should have been fearful of me. I can see nothing in his record that would suggest or support it."

Justice Stevens—I referred to two sitting Justices who support the nomination, one of whom is Justice Stevens, who says that Bork's judicial philosophy, quote, "is consistent with the philosophy you will find in the opinions by Justice Stewart and Justice Powell and some of the things that I have written."

Now, you are entitled to your point of view, as are all of the witnesses, but I think from time to time we need to counterpoise these negative opinions with some positive opinions from some very respected people.

In whatever time I have left, I would like for my part to address Mr. Meserve. By the way, we have a township in New Hampshire named "Meserve's Reserve" or something like that—nobody lives there, but——

Mr. **Meserve**. I can understand nobody living there.

Senator **Humphrey**. It is a piece of land that was carved out for some purpose and has the name "Meserve" attached to it.

Mr. **Meserve**. My origins are in your State.

Senator **Humphrey**. You seemed to say—I think I came in midstream in your testimony, and I did not catch all of it—but you seemed to say that Judge Bork is qualified in all respects which the ABA uses as criteria, but not in some other respect, which apparently you labelled as political; is that correct?

Mr. **Meserve**. That is absolutely correct.

Senator **Humphrey**. Well, if I had a gold medal, I would march right over to where you are and pin it on your lapel because, as much as I dislike your testimony, I have to say that among the opponents of the nomination, you are the most intellectually honest of any who has yet come before this committee, because you are admitting your opposition is political.

Mr. **Meserve**. Yes, I——

Senator **Humphrey**. I believe that the opposition of most who appear in opposition is political in nature.

Mr. MESERVE. That is due to my New Hampshire origin.

Senator HUMPHREY. I am not surprised to learn that, and I salute you for your intellectual honesty.

Mr. MESERVE. Thank you.

I just want to make one observation, if I may, on a personal basis. Senator Kennedy was kind enough to refer to my service as an assistant U.S. attorney recently. There are those who would say, having gone through the travails that Senator Simpson described, that I made enough money as a trial lawyer so I could work for nothing for anyone who would give me something to do after retirement.

That is not quite true. But the complaint I wish to register is the amount of mail that I get as a result of my one-time charitable endeavors, from Senator Kennedy's church and from my Jewish friends, and other organizations I do not belong to. The very fine black mail carrier who carries the mail to my house complains occasionally of the volume of solicitations that I receive, thanks to my adventures.

Thank you.

Senator HUMPHREY. Thank you, Mr. Chairman. My time has expired.

The CHAIRMAN. Do either of you gentlemen wish to respond?

Mr. KAUFMAN. I would just like to make one comment, because I think perhaps Senator Humphrey may not have been in the room when I responded with respect to the 53-member statement as to what the constitution of the association of the bar says.

If they are right, we have been doing something wrong for 117 years, because our association was founded to deal with the process of the selection of judges through what was then a pretty terrible process in terms of the criteria that were used, and it was established to improve the judiciary. And I think we have worked on that for 117 years, and I just have to disagree with them.

Thank you.

Mr. SMITH. May I?

The CHAIRMAN. Sure, you may, Mr. Smith.

Mr. SMITH. Senator Humphrey, for your information, when a gentleman from Montgomery with the ABA Judiciary Committee called me, my statement back to him is that I would find Judge Bork exceptionally well qualified; however, if I were either President or a Senator, I would not put him on the Supreme Court. You can draw the same conclusion.

Senator HUMPHREY. You are saying that your opposition is political as well?

Mr. SMITH. Yes, sir, if you characterize that as political. I say I do not think he is the man for the job, that is all.

The CHAIRMAN. There is a vote on, gentlemen.

I yield to Senator DeConcini, and then I am going to go vote.

Senator DECONCINI. Mr. Chairman, I do not have any questions. I would be glad to yield to the next person in line.

The CHAIRMAN. Well, we would then go to Senator Leahy, because the next one to question over here is Senator Hatch, and I told him to go and vote now, so he will be right back.

I am going to vote, and Senator Leahy, if you will shut it down for a moment until I get back, if you have to go and vote in the meantime. Okay. And the panel, do not leave, please.

Senator LEAHY. Thank you, Mr. Chairman, and I will keep it brief.

I do also appreciate having you all here. Mr. Smith, I know that when you were president of the bar association, I heard a number of good things from some of my Vermont colleagues in the Vermont Bar about you. One comment made by one was that you were the sort of person he would want to be the senior partner of his law firm—which, when you gain that from one of these dyed-in-the-wool Yankees from Vermont, you know it is a high compliment.

Mr. SMITH. Yes. I like it.

Senator LEAHY. Mr. Kaufman, your organization, the City Bar Association of New York, has to be considered by anybody's standards, one of the most prestigious of all bar associations, and it has provided guidance to this committee not only in this important nomination, but in two recent ones, for the Federal District Court of New York, Rena Raggi and Richard Deronco. I mention those because I have been given the assignment, for better or for worse, of chairing most of the hearings, in screening other judicial nominees this year. And I wish for all of the nominees I have had from all of the other States that we could have the kind of report that we received from your Bar Association on those two particular nominations. It would make things a lot easier. In fact, as you may recall, we moved fairly rapidly on both those nominations, and we were helped in large part because of not only the in-depth job done by the City Bar Association of New York, but also because of the bipartisan credibility given to the report you made.

I mention that, and I have dwelt on it just a bit longer than I would normally, because I notice in the New York Times that there was criticism of your bar association on the report and the split involving Judge Bork. And I want to note that what I have seen so far in the reports received from you have been very, very good. They have helped to expedite a number of nominees made by President Reagan and supported by a number of the hierarchy in the Republican Party in New York. The credibility given by your group was one of the reasons why they have moved so rapidly forward.

I note that because you cannot say that that same group that is so credible when it is supporting a Reagan nominee is suddenly not credible if it has members who do not.

Mr. KAUFMAN. Senator, if I might just interject a moment, I appreciate it, particularly coming from you. About 100 days a year, I am a Vermonter, and about 250 days a year, I am a New Yorker; so that your comment touched me particularly.

Senator LEAHY. Well, thank you. I had to step out of here for a couple of minutes a few minutes ago to take a phone call from my daughter, who was calling from our farmhouse in Vermont. She says at least in northern Vermont, the colors are probably going to peak this weekend, so that if part of your 100 days are around this time of year, you ought to get up there.

Mr. KAUFMAN. They sure are, Senator.

Senator LEAHY. You know, the Vermont Bar Association also had a vote on this. They voted, with not all members polled, but those who did vote at the weekend bar association meeting a week or so ago voted to oppose the nomination of Judge Bork. And I think we have to agree this is something bar associations, I think, properly should be involved in, and leading members of the bar should feel free to express their views.

I know in my own State, I have elicited views from leaders in the bar, and I have had some who come in very strongly for Judge Bork and some who come in very strongly against Judge Bork, but who have taken the time to express that, and I think that is important to the Senate.

Mr. Smith, you spoke to that and to the extent of what you want to see on the Supreme Court; and Mr. Meserve, you said, as I recall your testimony, that your 5 children and your 10 grandchildren—am I correct——

Mr. MESERVE. Yes, sir.

Senator LEAHY [continuing]. Will be affected by this. Well, my children are going to live most of their lives in the next century, and they are going to be affected by it, too. I think it is important.

Mr. MESERVE. I might add, Senator, since you have referred to me, that one of the greatest pleasures I have had in recent years is serving as a trustee of the Vermont Law School, a very fine institution. And my daughter, who unfortunately could not be here, is a graduate of Middlebury College, which I believe is located in the middle of your State.

Senator LEAHY. It very definitely is. In fact, the senior Senator from Vermont, Senator Stafford, is a graduate of that college, as is his wife; a very lovely school.

Ms. BIRNBAUM. Senator.

Senator LEAHY. Yes, ma'am.

Ms. BIRNBAUM. If I can comment on the process, because I think we can assure you that the process you saw in the evaluation of the judges for the district court by our bar association was done with the same care and quality here, if not more so; and that the members of the executive committee sat with members of the same judiciary committee and many members of the executive committee were members in the past of the judiciary committee.

So we can assure you that the process was of the same high caliber that you have seen in the past.

Senator LEAHY. Thank you. You anticipated my final question, and I appreciate the answer, and we will stand in recess for 10 minutes.

Senator HATCH. Pat, can you let me question, because the Chairman said I would be able to.

Senator LEAHY. Yes.

Senator HATCH. Could we have you take your seats again?

Senator LEAHY. If I could call the panel back, I understand Senator Biden had suggested that Senator Hatch could, having come back from voting, go ahead with his time, and if you do not mind, we will do that.

Senator HATCH. Is it okay to proceed, Pat?

Senator LEAHY. Yes.

Senator **Hatch**. I welcome all of you to the committee. These have been difficult hearings, and of course, we appreciate the respective points of view.

Now, Mr. Kaufman, you are appearing here on behalf of the City Bar Association of New York.

Mr. **Kaufman**. That is correct, Senator.

Senator **Hatch**. Before you decided to come to testify, did you survey your membership to determine the support of your entire membership for your particular position you are taking today?

Mr. **Kaufman**. No, we did not, Senator, and we do not do so with respect to the many issues on which we comment.

While you were out, Senator Leahy commented on our testimony here on two recent judicial candidates for the district court. We have procedures and committees which report to the executive committee. I also commented while you were out, Senator, that two committees had recommended unanimously to the executive committee that they take this position, and the executive committee is charged under the constitution with making the policy of the association.

Senator **Hatch**. Well, let me say this. That does not sound very democratic to me, but be that as it may, you have a right to make your rules. But I think that you need to change your rules, because I am getting a lot of calls and a lot of complaining from members of your bar who feel that you do not represent them.

As you are no doubt aware, the New York Times, as has been brought up, has reported that at least 53 of your members, including five sitting federal judges—Judge Thomas Griesa, Judge Milton Pollack, Judge John Sprizzo, Judge John M. Walker, Jr., and Judge Dudley Bonsal, who once served as president of the New York Bar Association—harshly criticized your actions as, quote, "unauthorized," was "unauthorized by the membership, irregular, and political in nature." And they were joined, were they not, by retired Court of Appeals Judge William Mulligan; is that correct?

Mr. **Kaufman**. That is correct, Senator. And I would suggest that any organization of 17,000 members will have more than 53 who disagree, and many of them will be distinguished.

Senator **Hatch**. Well, I think you do have more than 53. I am naming some very influential and important people whose viewpoints should not be ignored just because of your bylaws and your particular Association.

It is interesting for me to note that the U.S. attorney in Manhattan, Paul Curran, stated——

Mr. **Kaufman**. Former U.S. attorney, Senator.

Senator **Hatch** [continuing]. Yes, former U.S. attorney in Manhattan—stated that, quote, "The question is whether the Executive Committee has run away with itself, whether the members are anointing themselves with power the bylaws do not give them."

Now, indeed, this prominent lawyer and others have resigned to protest what they consider to be a, quote, "political," unquote, move.

I would simply like to enter into the record at this time, and I will do so, since there is no objection—and I am sure Senator Biden would go along with that—the article to which I referred in the

New York Times entitled, "New York Bar Association Split Over Its Stand on Bork."

[Articles follow:]

New York Bar Association Is Split Over Stand on Bork

By E. R. SHIPP

A decision by the leaders of the City Bar Association in New York to oppose the nomination of Judge Robert H. Bork to the United States Supreme Court has provoked an unusual public split with the group's leadership and several resignations.

Three members have resigned from the association to protest the leaders' position on Judge Bork. Among them is Paul J. Curran, a former United States Attorney in Manhattan.

Yesterday, a group of 53 members, including five sitting Federal judges and a retired member of the United States Court of Appeals for the Second Circuit, issued a statement charging that the leaders, in coming out against Judge Bork, had acted in a manner that was "unauthorized by the membership, irregular and political in nature."

The sitting judges are all from the Federal District Court in Manhattan. They are Dudley B. Bonsal, a past president of the City Bar Association; Thomas F. Griesa; Milton Pollack; John E. Sprizzo and John M. Walker Jr. The former appeals judge is William Hughes Mulligan.

Opposition by its committee to his nomination leads to resignations.

The dissident group, led by Mr. Curran and another lawyer, Winthrop J. Allegaert, is trying to obtain permission to have one of its members testify at the confirmation hearings being held by the Senate Judiciary Committee.

Robert M. Kaufman, the president of the 116-year-old association, one of the most prestigious in the nation, is already scheduled to testify against Judge Bork on Friday morning.

Mr. Kaufman said that despite the dissension, he believes an "overwhelming" number of the association's 17,000 members endorse the executive committee's position. He said he based that on telephone calls, letters and comments that lawyers have made to him in person. But he did acknowledge that he has received one negative telephone call and nine negative letters.

The executive committee comprises the association's president, three vice presidents, the secretary and treasurer, as well as 16 lawyers elected from the membership at large.

Shortly after Judge Bork was nominated to the Supreme Court, the executive committee appointed a special committee to study his record.

After receiving that committee's report, the executive committee voted on a resolution to oppose the nomination. Fourteen of its members voted for the resolution and four against. The four who voted against, according to Mr. Kaufman and others, did not necessarily endorse Judge Bork but rather thought the association was applying inappropriate criteria to determine his qualifications for the Court.

Of the other members of the executive committee, three were absent and the chairman only votes in case of ties.

Some With Guarded Views

The Curran-Allegaert group includes some lawyers who are Bork supporters, others who are opposed and others, like the sitting judges, with guarded views. What unites them, Judge Pollack said, is concern over how the committee went about deciding to oppose the nomination.

The bar association's judiciary committee has long ruled on the qualifications of judges for certain courts, but until recently there was no formal process for assessing nominees to other courts, including the New York Court of Appeals or the United States Supreme Court. On an ad hoc basis, however, the city bar leaders opposed the nomination of G. Harrold Carswell to the Supreme Court in 1970.

Last May, the executive committee adopted a resolution authorizing the association to take a position on all judicial candidates whose decisions could have a direct impact on New York.

Of the executive committee's action, Mr. Curran said, "They had no authority to do what they did." Judge Pollack said, "The question is whether the executive committee has run away with itself; whether the members are anointing themselves with power the bylaws don't give them."

Mr. Kaufman, however, said the committee has "the final authority to speak" for the association. In announcing its decision, the executive committee said, in part: "While the question of Judge Bork's intellect and professional experience is not in dispute, this cannot be the end of the inquiry for the association or the Senate."

NEW YORK LAW JOURNAL—Wednesday, September 23, 1987

LAWYERS SPEAK OUT ON BORK

Bork's Credentials Beyond Challenge; Opponents Use Political Standards

former U.S. Atty

By Paul J. Curran

ON SEPT. 14, THE *NEW YORK LAW JOURNAL* reported: "The Association of the Bar of the City of New York will oppose the nomination of Judge Robert H. Bork to the U.S. Supreme Court." This front-page, above-the-fold story recounted that fourteen members of the Association's Executive Committee had acted to align the Association and its 17,000 members with their own political agenda. Never mind that this statement of position was *ultra vires*. Never mind that Judge Bork was never interviewed by the Committee. Never mind that his professional competence and personal integrity are beyond challenge. And, above all, never mind that the Association's bylaws properly mandate that in evaluating candidates for judicial office the Association shall "endeavor to prevent political considerations from outweighing fitness in the selection of candidates."

Thus, this majority of the Executive Committee permitted its political views to overcome its professional responsibilities to the Association and its members. They, of course, have every right to express individually or collectively their personal and, I am sure, deeply-held political views. They had no right, however, to try to convert those views into the position of the Association. The issue for a Bar Association qua Association can only be Judge Bork's fitness for the Supreme Court. And fitness in this context may only be measured by professional ability and character. Why did this handful of lawyers act so irresponsibly? There can be only one answer. Judge Bork's judicial philosophy is hostile to their political views and goals: "How dare President Reagan nominate a scholar like Robert Bork when he could have nominated a scholar we like?" Say, for example, Lawrence Tribe.

Evoked a Knee-Jerk Response

Had the membership of the Association known in advance that the Executive Committee had secretly undertaken to pass upon Judge Bork's qualifications, many of us would have predicted that the Committee would do what it did. This is because President Reagan's nomination of Judge Bork has evoked precisely the kind of knee-jerk political response we have learned to expect, even from those who lay claim to objectivity. The hysteria is, however, understandable, given the opposition's view of the Supreme Court as a Super-Legislature which should never hesitate to make law in "important" areas when the Congress and State Legislatures fail or refuse to do so. Thus, his opponents in the Senate and elsewhere would examine Judge Bork's fitness solely on this political basis and without regard to the historical standards of legal ability, temperament, and character. Applying those standards they cannot, of course, oppose Judge Bork, because Judge Bork's credentials are beyond challenge.

A legal scholar and law professor and a successful private practitioner, who has also served the public as Solicitor General, Attorney General, and, for the past five years, as a Circuit Judge for the District of Columbia Circuit, Judge Bork's professional and public service achievements make him one of the most qualified nominees for the Supreme Court ever to be presented to the United States Senate. Indeed, the Senate has twice recognized his qualifications, having previously confirmed him to two of the highest legal positions in the government — Solicitor General and Circuit Judge. Both confirmations came only after extensive reviews of his personal and professional life by, among others, the F.B.I., the Senate Judiciary Committee, and bar and political groups. Both Senate votes were unanimous.

So everyone, including the Senate, knows that Judge Bork is a man of ability and high character. But now his detractors argue that is not enough. They say he is, among other things, anti-woman, anti-black, anti-privacy, anti-abortion, anti-free press, pro poll tax, pro restrictive covenants, and overall just a real bad man, who would rewrite the Constitution and, in the process, destroy the Bill of Rights. In trying without success to prove these points at last week's hearings, Messrs. Biden, Kennedy, and Metzenbaum — just like the fourteen members of the City Bar Association's Executive Committee — steadfastly refused to acknowledge his superb record as a Circuit Judge: Over 100 written opinions and 400 panel decisions with no reversals by the Supreme Court. They questioned him at length about every conceivable issue and, unlike most nominees, he responded fully. He even tried to educate these self-styled constitutional scholars, but it was apparent that they were not about to be confused by facts or law. Their questions and statements did, however, disclose the real basis underlying the opposition to Judge Bork's nomination. It came across loud and clear. Judge Bork swore that he will not permit his personal views on political issues to affect his duty to judge cases and controversies. Instead, he will analyze the issues, confer with his judicial colleagues, and then interpret and apply the law to the best of his ability.

Drives Opponents Wild

This judicial approach drives his opponents wild. For, in their view, a Supreme Court Justice should be prepared to interpret the Constitution so as to obtain results which are "right" by their political standards and, their reasoning goes, because they are "right" results they must be constitutionally based. Thus, Messrs. Biden, Kennedy, and Metzenbaum assert that Judge Bork is unfit to serve on the Supreme Court because he refuses to profess that the Constitution mandates a commitment to *their* political views.

In their rush to judgment, Messrs. Biden, Kennedy, Metzenbaum, and Leahy have, of course, acted predictably. Indeed, their own political records and personal backgrounds afford no reason to expect that they would be concerned either with Judge Bork's scholarship or with his good character and integrity. Their past actions have proved that they do not possess these qualities themselves, and they apparently neither appreciate nor understand them in others. They do, however, understand very well how to drum up support for their political positions and how — as Senator Simpson has so tellingly observed — they can rely upon "a deft blend of emotion, fear, guilt or racism" in order to marshal public opinion against Presidential nominees whose views they dislike. They have done precisely this to Judge Bork. But last week their tactics did not work, and now they and their supporters are becoming even more desperate.

A Threat to a Political Agenda

While giving lip service to the need for scholarship and an open mind, Judge Bork's opponents really want neither. For these qualities now constitute a threat to a political agenda, which, lacking the support of the President and the Congress, could only be sustained by a sympathetic Supreme Court majority. Recognizing that Judge Bork is likely not to be the activist they want, they have abandoned any pretenses to fairness and objectivity. Indeed, fairness and objectivity are by definition irrelevant to them.

Judge Bork's opponents are travelling an extremely dangerous road. If they prevail, political considerations will become the paramount test for fitness to serve on the Supreme Court. Such a result will doubtless prove to be a pyrrhic victory for the Judge's opponents. For, the adoption of this kind of political litmus test will surely over time result in more defeats than victories for their cause. In addition, such political tests will inevitably spread to nominees to the other federal courts, and that too will serve neither the public interest nor even the political interests of Senator Kennedy and his followers.

When a President nominates to the Supreme Court a lawyer with Judge Bork's credentials, character, and prior judicial experience, lawyers should applaud such a nomination. When we demand that nominees share our personal political views *and* pledge to implement those views as members of the Supreme Court, we seek to transform Supreme Court Justices into Congressmen. But Supreme Court Justices must not be Congressmen. Their electorate is the Constitution and their role is vastly different. Their duty is to *judge*, not to legislate. This distinction is crucial to the form of constitutional government which has served this nation so superbly for the

Paul J. Curran, a partner at Kaye, Scholer, Fierman, Hays & Handler, resigned from The Association of the Bar of the City of New York last week in protest

Senator HATCH. Let me just ask all of you, were you in support of Justice Scalia when he came up for his nomination last year? Let us start with you, Mr. Smith.

Mr. SMITH. Yes, sir, I was. I care about a balanced Court, and I thought that——

Senator HATCH. Fine. I just want to know whether you were in support of him.

Mr. Meserve.

Mr. MESERVE. I did not appear before this committee, but in response, I believe, to Mr. Lancaster's inquiry of me, he being the first circuit representative, I expressed my opinion that Mr. Justice Scalia was a man of real standing. He is a graduate of Harvard Law School.

Senator HATCH. All right. So you would have supported him had you been asked to?

Mr. MESERVE. Oh, if I had been here, I probably would have.

Senator HATCH. All right. Mr. Kaufman.

Mr. KAUFMAN. Let me comment for the association. We did not comment on Justice Scalia's nomination. I described earlier in our testimony the process by which we had determined, while no nominations were pending, that henceforth all Supreme Court nominations would be reviewed. That was after Justice Scalia's confirmation.

My own view is that he is a very fine judge.

Senator HATCH. Fine. So all three of you would have been for him personally, and you think your——

Mr. MESERVE. Yes, Senator, I do want, in view of your comments to my brother on my left, I do want to say that I do not think there is any split in my constituency, although my younger granddaughter at times has expressed some disagreement with policies that I have inaugurated.

Senator HATCH. And when she gets older, she is going to look back on this and say, "Grandpa, you should never have done that."

Mr. MESERVE. Maybe she will, Senator. I cannot predict. There is a certain amount of dissent amongst my children and grandchildren, but usually when it comes to public positions, they are with the old man.

Senator HATCH. Well, but out of the mouths of babes comes tremendous wisdom. In this case, I want you to go back and listen to those grandchildren.

Mr. MESERVE. I hope that is true.

Senator HATCH. Well, you all three would have supported and did support Judge Antonin Scalia in 1986. Now, it is difficult for me to understand how you could have supported Judge Scalia and failed to support Judge Robert Bork, except for Mr. Smith's comment, because Judge Bork voted with Judge Scalia 98 percent of the time on cases that they both decided. And on the one case where they differed, the *Ollman* case, Judge Bork granted far more liberal protections for free press and drew a dissent from the more conservative Scalia.

And if Scalia was qualified for the Supreme Court, certainly I would have to conclude Bork is as well—and I think any honest person would.

The only distinction between the two is this bogus—I called it a bogus balance argument. But on the grounds of balance, if you use that argument, Hugo Black would never have served on the Supreme Court, because he replaced one of the most conservative members, Judge Van Devanter, as I recall, on that Court; nor would Goldberg have ever replaced Justice Frankfurter; nor would Thurgood Marshall have ever replaced Tom Clark; nor should President Roosevelt have been allowed to place eight members on the Court. And you could go on and on with examples.

If the balance argument had been adopted in the past, we would still be governed by the erroneous doctrines like *Plessy* v. *Ferguson*, the separate but equal doctrine.

In fact, the balance argument is just a way of saying, as I view it, and I think as anybody who looks at it carefully views it, that you disagree with the way the five members of the Court might vote. And it is a wholly result-oriented argument that amounts to attempting to dictate the outcomes of cases by dictating who can or cannot be on the Court. And it is dictated, it seems to me, by people who basically resent President Ronald Reagan as President and his right to nominate people of quality and standing who, basically, he hopes agree with him.

And as you know, there is no way you can tell what a Supreme Court Justice is going to do when he gets on the——

Mr. MESERVE. Senator, if that is a question——

Senator HATCH. Let me make a couple of other comments, and then I will turn to you.

Once again, I wonder out loud whether Justices of the quality of Justice Felix Frankfurter, Hugo Black, and others would ever have been confirmed under this, I think, phony balance argument.

Now, that is what bothers me. One last comment, and then I will quit.

That is that 5 years before, the American Bar Association rated Judge Bork exceptionally well qualified, the highest rating a person could have for the circuit court of appeals. That rating, of course, was unanimous at that time.

Five years later, after what many—I think most—would have to admit is a sterling judicial record, never reversed, 400-plus cases, with the liberals and conservatives on the Court in many, many of those cases, and you can go on and on, and we have done that here—politics are played—and although 10 firmly come out with the highest rating anybody can have for the Court, 4 come out and rate him politically, based upon their political motivation.

Now, at least two of you have indicated that you are motivated primarily in your appearance here by politics. I think that is terrific that you admit that, because you are the only ones who have been honest enough to come in here and say yes, this is politics, and yes, we honestly do not think he should be on the Court because we differ with him politically.

I would just submit to you that I admire you for saying that, because that is the truth throughout this matter.

Mr. MESERVE. Yes.

Senator HATCH. This is politics. And frankly, if you were elected President, you could have somebody of your persuasion on the Court, it seems to me, as long as they met the same ethical and competency and judicial temperament standards that Judge Bork certainly can meet. And you would have my support.

Mr. **Meserve**. Senator.

Senator **Hatch**. Yes, sir.

Mr. **Meserve**. May I now answer that lengthy question, if that is a question? I——

Senator **Hatch**. I did not ask a question. I was just telling you what I felt. But go ahead.

Mr. **Meserve**. I thought perhaps that was so.

Senator, I feel very strongly that when we use the word "politics" we may be using the word, perhaps, in different senses. Both Mr. Smith and I have supported for membership on this Court and the ABA Committee, which we do not represent, as Shirley supported, many people of both political parties.

I happen to be a Yankee Democrat, and as Senator Kennedy can tell you, that is a fairly rare breed; but the fact is——

Senator **Hatch**. It is very strong here in this body.

Mr. **Meserve**. And I had a Republican father and grandfather and two Republican brothers, but I still am a Democrat.

Senator **Hatch**. And now a bunch of Republican——

Mr. **Meserve**. But on the other hand, I am not speaking here as a Democrat or as a Republican, nor in that sense are either Mr. Smith or I advocating a political situation.

We see here, in the true sense, that this is a political determination, but we do not think it is a partisan determination. We think it is based entirely upon the fact that we have here a doctrinaire gentleman who has expressed his opinions freely and honestly before he appeared before this committee, at least, in support of principles in which we do not believe, which I do not think have anything to do with my being a Republican or a Democrat, a conservative or a liberal.

I do not think we want a rightwing radical on that Court, and I think that the true conservatives on that Court, such as Mr. Justice Powell, who happens to be a very dear friend of mine and, I think, of Mr. Smith's, I think they are the kind of conservatives that I would like on that Court. And I might say, that would apply to the Chief Justice.

Senator **Hatch**. I have to turn to Senator Heflin, but let me just say this. I do not think——

Senator **Heflin**. I thought you were turning to me.

Senator **Hatch**. No, I am not.

I do not want any rightwing or leftwing radicals on the Court. But I think it is highly unusual—you are the first one, I think, to come in and call Judge Bork a radical, and I do not think there is any justification based upon his record as Solicitor General or as a judge, and I think that even his writings cannot be categorized as radical, even though he has fluctuated from time to time from one position to another, as law professors do, and as young lawyers do, and as people with open minds do—as you have done, as I have done, as everybody does who thinks in this world.

Let me turn and give the time to Senator Heflin; it is his time anyway.

Senator **Heflin**. We are trying to do it—Senator Biden asked me to return. We have got votes on, and another one coming up, and so we are trying to see if we cannot expedite and get this hearing moving so that we are not here next month—and that is a realistic prognostication that we may have to be, but we hope we will not.

I am delighted to see this group. I have long known Bob Meserve and Chesterfield Smith; we go back many years, I reckon, even before they were president of the American Bar, when they were at the American College of Trial Lawyers. I know both of them well, and know they are outstanding lawyers and have made great contributions to the bar, and we are glad to see the officers of the New York Bar Association here.

I probably have more of an affinity with Chesterfield Smith, he being from the South and being a neighbor, but I do want to pay him a compliment, that he probably got more lawyers involved in the American Bar Association than any president. I do not know why it came about. Some people said that Chesterfield represented the "rough element" in the Bar Association. But anyway, I reckon that is my affinity to you, because I sort of always felt like I was in the "rough element."

I know that you, Mr. Smith, have had some thoughts about the balance of the Court with a Southern person on it. Senator Thurmond raised this as quite an issue. I, in effect, said, well, we could look upon Justice Scalia, since he spent considerable time as a professor of law at the University of Virginia—but this does not necessarily amount to anything, and I bring it up merely for the future, not necessarily in connection with this nominee, but I know that you have expressed yourself some about that.

Would you like to comment on that?

Mr. SMITH. Yes, sir. I feel very strongly that credibility with the people is the most important single attribute of the Supreme Court, and to have it, that you have to have all segments of our nation, all segments of our culture and society represented on the Court.

I was born in Florida when it was the South, long ago, and I feel that as far as I know, this is the first time——

Senator HEFLIN. Well, what do you mean by that remark? [Laughter.]

Mr. SMITH. There are a lot of other people down there now. But this is the first time as far as I know since 1789 that there has not been somebody on the Court when Lewis Powell left from those great States going from Texas through Virginia and Maryland. And if I were the President, and appointing somebody, I think I would try to see that all segments of the country are represented, and that would certainly include the South.

If I were a Senator, however, I could not initiate that appointment but I could send a message to the guy that until he does get a balanced court and brings all segments of our nation together on there, that I am not going to vote to advise and consent, confirm, and put him on the Court.

Now, I think that in addition to the geography that they ought to look at other elements of the society. I do not want there to always be earmarked a Jewish seat or a Catholic seat or an Hispanic seat or a Polish seat, but I believe all of those factors ought to be looked at by Senators when they are deciding what is best for our nation. The nation has to have credibility in that Court and recognize that all views are there. So I want a Southerner there.

Senator HEFLIN. While you're speaking about all those positive influences, I reckon maybe that's the Florida influence?

Mr. SMITH. Yes, sir.

Senator HEFLIN. Now, you also brought out the one-man-one-vote issue which you mentioned. Of course, I recognize certainly in my State and in many States that, as a result of one man, one vote, that substantial changes occurred, not just because of racial members but because also of geographical areas. I mean there's no question that certain geographical areas were under-represented, and many of them were in the old days before the one-man-one-vote concept came about.

You mentioned a fear of some implementation. Would you expand a little bit on that? I have some interest in it.

Mr. SMITH. Well, I don't know exactly what Judge Bork thinks or doesn't think about one man, one vote. All I know is I don't want him——

Senator HEFLIN. Hold it just a moment.

Senator Grassley.

Senator GRASSLEY. I'm going to run and vote.

Senator HEFLIN. Well, if you'd stay, I believe we could let you, in about 2 minutes, ask and then you can get the last if you'd like.

Senator GRASSLEY. All right.

Mr. SMITH. My point was that in implementing one man, one vote, not knowing what Judge Bork would do or anything else, he stated in the past that basically he approves a test of rationality as far as apportionment is concerned.

Well, that's the exact crap that I used to hear from those people up in North Florida that had their hands on the throat of the people. They wouldn't reapportion the legislature because we've got a rational system. It's based on the Constitution.

I don't want somebody deciding things that uses that. And that's why I'm entitled—it may be bigoted, it may be biased, but it's based upon the way I live down there. And that's what people used to tell me. They believe in a rational system. And I believe in one man, one vote. Everybody ought to be the same.

Senator HEFLIN. All right. Senator Grassley.

Senator GRASSLEY. Thank you, Mr. Chairman.

First of all, I didn't get a chance to hear the panel speak this morning because I had HUD Appropriations Subcommittee meeting all morning prior to these votes. But I had a chance now to look over the witness list that we have before us, and obviously it's a very impressive list of people we are going to have this morning.

But I think what's especially impressive about it though is that as we look to the first eight witnesses, seven, from my judgment—already four so far have proven this—seven of the eight are going to speak in opposition to Judge Bork's nomination.

So those of us, Mr. Chairman, that want a balanced presentation today, are going to have to wait a long time, probably until late this evening to get that.

Also, Mr. Chairman, if I could, before I ask a question of this panel, I'd like to make reference to the fact that I've received an interesting letter from a constituent of mine. Diane Leibe of Des Moines wrote to me saying, and I quote, "Not all women are afraid of this nominee's confirmation. Not all women are swayed by hysterical rhetoric. Quite the opposite," she says, "there are many women and men in this country who are capable of making rational decisions about this nominee's fitness to sit on the Supreme Court without being influenced by the press and by Senators, and by being told how to interpret Mr. Bork's testimony by a third party."

Mr. Chairman, I believe that Diane Leibe's letter represents a large portion of women in this country, much larger than we've been led to believe. I've received, Mr. Chairman, over 6,000 letters on this nomination from people across the country, and I haven't had a chance to look at all of them, but I did take an opportunity last week to divide 700 randomly selected letters into two piles. And these were letters received from men and letters received from women. And in this mail count, the interesting thing is that 57 percent of the women who wrote me said they wanted Judge Bork confirmed.

Now, people can talk all they want to about organized women's groups. But I have a tall stack of letters from individual, independent women, who know that Judge Bork is going to serve them fairly.

So, Mr. Chairman, since this letter from Diane Leibe was written in the way of testimony, I ask permission to have it inserted in the record.

Senator HEFLIN. All right, sir. Without objection, it will be so ordered.

[Letters follow:]

The Honorable Charles Grassley
135 Hart Senate Bldg.
Washington, D.C. 20510

Sept. 16, 1987

Dear Senator Grassley,

In lieu of the opportunity to personally testify before the Senate's Bork confirmation committee panel, I request that the enclosed written testimony be considered for the record.

I understand the unusual nature of my request. However, sir, the comments of the Honorable Metzenbaum this A.M. need to be countered. Not all women are "afraid" of this nominee's confirmation. Not all women are swayed by hysterical rhetoric. Quite the opposite, there are many women and men in this country who are capable of making rational decisions about this nominee's fitness to sit on the Supreme Court without being influenced by the press, Senators or being told how to interpret Mr. Bork's testimony by a third party. I am only one such person who happens to have a lot of gall.

I thank you for your consideration in this matter.

Very truly yours,

Diane C. Leibe

Diane C. Leibe
1415 Clinton Av
Des Moines, Ia. 50313

Chairman Biden and Gentlemen of the committee panel,
I would like to thank you for this opportunity to testify in regard to the nomination of Mr. Bork to the Supreme Court.

Like the majority of the committee panel members, I anticipated these hearings with a particular bias regarding Mr. Bork's nomination. It appears, however, that unlike the majority of this distinguished panel, I determined to enter the hearings (via T.V.) without prejudice. Not unlike Mr. Bork's ability to separate his roles as Judge and professor, I separated myself from my bias in order to listen, not just hear, but listen to Mr. Bork's testimony. I have reached the following conclusions based upon listening to these hearings:

1.) Mr. Bork does not deserve this nomination based upon his leanings toward conservatism or away from liberalism. He deserves this nomination because he is qualified and he meets and/or exceeds all the requirements this nation has established for this important post. I would like to add that those political conservatives who expect an overturn of Roev. Wade because of Mr. Bork's confirmation should not do so. Likewise, political liberals need not anticipate civil liberties to be in jeopardy because of Mr. Bork's confirmation.

2.) I have come to have grave doubts about the Senate's role to "advise and consent" in such matters. Compared to Mr. Bork I would have to classify myself as a mental midget. However, the granular size of my grey matter did not impair my ability to comprehend Mr. Bork's responses. This panel's repitition of questions and lack of understanding of the responses leads me to conclude that we have shamefully politicized this process. It is my humble opinion Mr. Bork is due some type of formal apology or explanation for this conduct.

In closing, Gentlemen, I urge you to send unanimous approval of this nominee to thefloor of the Senate in a speedy fashion. This nation is not served with an empty seat on the Court. If this distinguished panel is incapable of expediting this matter without undue politicizing and the playing of games, then perhaps we ought to rethink the Senate's role to advise and consent in the manner in which we find ourselves.

I have not detailed the specifics of my support for this nominee as they are self-evident in the record of these hearings thus far. However, should you have any questions of me I would be most willing to testify further.

Thank-You again, Mr. Chairman and Gentlemen for the opportunity to testify via this letter. I am at your disposable and remain

Respectfully Yours,

Diane C. Leibe

Diane C. Leibe
1415 Clinton Av
Des Moines, Ia. 50313

No - I never claimed to be able to type!

Senator **Grassley**. I think that probably my question is best directed towards Mr. Smith, because you're the one that I think first brought mention of the Court's balance to this discussion. Many people are saying that Judge Bork's nomination should be rejected because Justice Powell, though he may be conservative, is not as conservative as Judge Bork and, therefore, Judge Bork is going to tip the balance.

Are you, Mr. Smith, aware of Professor Tribe's recent book on the Supreme Court?

Mr. **Smith**. Am I aware of it?

Senator **Grassley**. Yes.

Mr. **Smith**. If I've got to discuss it, I'd better say no. But I am aware of it.

Senator **Grassley**. Okay. Well, in it he cites two examples of appointments that shifted the balance of the Court. He stated that Hugo Black's appointment in 1937 decisively shifted the Court into one that would stop the upending of FDR's legislative program.

And then he cited Justice Goldberg's appointment in 1962 as the other example. And that's where the balance was shifted to give the Warren court a very solid majority for its overexpansive views.

And I take it, in those instances, you and many others were quite happy with the shift in the balance of the Court. Would that be fair for me to say?

Mr. **Smith**. Well, I wasn't happy.

Senator **Grassley**. You weren't happy with it.

Mr. **Smith**. I didn't know much about Justice Black, but I wasn't happy about that at all.

I believe that the Court should be in balance. The American Bar Association, which I do not speak for, but I say I'm proud of it, they stood up to President Roosevelt in one of the great days of their history. They opposed him trying to pack the Supreme Court and change the philosophy of it. They believed that we should go through the processes.

I would have done the same thing if I had been a little older.

Senator **Grassley**. Well, when you talk about balance on the Court, doesn't it really get down to whether or not those objecting to this perceived change or shift in the balance of the Court are objecting only because they want to preserve the balance that they like? Isn't that what it is in the final analysis?

Mr. **Smith**. I think that's not unfair for you to state. I supported Justice Bork and Justice Scalia going on the Circuit Court of Appeals for the District of Columbia, because I thought that court had gotten out of balance and that their appointment brought it back in balance.

But, you know, I got rational reasons that somebody else doesn't like all the time. And I feel that the President and the Senate can find somebody that serves the national interest better than Judge Bork. But that may be a rationalization on my part, and I have to acknowledge that.

Senator **Grassley**. Well, I think your statement just makes the point that I was trying to make, that it varies based on whose ox is being gored, whose interest is being hurt as they perceive it being hurt, or whose interest is being helped as they perceive it being helped.

But, on top of that though, I think we've got to remember that both opponents and proponents of Judge Bork have not questioned his qualifications from the standpoint of his scholarships and what he's done on the circuit court of appeals, his qualifications. I think that that ought to be paramount with those of us in the Senate.

Mr. **Smith**. He is a brilliant jurist and lawyer, and I respect his intellectual qualifications without reservation.

Mr. **Meserve**. I might say, sir, that I join in the answer of Mr. Smith. But I just want you to know, Senator, if it is not already clear on this record, that neither Mr. Smith nor I, as distinguished from my brother, are speaking for the American Bar Association. We are speaking for ourselves as American citizens and for our progeny.

Senator **Grassley**. I appreciate that, and I knew that as well.

Thank you, Mr. Chairman.

Senator **Heflin**. I believe Senator Humphrey has completed his questioning of this panel so we will appreciate this panel coming and being with us, and we will adjourn until a Democratic Senator comes to take over and to continue. It may be momentarily since this other vote has had time and I can turn off this device. [Laughter.]

I don't know how to operate these newfangled operations. [Laughter.]

Mr. **Meserve**. Senator, before we adjourn, on a point of personal privilege, thank you very much for listening to us.

I just want to say, as a Bostonian, that when I hear my brother on the left say that the New York City Bar is the oldest bar in the United States, I object in the name of John Adams if nothing else. And when I heard the nominee state that New Haven was the Athens of America, I felt that, as a Bostonian, I ought to take exception to that too.

Thank you.

Senator **Heflin**. Well, we'll let you Yankees fuss awhile there. [Laughter.]

But we will be in recess and, Mr. Sowell, if you will stand by to momentarily assume the witness chair.

[Recess.]

[The following letter was subsequently supplied for the record:]

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET
NEW YORK 10036-6690

ROBERT M. KAUFMAN
PRESIDENT

(212) 382-6700

September 28, 1987

Hon. Joseph Biden
Chairman
Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

During my testimony before your Committee on Friday, September 25, 1987, Senator Hatch made certain statements regarding the Association of the Bar of the City of New York's governance structure with which I am in strong disagreement, but did not permit response and promptly left the hearing room. The time of our panel expired and the hearing was recessed without giving me the opportunity to respond. I am writing to permit my response to be placed in the record of the hearing.

Senator Hatch stated that the position of the Executive Committee of the Association in opposition to Judge Bork should not have credibility because it was not voted on by the entire membership of the Association. He suggested that the authority of the Executive Committee of the Association to act in the absence of a vote by the membership was undemocratic. My planned reponse, which I was unable to give, was as follows:

"The Executive Committee of the Association of the Bar of the City of New York is the elected policy making body of the Association. This is in marked contrast with the Judiciary Committee of the American Bar Association, whose members are appointed by the President. Senator Hatch has not suggested that the majority views of that Committee should be questioned because they have not been submitted to or approved by the entire membership of the ABA, or even by its elected governing bodies. Yet Senator Hatch suggest that the Senate should give great credence to that ABA Committee report but not to the report of the Executive Committee of our Association. I have the highest respect for the ABA Committee and its members, who consistently perform a great public service, but I suggest that Senator Hatch's criticism of our Association process is not justified".

Respectfully yours,

Robert M. Kaufman

Senator **Kennedy** [presiding]. We'll come to order.

Mr. Sowell, Thomas Sowell is an economist and is currently a senior fellow at the Hoover Institute.

Please remain standing and raise your right hand.

Do you swear that the testimony you are going to give is the truth, the whole truth, and nothing but the truth?

Mr. **Sowell**. I do.

Senator **Kennedy**. We'll welcome your testimony. You've been here earlier. We'll try and follow as closely as possible the time limitations, but we want an opportunity to get your thoughts.

You may proceed in whatever way you want to. We'll include your full statement in its entirety in the record.

TESTIMONY OF THOMAS SOWELL

Mr. **Sowell**. Thank you very much, Mr. Chairman, for the opportunity to present my views to this committee.

Senator **Kennedy**. Let me just get a little quiet.

We'll be quiet, please, so the witness can be heard. He deserves to be heard.

Mr. **Sowell**. My support for the nomination of Judge Robert Bork to the U.S. Supreme Court began even before he became a judge of the circuit court of appeals. I publicly urged that he be considered as a replacement for retiring Justice Potter Stewart some years ago, and then again as a replacement for retiring Chief Justice Warren Burger last year.

So I'm, of course, heartened to see him nominated now, though I'm disheartened to see the confused, hysterical, and even dishonest terms in which that nomination is too often discussed in the media and elsewhere.

This may be the most important Supreme Court nomination of our time, not simply because the present Court is so closely divided, or even because Judge Bork is the most highly qualified nominee of this generation, but because this is an historic crossroads as regards the expanding power of judges, which is to say the erosion of people's rights to govern themselves democratically.

Gradually, but steadily, over the past 35 years, more and more decisions have been taken out of the hands of the American people and vested in courts. Those preoccupied with the merits or demerits of the specific issues raised in the cases involved pay little attention to the general drift away from accountable representative government. The ad hoc way many of these landmark cases of this era were based on legal principles improvised for the moment has meant that law itself has become more and more a matter of how judges happen to feel politically or socially about particular issues or particular litigants.

No one has opposed these judicial trends more consistently or more ably than Robert H. Bork—first, as a scholar, and then as a judge. Mr. Bork has rejected the idea that judges should engage in "heroic adventures in policymaking," as he calls it. "The renunciation of power," he has said, "is the morality of the jurist, not the assumption of power in the name of morality."

What Mr. Bork has fought against consistently over the years has been, in his words, "government by judges who are not applying the Constitution."

Against this background of historic issues about the very meaning of law, it is both ironic and appalling that Judge Bork's own record is being judged on a myopic basis of an issue by issue, statistical box score, on how he has allegedly voted for or against one class of litigants or another—as if he liked chemical companies more than he liked pregnant women, or liked asbestos manufacturers better than he like bereaved widows.

Surely, no responsible person thinks that this is what law is all about. Yet, such shrill propaganda from special interest groups is repeated in respectable quarters as if the statistics represented some objective facts. Many people have no idea how utterly worthless and therefore deceptive such statistical box scores can be.

Last year at this time in California, there was a bitter election campaign over the reelection of the State chief justice. During that campaign, one side cited statistics to show that the chief justice had voted for defendants 85 percent of the time over a period of nearly a decade. The other side, using exactly the same raw statistical data, for exactly the same span of years, concluded that the chief justice had voted for the prosecution nearly 90 percent of the time. These are not small differences, either in terms of numbers or implications. Neither were they based on any esoteric statistical methods. All that they depended upon were differences in definition as to what was a vote for the prosecution.

The statistics thrown around recklessly as to how Judge Bork has allegedly voted against women X percent of the time, or for some other class of litigants Y percent of the time are no more reliable than the definitions used by the special interest sources from which they come.

Arbitrary definitions are no less arbitrary when they are expressed in numbers rather than words. Taking these box scores seriously reflects either a dangerously naive gullibility about statistics, or an even more dangerously cynical view of the truth.

The same kind of box score approach has been used against Judge Bork in the racial area, except that all the things Mr. Bork has done to advance the civil rights of blacks and Asians are either ignored or played down, while every legal question he has raised about any portion of any civil rights law or court decision has been automatically defined by his critics as being anti-civil-rights or anti-black.

Obviously I wouldn't be here if I believed any of that.

The landmark civil rights cases which Robert Bork initiated or joined as Solicitor General have been dismissed by his critics because, supposedly, he was only the mouthpiece of the administration. But surely no one believes that someone with Robert Bork's marketable skills was so desperate that he had to hang on to a job that required him to perform duties which conflicted fundamentally with what he believed and wanted to do.

Civil rights need to be understood, not simply as a special benefits to minorities, but as something essential to everyone. Civil rights define a civilized and humane society. State-imposed discrimination was central to the racial oppression of blacks during the Jim Crow era in the South.

Judge Bork opposed this central focus of racial discrimination from *Brown* v. *Board* in the 1950's to *Washington* v. *Davis* in the 1970's to his work on the court of appeals in the 1980's. His criticisms of particular parts of laws in court decisions have often been in terms of the extension of constitutional rules from the government to private individuals and nongovernmental organizations. These serious legal questions are by no means confined to Judge Bork.

The law journals and law books have been full of controversies for decades over so-called State action. It was precisely this principle which many raised in the restrictive covenant cases which are not simply cases about whether you are for or against housing discrimination.

Demagoguery on this point is especially uncalled for since no one as far I have been able to tell has ever seriously advanced any evidence that *Shelley* v. *Kraemer* or *Reitman* v. *Mulkey* made any discernible difference in racial housing patterns.

The question is whether political symbolism was enough reason to justify trying to make the Constitution say something that it did not say.

In our preoccupation with specific issues and specific groups, it is easy to forget that all groups stand to lose as Americans when the law is undermined as judicial activism surrounds all laws with a large and growing penumbra of uncertainty.

Education in many public schools becomes impossible when the uncertainties of the law make expulsion of disruptive students difficult, costly or a time-consuming ordeal.

Senator **Kennedy**. I don't want to cut you off, but maybe you would want to summarize.

Mr. **Sowell**. I think I—10 minutes was it? I have about another minute.

Senator **Kennedy**. Fine.

Mr. **Sowell**. No one loses more than the black community when their children are not educated or when judicial undermining of law enforcements makes their streets far more unsafe than they were 40 years ago. Legal principles are not just abstract intellectual matters. They are often far more important to far more people than the specific issues which provoke single issue organizations to venom and propaganda.

If more people will look beyond this propaganda to the enduring principles which should guide the law of the nation, I am sure that more will support the nomination of Robert Bork to the Supreme Court.

Thank you.

Senator **Kennedy**. I have no questions. I will yield my time to the Senator from Arizona.

Senator **DeConcini**. Thank you, Mr. Chairman. Mr. Sowell, thank you for your testimony, and, in principle of nonactivism and making legislative decisions, that your reference—I happen to agree with you.

Let me ask you this question. If you were a woman, and you had read Judge Bork's writings, and his speeches, as current as just 3 months ago, where he clearly indicated that his definition and interpretation of the equal protection clause of the 14th amendment did not apply to women. However, I think 6 days ago he sat where you sat, and said that it applied to everyone now.

Would that give you cause and concern for a nominee to be put on the Supreme Court who, for some 20 years, had espoused a strong, sincere position, on his part, of a neutral principle of interpreting the Constitution, that the equal protection clause did not apply to women?

Mr. **Sowell**. Senator, I just do not believe that anything that I have read by Judge Bork has ever said that the 14th amendment does not apply to women.

I think that what he said was that the standards he would use in interpreting that law—because the 14th amendment clearly says persons. In fact some people have even raised the question why there was a need for an equal rights amendment, given that there was already the 14th amendment which is an equal rights amendment.

But I think there is a fundamental difference between saying that you interpret the 14th amendment differently, or that you interpret your test of it differently, in the case of racial groups, than in the case of men and women.

He used some obvious physical differences, differences in life expectancy, things of that sort--differences which you do not find, necessarily, between races.

Senator DECONCINI. What about his criticism of the poll tax? Does that trouble you at all, that someone would be going on the Supreme Court with a strong expressed feeling that, legally, there is nothing wrong with that, even though he himself says personally, he opposes it, as long as it is not excessive?

Mr. SOWELL. I think the poll tax that he was talking about was a dollar and a half, which I do not think is a crushing burden in any income bracket.

There is a fundamental difference between those devices which were historically used to promote discrimination, such as heavy poll taxes in some parts——

Senator DECONCINI. You think it would not be unreasonable if there was a poll tax of a dollar and a half?

Mr. SOWELL. No.

Senator DECONCINI. You agree with Judge Bork?

Mr. SOWELL. A dollar and a half? No.

Senator DECONCINI. Yes.

Mr. SOWELL. If you start getting into larger numbers, then of course we start having some problems.

Senator DECONCINI. Just 3 months ago, Judge Bork was quoted in Worldnet, June 10, 1987, as saying regarding the equal protection clause, quote: "I do not think the equal protection clause probably should have been kept to things like race and ethnicity," which means excluding women.

Doesn't that tell you something about——

Mr. SOWELL. I would really have to see the context, Senator, because I have seen so many things out of so many contexts——

Senator DECONCINI. Yes. I will give you a copy of the speech. Would you give that to Dr. Sowell, please, and show him. What page is that on? It is at page 12, the bottom of page 12.

If you read the question there, Dr. Sowell, in the middle of the page, you will see what the context was for his answer, which—"which later decisions in which the equal protection clause is applied, would you consider to be a logical further extension of the principle, or where would you think that the Court has gone too far in applying equal protections," et cetera.

And then you see the answer, and I read a part of that to you.

Mr. SOWELL. Well, he says that if you are talking about having different drinking ages for young men and young women, that has violated the equal protection law, he thought that was going—that was trivializing the Constitution.

Senator DECONCINI. Yes. And you do not agree with that? I mean, you agree with his position?

Mr. **Sowell**. Only in the sense that in some of the cases in which these things are extended to women—you cannot do it mechanically. You cannot mechanically extend the analogy from racial minorities to women for a lot of reasons.

Senator **DeConcini**. But in other words, if you were a woman, it would not concern you that his position was that "I don't think the equal protection clause probably should have been extended to things other than like race and ethnic discrimination," and when he goes further——

Mr. **Sowell**. If that was all he said—this is the only thing I had to go by on a program—I do not think I would give it very much weight.

Senator **DeConcini**. That would not bother you, in his earlier writings——

Mr. **Sowell**. I would not give it very much weight, because, in other words, if he said in a law journal article, saying why he thought women were not covered under the equal protection law—and I suspect as a judge, he has already ruled that women have in fact been protected.

Senator **DeConcini**. Well, he stated here, under oath, that now, he felt the equal protection clause applied to everyone, and of course that is, to me——

Mr. **Sowell**. Has he ever ruled, as a judge, that women simply do not have protection under the 14th amendment? I would think that would be headline news.

Senator **DeConcini**. No, but he has written, I think very clearly, that up until he testified here, that he did not think the equal protection clause should have been interpreted to include women, and I just cited one, and I take it your answer is that——

Mr. **Sowell**. Well, no, he is talking about extensions of the law.

Senator **DeConcini**. Of the equal protection clause.

Mr. **Sowell**. Well, it depends on what you mean by the "further extension of a principle." I do not think, for one minute, that he would accept a law that said, you know, women were not allowed to drive cars and men could.

Senator **DeConcini**. Well, the question is, which of the later decisions in which the equal protection clause is applied, so he is referring to the equal protection clause, and his answer is "I don't think the equal protection clause probably should have been kept—that probably should have been kept to things like race."

And that is a troubling statement with me. I am pleased that he came here and finally said, hey, I have changed my mind, that now it applies to everybody, and that I am not stuck with those kind of statements that he has been making, but it obviously does not concern you, or frighten you, by any means?

Mr. **Sowell**. No, no.

Senator **DeConcini**. Going back to the poll tax, what about the one-man-one-vote decisions that he has made? Does that trouble you, at all, that the judge has expressed some opposition to the Supreme Court, that it was in an activist role when it said that that was unconstitutional?

Mr. **Sowell**. Well, you know, I think we are doing exactly the thing that I said should not be done, and that is we are looking at it issue by issue. I think what he is objecting to is the way this was done, and the legal principle that is established, so that this principle now applies far beyond the questions of voting.

Senator **DeConcini**. Well, if you do not look at it issue by issue, how do you determine what a person is going to do, whether it is Justice Rehnquist, or Scalia, or Bork, if you do not look at some issues? What do you do?

Mr. **Sowell**. I do not think that you determine it, even when you do look at issues. That you look at the issues which were important as of the time that this happens, which is very different from the issues that are likely to come up over the lifetime of that Justice.

I can imagine, when Earl Warren was confirmed, that if people had looked back over the issues that were hot at that moment and asked him about all of them, they probably would have missed most of the landmark decisions that he made.

Senator **DeConcini**. Well, yes, you know, and Dwight Eisenhower was quoted as saying it is the worst appointment he ever made. So maybe they did not look at issues enough.

I hope that if Judge Bork is confirmed, and I should end up voting for him, I do not look back and say, boy, you know, I did not look at specific issues. That is the worst vote I ever had.

Mr. **Sowell**. Oh, but Senator, you cannot possibly look at future issues, which are the only issues he can ever vote on.

Senator **DeConcini**. No, you can only judge based on his past, right, because we do not know what he is going to do in the future?

Mr. **Sowell**. Oh, but the past consists not only of different opinions, it consists of completely different issues that he is likely to face in the future. And that was the point about Earl Warren—That if you asked Mr. Warren how would you vote about the President taking over corporations—that was a hot issue.

Senator **DeConcini**. Are you saying that you do not think that the Supreme Court is going to address the issue of women under the equal protection clause in the future? That that has all been put behind us now, and that racial discrimination, or restrictive covenants, are never going to be brought up in the future before the Supreme Court? Maybe you are right.

That would be nice, if there were no such cases.

Mr. **Sowell**. I am only saying that the cases of one era are not the cases of a previous era. That is all I am saying. I am also saying the principles, though, of the law should be the same from one era to another, if you are serious about having a Supreme Court.

Senator **DeConcini**. Because—well, my time is up. Thank you, Mr. Chairman.

The **Chairman**. Senator Thurmond.

Senator **Thurmond**. Thank you, Mr. Chairman.

Mr. Sowell, I want to congratulate you for appearing here. I know, in a way, it must be a little tough on you. You have studied Judge Bork's record, and I am sure you are familiar with it in general.

As a member of the circuit court of appeals, he wrote 150 decisions, and participated in 400 decisions, and my understanding is that none of those have been overruled by the Supreme Court.

Chief Justice Burger said that somebody called him an extremist, and he said, "If Judge Bork's an extremist, I'm an extremist, too."

And then Mr. Cutler testified here, strongly in favor of him.

In other words, do you know of any reason why this man should not be confirmed?

Mr. **Sowell**. No legitimate reason.

Senator **Thurmond**. Do you think he possesses the qualities that a judge ought to possess to be on the Supreme Court, such as integrity, judicial temperament, professional competence?

Mr. **Sowell**. Absolutely.

Senator **Thurmond**. He has said here that he would be fair to blacks, and fair to women, and what more can he do? And his decisions on the circuit court affirm that. They had to keep on bringing up some statement he made seventeen or so years ago.

Well, people, as time goes by, sometimes they make statements or write articles for the sake of argument, or to bring out new points, or to show a new imagination or new ideas. But when it came to writing decisions, he wrote sound decisions that are in line with the other judges, such as Chief Justice Burger, and the others. And Justice Potter Stewart. He mentioned him, and others.

And do you know of any reason, at all, why this man should not be confirmed?

Mr. **Sowell**. None, Senator.

Senator **Thurmond**. And you favor this committee recommending confirmation?

Mr. **Sowell**. Absolutely.

Senator **Thurmond**. Thank you very much.

The **Chairman**. Thank you. Senator Leahy.

Senator **Leahy**. Thank you, Mr. Chairman.

Just one question. Did you follow the statements that Judge Bork made on first amendment rights, freedom of speech rights, during the series of questions that I asked him, and followup questions Senator Specter asked him?

Mr. **Sowell**. I cannot quite sort all those out. I heard a lot, and I read a lot about his views on free speech.

Senator **Leahy**. Did you feel that his answers here were at variance with his writings and statements over the past 15 to 20 years, in that area, in the area of freedom of speech?

Mr. **Sowell**. I do not know. He sounded more moderate here than he did there, but, on the other hand, Senator, if I went back to stuff that I wrote in 1972—in fact I have had to make that decision, whether I wanted a book I wrote in 1972 to be reprinted, and that was just in the last couple of months. And I said no, because I do not want it out there any more, because I have moved beyond that.

Senator **Leahy**. In 1971, he strongly, strongly criticized—in fact some of the harshest criticism I have heard—in 1971 criticized the 1969 *Brandenburg* opinion, a unanimous opinion of the Supreme Court on freedom of speech.

Now, in his confirmation hearing, he converts that to a statement where he supports *Brandenburg*.

Would you say that was a basic shift?

Mr. **Sowell**. No, because that was a shift on where you are drawing the line on a particular issue. It was not a shift of legal principles. Everybody that I have read, going back to Holmes, that talked about freedom of speech, said yes, we have freedom of speech in this area, in that area, but at some point you draw the line.

And for a man to draw that line here today, and there tomorrow, but on the same general principles, does not strike me as a shift of principle.

Senator **Leahy**. You do not see his strong rejection of *Brandenburg* before the confirmation hearings, and his acceptance of *Brandenburg* during the confirmation hearings, as a shift?

Mr. **Sowell**. Not when they are 16 years apart.

Senator **Leahy**. You do not see his rejection within just the past year, or so, of *Brandenburg,* in his writings and speeches and his acceptance of *Brandenburg* during the confirmation hearing as a shift?

Mr. **Sowell**. I have not read the more recent one.

Senator **Leahy**. Thank you. Thank you, Mr. Chairman.

The **Chairman**. Senator Hatch.

Senator **Hatch**. Mr. Sowell, you are widely published, you have lectured widely, you have appeared before many congressional committees, certainly before committees that I have sat on, and you are widely respected, by people from all persuasions, and you have been a principal spokesman, in many ways, for ethnic America.

We have repeatedly heard from leaders of civil rights groups that judicial activism is beneficial to minorities.

Now, do you agree with this, and why do you think that civil rights leaders in this country, or at least the top leaders of the civil rights groups are so opposed to Judge Bork?

Mr. **Sowell**. I do not believe that judicial activism has been beneficial to minorities.

Senator **Thurmond**. Speak into the microphone, so we can hear.

Senator **Hatch**. If you would pull that up just a little bit, and get it close to you.

Mr. **Sowell**. I do not think that judicial activism has been beneficial to minorities. One of the reasons is what I have mentioned earlier, that it is extremely hard for kids in many ghettos to get a decent education today, let's say as decent an education as I got in Central Harlem some 40 years ago, because the disruption is so much greater today, and there is so little you can do about it.

If you expel more black males from some schools than you expel Asian females, that becomes a court case.

You have the American Civil Liberties Union intervening in these places. There were students—there were parents, actually, parading, I believe in Chicago, with signs saying "American Civil Liberties Union keep out," because they wanted their kids to get educated, and that could not be done if you are going to have to due process every disruptive student.

So I think that has been very harmful. I have seen the deterioration in crime as well. No, I do not believe that judicial activism has been beneficial to minorities.

Senator **Hatch**. Over the past few weeks, we have witnessed a great irony. Judge Bork states, and has written, that he believes the people's elected representatives should determine policy in this country, not unelected lifetime-appointed judges.

Yet some of those elected representatives are objecting to this nominee, who contends that Congress, not the courts, should make our fundamental policy choices.

Now, why do you believe that some Members of this body, and others, who are liberal in persuasion, are worried about a judge who will really let them make the nation's key decisions?

Mr. **Sowell**. Because they will have to make those decisions publicly, and stand up and vote, whereas judges can simply engage in verbal sleight of hand about constitutional clauses and make the same decisions.

Senator **Hatch**. I think that kind of sums it up. The fact is it makes the hard political choices ours, rather than the unelected judges.

Mr. **Sowell**. Yes.

Senator **Hatch**. And that is pretty tough on people who have to run for election over and over again, and maybe they cannot get some of these decisions through the elected representatives' bodies.

Mr. **Sowell**. I suspect not. It is also very ironic to hear a man described as "dangerous" because he has announced that he is going to follow the instructions from Congress.

Senator **Hatch**. Mr. Sowell, as the nation's leading lawyer and Solicitor General, and 5 years as a judge on the second highest court in the land, Judge Bork has never advocated or rendered a decision less favorable to minority plaintiffs than the decisions already reached by the current Supreme Court. Never. Nobody can make a case that he has.

Nor for that matter, has he ever taken a civil rights position less protective of minorities than Mr. Justice Powell. Never.

Frankly, we continue to hear that he might shift the balance, and I think this is very hard to justify on the facts, as I view them, and as I think any fair-minded person would.

Indeed, in many areas, such as the Voting Rights Act, and sex discrimination, Judge Bork has taken positions even more protection of the minorities than those advocated by the Supreme Court.

Now on the basis of the record, the only difference I can find between Judge Bork and Justice Powell are his statements about the *Bakke* case involving affirmative action.

Judge Bork has said he prefers the original, nondiscrimination concept of affirmative action. This means that he would permit, and would actively permit active recruitment of qualified minorities, among other things.

The alternative, as you know, is some form of mandatory proportional representation for minorities, or quotas, to put it in one word.

Now do you believe that mandatory proportional representation benefits minorities?

Mr. **Sowell**. No. In fact I think one of the great handicaps that blacks, and other minorities face, across the country, is that they are systematically mismatched with universities in the admissions process.

That is, if Harvard feels that it must have *x* percent of blacks, and if the pool is such that they cannot get *x* percent of blacks at the same level as the rest of the Harvard students, they are going to take those blacks who would have succeeded in some State university and bring them to Harvard, where many of them will fail.

Or MIT is a better example. The average black student at MIT is in the bottom of MIT students in math, but he is in the top 90 percent of all American students in math, because MIT students are so phenomenal in mathematics.

Something like one-fourth of all the black students going to MIT do not graduate. You are talking about a pool of people who score at the 90 percentile in math, whom you are artificially turning into failures by mismatching them with the school.

Much earlier, you had a great increase of blacks in the universities through the GI bill. You had nothing like that kind of attrition from that process because the student went wherever he could be accepted, wherever he met the normal standards, and the Government simply paid the money.

Senator HATCH. Now Mr. Sowell, when Judge Bork says the equal protection clause probably should be kept to things like race, he is not saying anything other than what he has said before this committee.

He is saying that groups, other than race, should not be covered by the equal protection clause. He said that all persons, not groups, should be covered.

And to repeat what Judge Bork said many times—one, he said that the equal protection clause itself grants, quote, "any person equal protection of the laws," unquote.

Thus every person—black, white, male, female—everyone is covered by the equal protection clause according to Judge Bork.

Now when it comes to the standard, which is a separate question from coverage, Judge Bork says that only blacks are covered as a group by strict scrutiny. All other persons are covered by a reasonable basis test. Now this test will grant women as much protection, or more than they get now, in fact.

The CHAIRMAN. Senator, I just want

Senator HATCH. Is my time up?

The CHAIRMAN. Time has been up. Yes.

Senator HATCH. Well, let me just finish with a couple more——

Senator THURMOND. Mr. Chairman, I will use only half of mine. I yield my half to him.

The CHAIRMAN. That is fine. Okay. Good.

Senator HATCH. Well, I appreciate it, because this is an important issue, because I think his record has been seriously distorted before this committee, and in some ways by some of us on the committee.

Now, not intentionally. I do not denigrate anybody that way. But I think it is hard to understand these areas. This is a very, very difficult area.

Mr. SOWELL. Yes. I had not heard that explanation before, and it does make sense.

Senator HATCH. Well, let me just say this: besides being equal, Judge Bork's reading of the equal protection clause is also fair, under this approach, whenever an immutable trait, such as gender, which bears no relationship at all to one's ability, or merit, or inherent equal personhood, is the basis for discrimination, he would always hold it to be a denial of equal protection.

Now this means that almost no laws that distinguish on the basis of race, or sex will be upheld by Judge Bork.

And as Justice Stevens, who is known as a champion of the rights of the disadvantaged has written, quote: "We do not need to apply a special standard, or to apply strict scrutiny, or even heightened scrutiny to decide such cases." Now this is because the rights of minorities and women can be, and are fully protected by Judge Bork's equal protection approach, without extending special advantages to one group over others.

Mr. SOWELL. Yes.

Senator HATCH. Now that is what he has said. Do you find any fault with that, as a minority?

Mr. SOWELL. Not at all. Not at all.

Senator HATCH. As a professor, as a thinker, as somebody who has written extensively, and has thought through, I think more than perhaps any other person in our society, the implications of affirmative action and other minority relationships?

Mr. SOWELL. I not only accept that explanation, but I am even more impressed by what he has done, because "by their fruits you shall know them," and what he has done on the circuit court of appeals means a lot more to me than a phrase that was lifted out in an interview on the run with some magazine.

Senator HATCH. Well, I have certainly used up my time. I want to thank you. I think that your testimony is extremely important to this committee, because the American people really are not hearing the truth, and these are intricate, difficult, hard-to-understand concepts, and I think it is about time they heard the truth.

There is no reason for any woman to be afraid of Judge Bork, or Justice Bork, as I hope he will become, or any minority person, or anybody else.

I think that, as a matter fact, he would apply the equal protection clause the way the Constitution provides that it should be applied.

Mr. SOWELL. I believe that as well.

Senator HATCH. Well, thank you.

The CHAIRMAN. Thank you. I have not used my time. I am going to use my 5 minutes now, if I may, and hold me strictly to the 5, please. Give me a 1 minute notice.

Let me ask you a couple questions. You think judicial activism, Doctor, has hurt blacks.

Judicial activism of eliminating restrictive covenants in deeds, eliminating segregation in schools, one man, one vote, literacy test. Do you consider those judicially active?

Mr. SOWELL. Well, as regards restrictive covenants, I can see no evidence that they did anything other than make some people feel good because it was symbolic.

As regards desegregation of the school system, that should have been done long before, and on a much more sound basis. I have gone into this at great length in previous writings.

The CHAIRMAN. But are they——

Mr. SOWELL. The problem with—no, no. You see, the problem is not whether you believe that school desegregation should have ended. I believe it should have ended long before. Judge Bork believes it should have ended long before.

What he, and what I have objected to, are the principles used in that decision, because those principles take on a life of their own and they come back to haunt you in other areas.

Obviously, this old phrase, "hard cases make bad law" derive from that fact. You dream up a principle to reach this result, and then the principle has a life of its own.

The CHAIRMAN. So the principle of desegregating the schools——

Mr. SOWELL. No, that was not the principle. The principle was the reason that they picked for it was——

The CHAIRMAN. Well, that is all I am saying. Okay. The reasons they picked——

Mr. SOWELL. Yes.

The CHAIRMAN [continuing]. Desegregating the schools, you and Judge Bork agree were the wrong principles, and they should have not—so the Court should not have done that, the——

Mr. SOWELL. No, no, the courts should have done it.

The CHAIRMAN. Oh, okay.

Mr. SOWELL. Both of us have said the Court should have done it, and in my case, and I think in his case, the Court should have done it a lot sooner.

The CHAIRMAN. How?

Mr. SOWELL. They should have ruled that it was not equal protection of the law because nobody in his right mind believes that there was equal protection of the law in the Jim Crow era of these school systems.

The CHAIRMAN. Okay. I am just trying to figure out what you are saying.

Mr. SOWELL. Yes, yes.

The CHAIRMAN. Now when they desegregated the D.C. schools, it is clear the 14th amendment did not apply. Everyone agrees that the 14th amendment does not apply to the District of Columbia.

How would they have done it in the District of Columbia? Should they have just let segregation stand in the District of Columbia?

Mr. SOWELL. No. In fact, Senator, it is interesting that you say that, because I have gotten—the first thing I ever wrote on a public issue was on November 13, 1950, in the Washington Star in which I argued for the desegregation of the D.C. school system. So that——

The CHAIRMAN. On what principle?

Mr. SOWELL. I had not studied nearly as much then as I have 37 years later, and so I had not worked it out. Nor do I think that I would want to work it out on the run, in front of a large group of lawyers at this very moment in the time that is available.

The CHAIRMAN. Well, how about literacy test? Was it judicial——

Mr. SOWELL. Oh, I see no reason why people should not be literate in order to vote. The question is, if you have a black who comes in with his degree from Harvard, and the man behind the desk says, no, you're not literate, you can't vote, then—you see, this is what bothers me. People are talking about how judges should be sensitive to this particular group or that particular group, and if that means anything—if it means he is applying the law differently, that is precisely how blacks were held down for generations in the South, by applying the law differently.

The CHAIRMAN. So literacy tests, as long as they were equally applied, are all right?

Mr. SOWELL. Sure.

The CHAIRMAN. That is what I thought you thought.

Now I also want to clarify. I gather from your comments about MIT and Harvard, that you do not think there are enough blacks out there who are qualified to fill the number of vacancies allotted for them in those schools? Is that right?

Is that what you are saying?

Mr. SOWELL. Well, the word "qualified" really is misleading. The question is whether or not they are like the other students at Harvard or MIT.

The CHAIRMAN. Well, okay. So there is not—

Mr. SOWELL. So they may be perfectly qualified. This same student might go through—God help us, I hope there is no one here from Illinois—Illinois Institute of Technology, and do well, but there is no reason why he should fail at MIT. There is no prestige in flunking out of the Ivy League.

The CHAIRMAN. But my point is, you believe there are not enough black women, and men, out there, that are the same as white women and men, to be able to go through Harvard and MIT?

Mr. SOWELL. If there were, it would mean that a whole history of oppression had done no harm whatever.

The CHAIRMAN. So the answer is you do not think there are. I just want to understand what you are saying.

Mr. SOWELL. It is not a question of what I think. It is a factual matter.

The CHAIRMAN. So you are saying, factually, there are not enough?

Mr. SOWELL. Factually, this study has already been done by Klitgaard at Harvard, and the figures are all there, and anyone can look them up.

The CHAIRMAN. Okay. I just want to hear from you. I want to know what you are thinking. Have you read all of Judge Bork's cases, or any of them?

Mr. SOWELL. Not all.

The CHAIRMAN. Have you read all of his writings?

Mr. SOWELL. I have not read all of them, but I have been reading them for more than 20 years because I used to teach antitrust economics.

The CHAIRMAN. Now are you part of what they call the "law and economics school?" You know, would you consider yourself a part of that school?

Mr. SOWELL. I do not know.

The CHAIRMAN. There is nothing wrong with that. It is not a bad school. I just wondered where you are?

Mr. SOWELL. When I sit down to write, Senator, I do not ask what my label—I do not check my identification tag to see what I am. But one of my books did win a prize as the best book on law and economics in 1980. [Knowledge and Decisions, Basiz Books, 1980.]

The CHAIRMAN. No, but I mean, there is almost a term of art out there called the "school of law and economics."

Mr. SOWELL. Yes.

The CHAIRMAN. And are you a part of that school, intellectually? That is all I am trying to get at.

Mr. **Sowell.** I am very much interested in the application of economic principles in the law, and vice-versa.

The **Chairman.** My time is up. Thank you very much.

The Senator from Pennsylvania.

Senator **Specter.** Thank you, Mr. Chairman.

Mr. Sowell, back to judicial activism. Aside from the legal principles—although I think there has been enough time, since 1954, since the cases came down, to figure out a legal principle—but just back to judicial activism.

You say that judicial activism has not been helpful to minorities. You say that——

Mr. **Sowell.** On net balance.

Senator **Specter.** You say that discrimination should have been ended long before it was. Judge Bork has written that, that discrimination should have been ended in the 1930's and 1940's, not waiting until 1954.

The Congress of the United States would not do anything about segregation. The State of Mississippi, and the State of Georgia, and the State of Kansas would not do anything about segregation. If it were not for judicial activism of the Supreme Court of the United States, there still might be segregation.

Who would have done it except for judicial activism, and never mind the theories?

Mr. **Sowell.** Senator, if the Supreme Court struck it down, it would have been struck down no matter what reason they used for striking it down.

Senator **Specter.** But it was judicial activism.

The point is that no one else would act except the judiciary, and that is what you call judicial activism.

Mr. **Sowell.** Oh, no, Senator, because as long as the judiciary has been acting, every judge, including Judge Bork, would have to be a judicial activist. That is not what the term means, as he uses it.

Senator **Specter.** But you have a variety of ways to end segregation.

Mr. **Sowell.** Yes.

Senator **Specter.** You have legislative activism, you might have executive activism, or you could have judicial activism.

Who else is going to act?

Mr. **Sowell.** Senator, if every time a court acts you call it judicial activism, then every single judge must be a judicial activist, and the term would have no meaning.

Senator **Specter.** Are you aware of the fact that Judge Bork has spoke forcefully for judicial activism in carrying out the principles of the Constitution?

Mr. **Sowell.** Again, it depends on what you are defining. It is like these definitions of——

Senator **Specter.** Answer my question. Are you aware that Judge Bork has spoken out actively in favor of judicial activism? That judicial activism is highly desirable when you carry out constitutional principles?

Mr. **Sowell.** I am unaware of that particular statement out of his voluminous writings.

Senator SPECTER. Dr. Sowell, are you aware of the fact that Judge Bork has repeatedly said that equal protection of the law does not apply to women?

Mr. SOWELL. Well, Senator, we have discussed that twice, and apparently it does apply to women.

Senator SPECTER. We have discussed it many times, but I do not think on the same facts. Repeatedly, in this hearing room, we have cited texts where Judge Bork has said that on original intent, and his construction of the Constitution before coming into this room, that equal protection of the law does not apply to women.

I understood you to say that Judge Bork has ruled as a judge, on the court of appeals, that equal protection of the law does apply to women.

Did I understand you, correctly?

Mr. SOWELL. No, I was saying I knew of no cases on the court of appeals in which Judge Bork had said that it does not apply to women.

Senator SPECTER. But that is not the point. The point is, do you know of any case on the court where he has said that executive committee equal protection of the law does apply to women?

Mr. SOWELL. No, Senator.

Senator SPECTER. Well, then on the record we have so far—and I agree that Judge Bork can change his mind—but the issue is what you know about Judge Bork's position, and Judge Bork has repeatedly said before coming into this room, that equal protection of the law does not apply to women.

Now my question to you is, if you had known that, would you still be as emphatically in support of Judge Bork as you are?

Mr. SOWELL. Senator, if there were certain words that were put together in a certain way, that means nothing. What really matters is what did he say in substance, and I think the question of judicial activism is a classic example of that.

Senator SPECTER. I do not understand you. If a group of words were put together in a certain way—what other basis do we have for judging this man? He puts a group of words together in a certain way when he writes an opinion.

He puts a group of words together in a certain way when he makes a speech. He puts a group of words together in a certain way when he writes a law review article.

What I am trying to find out, Dr. Sowell, is really what you know about Judge Bork.

Mr. SOWELL. Well, I have read his writings on antitrust for a very long time.

Senator SPECTER. Well, aside from antitrust, which we have not gotten to, how about on equal protection of the law, how about freedom of speech?

Mr. SOWELL. I have read him on freedom of speech. I read the Indiana law article. I have read some things——

Senator SPECTER. Well, if you have read the Indiana law article, it is hardly a line that he has drawn. You say that when you come to freedom of speech, and clear and present danger, it depends on where you draw the line.

The line would not appear on the table, it would be off the table, as Judge Bork articulated the principles in the Indiana law review.

He says that you may not contest legality. He says that you should not be able to articulate a principle of proletarian dictatorship.

The clear and present danger test of Holmes is that there has to be an imminence of violence. It is not on the table, and that is a long table you have.

Dr. Sowell, I think that Judge Bork has a perfect right to modify his positions and come into this room, but when you have made representations about where Judge Bork stands, I have a real question as to how much you know about Judge Bork.

Mr. SOWELL. Well, Senator, one of the things I know is that long before these hearings, the Indiana Law Review article was brought up at a meeting of The Federalist Society at Stanford University, where I was there, and Judge Bork at that time said, well, I have been eating those words for a long time now. He had not been nominated to anything, except he was already on the circuit court of appeals.

Senator SPECTER. Well, are you aware of the fact that in 1985 he was interviewed and published in a conservative magazine, that he stood by his 1985 comments?

Mr. SOWELL. Well, Senator, I stand by what I wrote in 1972.

Senator SPECTER. His 1971 comments, in 1985?

Mr. SOWELL. Senator, I stand by what I said in 1972 as a matter of general principle, but there are many sentences, and whole paragraphs that I would not repeat today, and therefore I do not want the book reprinted.

Senator SPECTER. Well, aside from what you stand behind, are you aware of the fact that in 1985 Judge Bork said he stood behind his 1971 Indiana Law Journal article?

Mr. SOWELL. In the same sense in which I stood by my 1972 book.

Senator SPECTER. Well, he did not say that he stood behind them in the same sense you did. He said he stood behind them.

Mr. SOWELL. Sure, Senator, but I would say that, too.

Senator SPECTER. And in 1987—I believe it was on Worldnet—he said that equal protection of the law did not apply beyond race and ethnics. Are you aware of that?

Mr. SOWELL. Well, the argument that Senator Hatch has just made is if you are talking about persons, that is one thing, and if you are talking about groups, it is something else.

Senator SPECTER. Well, he did not say groups and persons. He did not say groups and persons in the 1971 article. He did not say groups and persons in the 1987 article.

Mr. Sowell, my time is up, and I think Judge Bork has articulated a position in this room, as I said earlier today, which may well warrant confirmation. I am not saying yes or no. But when I hear you say that there is—what I hear you say what you have about Judge Bork's record, I just would refer you to some of his writings.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you. Senator Heflin.

Senator HEFLIN. Doctor—how do you pronounce your name?

Mr. SOWELL. Sowell, just like Lowell.

Senator HEFLIN. Sowell. All right. Sowell. Pardon me.

You are with the Hoover Institute as a fellow. What is your academic background? Are you a lawyer? I should know, but——

Mr. SOWELL. Oh, I am an economist by trade, but I have wandered into other fields.

Senator HEFLIN. You have educational degrees in law as well as——

Mr. SOWELL. No, no. In economics.

Senator HEFLIN. Just in economics?

Mr. SOWELL. In economics.

Senator HEFLIN. Just to continue a little bit on what Senator Specter was inquiring about. Judge Bork has indicated that he has shifted some of his opinions since—well, at least he has articulated changes in his opinions here at these hearings.

Does this cause you any concern in predicting how Judge Bork may rule, if he is on the U.S. Supreme Court, on such issues as the first amendment, or equal protection?

Mr. SOWELL. Not really, because, again, if you are talking about specific issues, it is always a question of how far you carry some principle, and he may carry it further one time than he did 16 years earlier.

But if you are talking about the more fundamental question of the role of a judge in the whole legal system, in the whole political system, that would concern me a great deal, and there I think I have seen a great deal of consistency.

In other words, the consistency I see is in the fundamental set of principles about the role of a judge and the law, and these inconsistencies are about specific issues—maybe he would go a little further this way, a little less far that way. That really seems, to me, secondary.

Senator HEFLIN. You mentioned the school systems, and indicated that you did not think that the decisions of the courts which brought about desegregation—as I understood you, that you used the phrase "judicial activism hadn't helped minorities."

Mr. SOWELL. No, Senator.

Senator HEFLIN. Maybe I misunderstood you.

Mr. SOWELL. No, no. What I said was that I thought that the desegregation not only should have taken place, it should have taken place a lot earlier, but a different set of reasoning should have been used.

Senator HEFLIN. Well, as I understood it, you were saying that the court action has not helped minorities?

Mr. SOWELL. Oh, I am not saying that at all. That is the problem with pat phrases like "judicial activism" because everybody means something different by it.

Senator HEFLIN. Well, what do you mean? I just was curious about how you say that the school children, blacks in a desegregated school, have not been helped. That is what I understood you to say.

Mr. SOWELL. No, no. I am saying that by using the kind of reasoning they did, drawing upon principles not in any written document anywhere, any legal document anywhere, but on—for example—the famous dolls test of Kenneth Clark, and so on.

If you buy the line of reasoning they give, then you have a definition of segregation for schools which is totally different from the definition of segregation in any other institution in our society.

That is, by the definitions that are used in schools to start bussing, Dulles Airport is segregated. This room may be segregated, for all I know, by those percentage representation things.

Senator HEFLIN. Well, now, I did not understand, and just to clarify in my own mind as to your testimony. I did not exactly understand what you had in mind when you said something about the restrictive covenants.

I do not remember the exact words, but in effect that the decisions that eliminated restrictive covenants have not benefitted——

Mr. SOWELL. Well, I know no one who has even claimed that there has been any discernible change in the pattern of discrimination brought about by either *Shelley* v. *Kraemer* or *Reitman* v. *Mulkey*.

Senator HEFLIN. In other words, you say that there has been no change.

Mr. SOWELL. I am saying of that era. Now, over a long 30-year period, with lots of economic changes, then you may have some gradual changes. But even so it has been fairly minuscule.

Senator HEFLIN. All right. I believe they are telling me I have got 30 seconds, so I think there is no point in asking another question.

Senator LEAHY. Who has not—the Senator from New Hampshire.

Senator HUMPHREY. Thank you, Mr. Chairman.

Mr. Sowell, you grew up in Harlem?

Mr. SOWELL. Yes.

Senator HUMPHREY. Is it safe to assume you were not born with a silver spoon in your mouth?

Mr. SOWELL. I think that is very safe, Senator.

Senator HUMPHREY. From which universities do you hold degrees?

Mr. SOWELL. Harvard, Columbia, and the University of Chicago.

Senator HUMPHREY. Harvard, Columbia, and the University of Chicago.

Mr. SOWELL. That is right.

Senator HUMPHREY. You were a nationally syndicated columnist?

Mr. SOWELL. Yes.

Senator HUMPHREY. At one time you were pretty far over on the left of the political spectrum, were you not?

Mr. SOWELL. Yes, yes, I was. I was a Marxist.

Senator HUMPHREY. You were a Marxist.

Mr. SOWELL. So I have great sympathy with people who have changed their views over the years. [Laughter.]

Senator HUMPHREY. I was coming to that. You would say your views have matured as you have matured in age?

Mr. SOWELL. Yes.

Senator HUMPHREY. You are a man of brilliant mind, obviously. Supposing you were now being considered. Supposing you were sitting there right now as a nominee to a high Federal position—and you have been offered high Federal positions, which you have turned down—but supposing you were sitting there as a nominee in the confirmation process. Would it be fair for Senators to repeatedly refer to your statements as a Marxist as the principal basis for granting or denying confirmation?

Mr. SOWELL. I would think not, Senator.

Senator HUMPHREY. Would it be fair or unfair for them to look at your more recent statements, even within the last 2, 3, 4 years?

Mr. SOWELL. Oh, it certainly would.

Senator HUMPHREY. Would you object if we suggested you were opportunistic because in recent years you have changed your views?

Mr. SOWELL. I would think not.

Senator HUMPHREY. Would it be a new kind of discrimination if we denied you confirmation on the basis of your previous views?

Mr. SOWELL. Well, I do not know if I would characterize it that way or not, but it certainly would not be desirable.

Senator HUMPHREY. Well, I would, and that is exactly what is going on here. It is a new kind of discrimination.

In regards to the statements, largely misleading, in the last half-hour on the subject of Robert Bork's views on the first amendment and on the 14th amendment, let me read this from page 113 of the transcript, Judge Bork speaking—excuse me, that is the wrong part. I have no talent at all in managing paperwork.

At page 57, Judge Bork: "You know, beginning with the *Brown* v. *Board of Education*—1954, I think it was—I have supported black equality, and I have done that in print long before I got here. I have never said anything or decided anything that should be frightening to women." And so on.

I ask unanimous consent to put that back into the record.

[See Sept. 18 Bork testimony.]

Senator HUMPHREY. Now, here is another interesting facet of this whole discussion, Doctor. There are those here now, those who have appeared before us, who apparently believe that only judges could have broken down the barriers which held back black Americans, that only activist judges are responsible for the gains which blacks have made in our society.

Now, I remember well the 1960's and the civil rights struggle, because I was out there in—what was it—1963, in that sea of people protesting the inhumanity and the immorality of racism and discrimination. And I say to those who suggest that only judicial activists and only judges could have broken down those barriers that you are insulting all of us, including yourselves, who participated in the great civil rights struggle, because political activism would have broken down those barriers may not quite as soon, but very nearly as soon as judicial activism broke them down.

Mr. SOWELL. Yes. The other thing, too, is if you look at history—and again, I think that is appropriate where you are talking about something like the Supreme Court—it is by no means clear from history that judges have been more sympathetic to blacks throughout history than the legislature or the Presidency.

Senator HUMPHREY. Yes, yes.

Mr. SOWELL. From the time of the *Dred Scott* decision until *Plessy* v. *Ferguson* was a longer period of time than from the time that Earl Warren came on the Supreme Court to this very moment.

Senator HUMPHREY. Yes.

Mr. SOWELL. And during that period, the courts were the lagging element, and it was the President and then the Congress that protected blacks.

Senator **HUMPHREY**. Indeed it was, indeed it was. And to suggest that blacks would have leaned supinely and put up with that kind of discrimination for even another 5 years, or 3 years, or 2 years, is to insult black Americans, I believe.

Indeed it was political activism and indignation on the part of blacks and those who sympathized with them, more than judicial activism, which resulted in passage of civil rights statute. It was political activism, not judicial activism, that emancipated blacks in the fullest sense of the word.

How do you feel about black Americans who have come before this committee and have opposed confirmation? Do you think they serve the black community well?

Mr. **SOWELL**. No, I do not. I do not know what all their reasons are. One of the sad things that happens with any organization over a period of time is that as it fulfills its mission, it looks for new missions, because organizations do not die quietly. And I think there are many, many problems that need to be addressed in the black community. Not all of them can be addressed with either the rhetoric or the strategies of the 1950's. But people tend to—generals will fight the last war over and over again, and I think that is what is happening here.

Senator **HUMPHREY**. I think so, too. I wish I had more time, but thank you.

Senator **LEAHY**. The Senator's time is up.

Senator Thurmond, are there other members on the minority side who wish to question, who have not had a chance to?

Senator **THURMOND**. I believe they have all questioned.

Senator **LEAHY**. Thank you.

Then we will stand in recess until 2:15.

[Whereupon, at 12:54 p.m., the committee was recessed, to reconvene at 2:15 p.m. this same day.]

AFTERNOON SESSION

The **CHAIRMAN**. The hearing will come to order. Would you all mind standing to be sworn?

Do you swear the testimony that you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. **HUFSTEDLER**. I do.

Ms. **BABCOCK**. I do.

Ms. **LAW**. I do.

Ms. **WILLIAMS**. I do.

The **CHAIRMAN**. We begin this afternoon with a distinguished panel, indeed. We are delighted to welcome you all here. We apologize for your having to be here on Friday afternoon. But as you well know, this is an important issue or you would not be here, and we are anxious to hear what you have to say.

Our panel is made up of four witnesses. First, Shirley Hufstedler; she has served as Secretary of Education and as a Federal Circuit Court judge for the Ninth Circuit, and currently is a practicing attorney. It is a great pleasure to have her here.

Second is Barbara Babcock. She served as Assistant Attorney General for the Civil Division. Currently, she is a professor of law at Stanford Law School. She is an author of articles on equal protection, federal courts, and judicial procedure.

Third is Wendy Williams. She is a professor of law at Georgetown School of Law. She, too, has authored articles on the equal protection clause, and especially on gender discrimination.

Finally, Sylvia Law, who is a professor of law at New York University School of Law. She teaches in the areas of family law and federal courts, and also has written on equal protection issues.

I would like to welcome all of you here today, and if we can, Madam Secretary, we will begin with you first. If you would all sort of unsheathe those microphones there; the closer you can pull them to you, the better everyone can hear in the back.

If you would begin, Madam Secretary.

TESTIMONY OF PANEL CONSISTING OF SHIRLEY HUFSTEDLER, BARBARA ALLEN BABCOCK, SYLVIA LAW, AND WENDY WILLIAMS

Ms. HUFSTEDLER. Thank you, Mr. Chairman.

The nation now needs a great moderator as the next Associate Justice of the U.S. Supreme Court. That person must have the ability to help the Court maintain the delicate balance that the Constitution must preserve if it is to continue to be the stabilizing, yet dynamic, force that it is in our country today.

We would have no reason to celebrate the 200th birthday of the U.S. Constitution if we had not built and preserved the institutions necessary to enforce it and to use its grand ambiguities to meet the immense challenges in transforming 13 quarreling colonies into the greatest free country in the world. Without the creative power to interpret the Constitution, we could not have managed to save our freedoms through devastating wars and the multiple revolutions in geopolitics, economics, technology and society that have moved us from the isolated agrarian world in which our country was born to the interdependent, pluralistic, industrialized, urbanized nation we have become. The institution that has been most critical in shaping the Constitution to perform these tasks is the U.S. Supreme Court. The role that that Court plays in American Government is unique in the world.

The Supreme Court's existence is rooted in the Constitution. But its power in American life has evolved from a series of decisions by unusually distinguished justices who interpreted the document—most particularly the Bill of Rights—to give it the living force required to obtain obedience to our constitutional system of checks and balances controlling the three branches of Federal Government and the relationship between State and federal sovereignties. The Supreme Court has become in this nation the final arbiter of those issues that most deeply divide our people from one another.

The Court's role began evolving under the leadership of the great Chief Justice John Marshall with the decision of *Marbury* v. *Madison,* establishing the power of the Court to declare a legislative act unconstitutional. The struggle to adapt the role of the Court and the Constitution in a changing society is constant. When the membership of the Court has proved unequal to its task, the nation has been imperiled. The nation could not endure half enslaved and half free. When the *Dred Scott* decision did not free the nation from the bondage of slavery, that failure was a precipitating cause of the Civil War. When a majority of the Justices were unable to accommodate their 19th century views of the Constitution to meet the urgent demands of the United States in the 1930's, the majority imperiled the Court itself.

Today, the Court is sharply divided. The members of the Court speak not only for themselves. Their dissonant voices reflect the views and needs of millions of Americans: rich and poor, women and men, young and old, powerful and powerless, black, white and brown. To bring our people together in principled accommodation of our differences, to prevent one branch of government from overwhelming another, and to prevent any changing majority or vocal minority from trampling the fundamental freedoms of those with whom they disagree, the nation needs a gifted moderator on the U.S. Supreme Court.

Justice Lewis Powell was a gifted moderator on the Supreme Court. His plurality in *Regents of the University of California* v. *Bakke* was the work of a statesman. Our tragic inheritance from slavery and civil war—racial apartheid—had been gradually dismantled by the Supreme Court. No other institution of Government had the combination of power, life tenure, and moral authority to do it. Affirmative action to redress invidious racial discrimination generated the same fears that had earlier prevented apartheid from being resolved and that still lingers in the smoldering controversies over the emergence of the rights of women and minorities in America. Justice Powell was deeply aware of the personal and societal dilemmas that affirmative action poses when whites and blacks are pitted against each other to obtain access to scarce resources. In *Bakke,* of course, the scarce resource was a seat in medical school. His moderate approach balanced the interests of black and white students. None lost more than any could bear, and the needs of each received some nourishment.

Of Justice Powell's opinion in *Bakke,* then Professor Bork wrote that the opinion was "justified neither by the theory that the [14th] amendment is pro-black nor that it is colorblind," and that it is, he added, "an uneasy compromise resting upon no constitutional footing of its own." Is this the voice of a man who today could provide a principled accommodation between the rights of black and white Americans, of men and women who are struggling for their fair share of this great nation's bounty?

Judge Bork has also been said to resemble Justice John Harlan, a moderately conservative jurist and a man of highest principle. Justice Harlan wrote the opinion for the Court in *Cohen* v. *California,* striking down, on first amendment grounds, a California statute banning disturbance of the peace by "offensive conduct." The statute, as you know, had been applied against a man who wore a jacket emblazoned with a slogan containing a vulgar word protesting the draft during the Vietnam War. Then Professor Bork severely criticized the *Cohen* opinion, stating that "if the first amendment relates to the health of our political processes, then, far from protecting such speech, it offers additional reason for its suppression." Does Judge Bork now agree with Justice Harlan that the first amendment protects speech that offends some of us either by the ideas expressed or by the manner of expressing them? If he does, what has caused him to change his mind?

I oppose Judge Robert Bork's confirmation as an Associate Justice of the Supreme Court because, in my view, he is not the moderate constitutional architect that the country requires at this time in the Court's history. Those who have characterized Judge Bork as a person whose views resemble those of Justices Powell and Harlan are either persons unfamiliar with the records of these men or those who have been willing to ignore the record to pursue their other interests.

My 19 years as a judge taught me to scrutinize records and to have considerable skepticism about changes——

The CHAIRMAN. How many years, Madam Secretary, were you a judge?

Ms. HUFSTEDLER. Pardon?

The CHAIRMAN. How many years were you a judge?

Ms. HUFSTEDLER. Nineteen years. State trial courts, State appellate courts, federal appellate courts.

The CHAIRMAN. Thank you.

Ms. HUFSTEDLER. It has caused me considerable skepticism about changes of mind on the eve of trial. In examining Judge Bork's record as an academician, as a high-ranking member of the executive branch of the Federal Government, and as a judge, the evidence discloses his quest for certitudes to resolve the ambiguities of the Constitution and of the Supreme Court's role in constitutional adjudication, and an effort to develop constitutional litmus tests to avoid his having to confront the grief and the untidiness of the human condition.

For a while, his articles of adjudicatory faith were an unusual form of libertarianism, with a pinch of "natural law," one of the most striking features of which was that a person running a public business should not be restrained from refusing to deal with persons who were members of a group that the proprietor did not like. The theory appears to have been based on his then conviction that imposition of a restraint on the innkeeper's conduct would cause an unacceptable loss of the innkeeper's personal liberty. The theory did not explain why the innkeeper's personal liberty to refuse service was of a higher constitutional value than the interest of a member of the disfavored group who could find no room at the inn. While he adhered to that theory, Judge Bork opposed the public accommodations bill in 1963 and other legislation designed to reduce the impact of invidious racial discrimination.

Before he discarded libertarianism, he was developing a new credo to which he has adhered with some degree of consistency over a period of many years: If the intention of the draftsmen of the Constitution does not unmistakably appear to him from the text of the document and the contemporaneous history of its draftsmanship, judicial search for meaningful application of the words of the Constitution must end. Few judges and no constitutional scholars would disagree that constitutional adjudication necessarily begins with the text of the Constitution and its history. Most of them, however, part company with Judge Bork because, to them, that beginning is not the end of the inquiry.

It is easy to interpret and to apply the specific provisions of the Constitution. For example, when the Constitution says that the "Senate of the United States shall be composed of two Senators from each State,"——

The CHAIRMAN. Were they not brilliant when they did that.

Ms. HUFSTEDLER. Yes, indeed.

The CHAIRMAN. That was one of the wisest things they have ever done.

Ms. HUFSTEDLER. It now means that one person, one vote will make it a certitude that those who have the right to participate in the electoral process will have full power to choose which man or woman should serve this nation in the great Senate of the United States.

We have little concern about what the draftsmen meant on that grand provision of the U.S. Constitution. It would not have been rational to have thought they meant 3 years or 7, or that it was debatable whether each State should have more than two Senators.

The spirit and the grandeur of the Constitution lies in its magnificent abstractions and its deliberate ambiguities. Remember the Preamble: "We the People of the United States in Order to form a more perfect Union, establish Justice, ensure domestic Tranquility * * * promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity * * *" And some of the words from the Bill of Rights: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of press, or the right of the people peaceably to assemble, and to petition the Government for redress of grievances." "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause * * *" "Nor shall any person be deprived of life, liberty, or property, without due process of law; nor shall private property be taken * * * without just compensation." "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

"Justice," "liberty," "welfare," "tranquility," "due process," "property," "just compensation" are neither neutral nor static concepts or principles. They are words of passion. They are words of dedication. They are words that cannot be drained of their emotional content and carry any meaning. None can be cabined without destroying the soul of the Constitution and its capacity to encompass changes in time, place, and circumstances. To limit the search for meaning to the thoughts of colonial gentlemen as applied to the conditions in the 17th and 18th centuries would destroy the hopes of its draftsmen to write a charter of government for their posterity and, I might add, our own. It is as futile to discern the meaning of these words from a crabbed "originalist's" point of view as it would be to know the meaning of marriage solely from the words of the nuptial vows and the thoughts of a bride and groom on their wedding day.

Adhering to his "originalist" credo, Judge Bork has caustically criticized all of the Supreme Court decisions recognizing a constitutionally protected right of privacy. He has been unable to find a definition of privacy in the Bill of Rights to satisfy his requirement of certitude. He can find no meaning for the grand words of the ninth amendment. Applying his criteria, he has denied the existence of the right, and discarded the ninth amendment altogether.

Judge Bork has adhered to his originalist theory as recently as 1984 in his opinion in *Dronenburg* v. *Zech*, restating his position attacking the Supreme Court's privacy decisions. Because his polemic was unnecessary to the decision of the case, four of his colleagues on the court of appeals, in dissent, chided him and observed that it was "particularly inappropriate . . . to wipe away selected Supreme Court decisions in the name of judicial restraint."

On earlier occasions, he has used the same interpretive credo to attack the Supreme Court's decisions striking down racially restrictive covenants in housing, decisions forbidding literacy tests as conditions for voting, and those outlawing poll taxes to restrict voting rights, the application of the equal protection clause to women, and many of the other major decisions of the Supreme Court that most deeply affect the freedom of women, of parents, and of children.

Judge Bork has testified before this committee that he has modified his views on many of these subjects—not, of course, on privacy. In the light of the record, however, it is appropriate to ask oneself, as the American people will ask themselves, whether he has, in fact, changed his mind or whether he is searching for a new article of adjudicatory faith. And if he is, what will that credo become if he is seated on the Supreme Court of the United States?

Judge Bork has stated that he believes that courts should defer to the will of the legislatures in constitutional adjudication unless the statute unmistakably contravenes a nonambiguous term of the Constitution. However, his insistence upon deference to legislatures has vanished when the subject of the legislation is one upon which he has other fixed beliefs. His record of attacking the legislative will in the antitrust field is well known to this committee. Is there a principled way to reconcile the conflicts in Judge Bork's theories of congressional deference or judicial restraint?

I, for one, have not been able to find one.

The Court and the nation need a healer, not a swordsman. Which role would Justice Bork play? I do not for a moment question the nimbleness of his intellect or his wit. I gravely question his ability to transform himself into a man of moderate views who will respect the opinions of others with whom he does not agree. I do not believe that he will be able to abandon his continuing search for absolutes in favor of a search for tempered justice.

A vote for the confirmation or against the confirmation of Judge Bork is not a Democratic or Republican vote. It is not a vote for or against the President of the United States. It is an act of statesmanship by each Senator in exercising the Senate's constitutional right to advise the President of the United States and the people of America of each Senator's conscientious conviction that the nominee either will or will not be a person who will, for the rest of his life, defend liberty and justice for all Americans.

The CHAIRMAN. Thank you, Madam Secretary. Presumptuous of me to make an editorial comment, that was a brilliant statement.

Ms. HUFSTEDLER. Thank you.

[Prepared statement follows:]

STATEMENT OF SHIRLEY M. HUFSTEDLER,
Partner, Hufstedler, Miller,
Carlson & Beardsley,
Los Angeles, California

Before
The Committee on the Judiciary
United States Senate
Senator Joseph Biden,
Chairman

September 23, 1987

My name is Shirley M. Hufstedler. I was admitted to the Bar in January, 1950, and for the next 10 years I was in private practice of law. At that time I became Special Legal Consultant to the Attorney General of California in the complex litigation in the United States Supreme Court over the rights to the Colorado River, Arizona v. California. In 1961 I was appointed Judge of the Los Angeles County Superior Court, a trial court of general jurisdiction. In 1966, I was appointed Associate Justice of the California Court of Appeal, a position in which I served until President Lyndon B. Johnson appointed me in 1968, as United States Circuit Judge, United States Court of Appeals for the Ninth Circuit. I resigned the Bench in 1979 when the Senate confirmed President Jimmy Carter's nomination of me as the Nation's first Secretary of Education. When I returned to private life in 1981, I became a partner in the firm Hufstedler, Miller, Carlson & Beardsley in Los Angeles, with time out to teach for a semester as Phleger Professor at Law at Stanford Law School and to lecture in other universities and colleges throughout the United States and abroad.

The Nation now needs a great moderator as the next Associate Justice of the United States Supreme Court. That person must have the ability to help the Court maintain the delicate balance that the Constitution must preserve if it is to continue to be the stabilizing, yet dynamic, force that it is in our country today.

We would have no reason to celebrate the 200th birthday of the United States Constitution if we had not built and preserved the institutions necessary to enforce it and to use its grand ambiguities to meet the immense challenges in transforming thirteen quarreling colonies into the greatest free country in the world. Without the creative power to interpret the Constitution, we could not have managed to save our freedoms through devastating wars and the multiple revolutions in geopolitics, economics, technology and society that have moved us from the isolated agrarian world in which our country was born to the interdependent, pluralistic, industrialized, urbanized nation we have become. The institution that has been the most critical in shaping the Constitution to perform those tasks is the United States Supreme Court. The role that the Court plays in our government is unique in the world.

The Supreme Court's existence is rooted in the Constitution. But its power in American life has evolved from a series of decisions by unusually distinguished justices who interpreted the document--most particularly the Bill of Rights--to give it the living force required to obtain obedience to our Constitutional system of checks and balances controlling the three branches of federal government and the relationships between state and federal sovereignties. The Supreme Court has become the final arbiter of those issues that most deeply divide our citizens from one another.

The Court's role began evolving under the leadership of Chief Justice John Marshall with the decision of Marberry v. Madison, establishing the power of the Court to declare a legislative act unconstitutional. The struggle to adapt the role of the Court and the Constitution to meet the demands of government and the people in a changing society is constant. When the membership of the Court has proved unequal to its task, the Nation has been imperiled. The Nation could not endure half enslaved and half free. When the Dred Scott decision did not free the Nation from the bondage of slavery, that failure was a precipitating cause of the Civil War. When a majority of the Justices were unable to accommodate their Nineteenth Century views of the Constitution to the urgent demands of the country in the 1930's, the majority imperiled the Court itself.

Today, the Court is sharply divided. The members of the Court speak not only for themselves. Their dissonant voices reflect the views and needs of millions of Americans: rich and poor, women and men, young and old, powerful and powerless, black, white and brown. To bring our people together in principled accommodation of our differences, to prevent one branch of government from overwhelming another, and to prevent any changing majority or vocal minority from trampling the fundamental freedoms of those with whom they disagree, the Nation needs a gifted moderator.

Justice Lewis Powell was a gifted moderator on the Supreme Court. His plurality opinion in Regents of the University of California v. Bakke was the work of a statesman. Our tragic inheritance from slavery and civil war-- racial apartheid--had been gradually dismantled by the Supreme Court. No other institution of government had the combination of power, life tenure, and moral authority to do it. Affirmative action to redress invidious racial discrimination generated the same fears that had earlier prevented resolution of apartheid and that still lingers in the smoldering controversies over the emergence of the rights of women and minorities. Justice Powell was deeply aware of the personal and societal dilemmas that affirmative action poses when whites and blacks are pitted against each other to obtain access to scarce resources. In Bakke, the resource was a seat in medical school. His moderate approach balanced the interests of black and white students. None lost more than any could bear, and the needs of each received some nourishment.

Of Justice Powell's opinion in Bakke, then Professor Bork wrote that the opinion was "[j]ustified neither by the theory that the [Fourteenth] Amendment is pro-black nor that it is colorblind," and that it is "an uneasy compromise resting upon no constitutional footing of its own." Is this the voice of a man who today could provide a principled accommodation between the rights of blacks and whites, of men and women who are struggling for their fair share of the Nation's bounty?

Judge Bork has also been said to resemble Justice John Harlan, a moderately conservative jurist and a man of highest principle. Justice Harlan wrote the opinion for the Court in Cohen v. California, striking down, on First Amendment grounds, a California statute banning disturbance of the peace by "offensive conduct." The statute had been applied against a man who wore a jacket emblazoned with a slogan containing a vulgar word protesting the draft during the Vietnam War. Then Professor Bork severely criticized the Cohen opinion stating that "if the First Amendment relates to the health of our political processes, then, far from protecting such speech, it offers additional reason for its suppression." Does Judge Bork now agree with Justice Harlan that the First Amendment protects speech that offends some of us either by the ideas expressed or by the manner of stating them? If he does, what caused him to change his mind?

I oppose Judge Robert Bork's confirmation as an Associate Justice of the Supreme Court because he is not the moderate constitutional architect that the country requires at this time in the Court's history. Those who have characterized Judge Bork as a person whose views resemble those of Justices Powell and Harlan are either persons unfamiliar with the records of these men or those who have chosen to ignore the record to pursue their other interests.

My nineteen years as a judge taught me to scrutinize records and to have considerable skepticism about changes of mind on the eve of trial. In examining Judge Bork's record as an academician, as a high-ranking member of the Executive Branch of the Federal Government, and as a judge, the evidence discloses his quest for certitudes to resolve the ambiguities of the Constitution and of the Supreme Court's role in Constitutional adjudication, and an effort to develop constitutional litmus tests to avoid his having to confront the grief and untidiness of the human condition.

For a while, his articles of adjudicatory faith were an unusual form of libertarianism, with a pinch of "natural law," one of the most striking features of which was that a person running a public business should not be restrained from refusing to deal with persons who were members of a group that the proprietor did not like. The theory appears to have been based on his then conviction that imposition of a restraint on the inkeeper's conduct would cause an unacceptable loss of the inkeeper's personal liberty. The theory did not explain why the inkeeper's liberty to refuse service was of higher constitutional value than the liberty of a member of the disfavored group who could find no room at the inn. While he adhered to that theory, Judge Bork opposed the Public Accommodations Bill in 1963 and other legislation designed to reduce the impact of invidious racial discrimination.

Before he discarded libertarianism, he was developing a new credo to which he has adhered with some degree of consistency for many years: If the intention of the draftsmen of the Constitution does not unmistakably appear to him from the text and the contemporaneous history of its draftsmanship, judicial search for meaningful application of the words of the Constitution must end. Few judges or constitutional scholars would disagree that constitutional adjudication begins with the text of the Constitution and its history. Most of them, however, part company with Judge Bork because, to them, that beginning is not the end.

It is easy to interpret and to apply the specific provisions of the Constitution. For example, when the Constitution says that the "Senate of the United States shall be composed of two Senators from each State" and prescribes the term as six years, no one could rationally argue that the draftsmen meant something else.

The spirit and the grandeur of the Constitution lies in its magnificent abstractions and its deliberate ambiguities. Remember the Preamble: "We the People of the United States in Order to form a more perfect Union, establish Justice, ensure domestic Tranquility . . . promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity

. . . ." And the words from the Bill of Rights: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of press, or the right of the people peaceably to assemble, and to petition the Government for redress of grievances." "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause . . . ." "Nor shall any person be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

"Justice," "liberty," "welfare," "tranquility," "due process," "property," "just compensation," are neither neutral nor static concepts. None can be cabined without destroying the soul of the Constitution and its capacity to encompass changes in time, place, and circumstances. To limit the search for meaning to the thoughts of colonial gentlemen as applied to the conditions in the Eighteenth and Nineteenth centuries would destroy the hopes of its draftsmen to write an enduring charter of government for posterity. It is as futile to discern the meaning of these words from a crabbed "originalist's" point of view as it would be to know the meaning of marriage solely from the words of the nuptial vows and the thoughts of a bride and groom on their wedding day.

Adhering to his "originalist" credo, Judge Bork has caustically criticized all of the Supreme Court decisions recognizing a constitutionally-protected right of privacy. He has been unable to find a definition of privacy in the Bill of Rights to satisfy his requirement of certitude. He can find no meaning for the words of the Ninth Amendment. Applying his interpretist criteria, he has denied the existence of the right, and discarded the Ninth Amendment altogether.

Judge Bork adhered to his originalist theory as recently as 1984 in his opinion in Dornenburg v. Zech, restating his position attacking the Supreme Court's privacy decisions. Because his polemic was unnecessary to the decision of the case, four of his colleagues on the Court of Appeals, in dissent, chided him and observed that it was "particularly inappropriate . . . to wipe away selected Supreme Court decisions in the name of judicial restraint."

On earlier occasions, he has used the same interpretive credo to attack the Supreme Court's decisions striking down racially restrictive covenants in housing, decisions forbidding literacy tests as conditions for voting, and those outlawing poll taxes to restrict voting rights, the application of the Equal Protection Clause to women, and many other major decisions of the Supreme Court deeply affecting the freedom of women, parents, and chidren.

Judge Bork has testified before this Committee that he has modified his views on many of these subjects. In light of the record, however, it is appropriate to ask oneself when and why he has discarded his commitment to that credo. Is he searching for a new article of adjudicatory faith, and, if so, what will that credo become if he is seated on the Supreme Court?

Judge Bork has stated that he believes that courts should defer to the will of legislatures in constitutional adjudication unless the statute umnmistakably contravenes a nonambiguous term of the Constitution. However, his insistence upon deference to legislatures has vanished when the subject of the legislation is one upon which he has other fixed beliefs. His record of attacking the legislative will expressed in anti-trust statutes is well known to this Committee. Is there a principled way to reconcile the conflicts in Judge Bork's theories of congressional deference or judicial restraint?

The Court and the Nation need a healer, not a swordsman. Which role would Justice Bork play? I do not question the nimbleness of Judge Bork's intellect or his wit. I gravely question his ability to transform himself into a man of moderate views who will respect the opinions of others with whom he does not agree. I do not believe that he will be able to abandon his continuing search for absolutes in favor of a search for tempered justice.

A vote for or against confirmation of Judge Bork is not a Democratic or Republican vote. It is not a vote for or against the President of the United States. It is an act of statesmanship by each Senator in exercising the Senate's constitutional power to advise the President and the American people of each Senator's conscientious conviction that the nominee either is or is not a person who will, for the rest of his life, defend liberty and justice for all Americans.

The CHAIRMAN. Professor Babcock.

TESTIMONY OF BARBARA ALLEN BABCOCK

Ms. BABCOCK. Thank you.

I will focus on the issues of gender and justice. In the early 1970's, I was one of the first law teachers to teach the new field—it was then a new field—which we called in rather more innocent times "Women and the Law." I taught the first course in women and the law, sex discrimination, at Yale, at Georgetown, at Stanford and at the University of Hawaii Law School.

In 1977, I coauthored a case book on sex discrimination and the law. No doubt my views here have also been influenced by my experience as a woman lawyer.

Judge Bork's rhetoric is a good 15 years behind the times on women's rights, just as it was on civil rights for blacks. When he responds to questions about how sex discrimination differs from the paradigm of race discrimination by constantly returning to the example of unisex toilets, he fails to acknowledge the real difficulties in analysis when a court tries to apply discrimination law to women; a group that is not a minority, a group that is not consciously despised and feared.

Judge Bork has not had occasion on the circuit court to deal with very many sex discrimination cases, and in only one case has he had to grapple with difficult issues and unsettled law. In that case, he showed a fundamental lack of understanding, and I want to spend a few minutes on that case because he was interpreting title VII of the Civil Rights Act. His handling of that statute negates the argument that his alleged deference to the legislature will make him responsive to sex discrimination claims.

The case is *Vinson* v. *Taylor*. It was on the frontier of title VII law. It deals with sexual harassment and particularly with the claim that a hostile work environment can amount to harassment. Judge Bork dissented from the whole court's refusal to rehear the case, stating that he thought that the panel decision in favor of the woman plaintiff was wrong. It was exactly the sort of hard case that goes to the Supreme Court. In fact, of course, it did go to the Supreme Court which found unanimously that the woman was right.

Now, Judge Bork's supporters argue that it's unfair to look at *Vinson* because it really didn't say anything about the merits. More incredibly, his supporters say that the Supreme Court's opinion accords with Judge Bork's when, in fact, it is dramatically opposed to his opinion in approach and tone and definitely dissimilar in holding.

Judge Bork's first point in *Vinson* was that voluntariness and solicitation should be defenses to a sexual harassment charge because, otherwise, and I quote, "sexual dalliance, however voluntarily engaged in, becomes harassment."

In so many words, the Supreme Court rejected Judge Bork's suggested defenses. The Court held, and I quote, "the correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."

Instead of Judge Bork's alarm that a voluntary "sexual dalliance" must be transformed into harassment, the Supreme Court's response to the facts was, and again I quote: "Respondent's allegations in this case, which include not only pervasive harassment but also criminal conduct of the most serious nature, are plainly sufficient to state a claim of hostile environment sex discrimination."

Judge Bork argued that evidence of Mechele Vinson's dress and behavior should be admitted on the defenses that he proposed. On the evidentiary point, the Supreme Court found that the testimony was relevant to whether the sexual advances were unwelcome. Such evidence, the Court said, might be admissible if its probative value outweighed its prejudicial effect, a decision for the trial court. The Supreme Court's only holding was that there is per se rule against admissibility.

Judge Bork's other point was that traditional agency principles could insulate an employer from liability for sexual harassment by supervisors because such acts do not further the employer's business interest, and because the employer knew nothing about the conduct. In this connection, he notes, "The employer could not have done more to avoid liability without actually monitoring or policing his employees' voluntary sexual relationships."

The Supreme Court specifically found, Justice Rehnquist writing, that the employer could have done much more, and gave examples, such as including prohibition of sexual harassment in its nondiscrimination policy, and providing a meaningful grievance procedure.

Generally, on the liability of the employer, the Supreme Court found the record insufficient to decide definitively, unlike Judge Bork who was ready to rule. The Court held that there are some limits on the acts of employees for which employers may be held responsible. These will be defined in future cases on adequate records. The Court also held that absence of notice does not necessarily insulate the employer.

But the big picture—and I've gone over the technical details of the holding in the case because I think this case has been much misconstrued—but the big picture here is the receptivity to the sexual harassment claims. And here the Supreme Court's decision contrasts vividly to Judge Bork's crabbed and reluctant approach. At the very threshold, Judge Bork doubts that sexual harassment is actually covered by title VII. He writes in a footnote about the awkwardness—the awkwardness—of classifying sexual advances as discrimination. "Harassment is reprehensible," he says, "but title VII was passed to outlaw discriminatory behavior and not simply behavior of which we disapprove."

Now, the High Court had no doubt about the applicability of title VII to sexual harassment. It was unanimous on the question. Here are Justices who do not find it "awkward" to recognize and define discrimination in situations that the legislature could not have envisioned when it included sex in title VII. Robert Bork tells us in *Vinson* he is not such a judge.

Now, some of Judge Bork's proponents dismiss this point by saying, "Well, it's just a footnote." But my question is why did he write this footnote? Was he doing it just to be provocative and make people think? This is hardly the function of a judge.

Now, see, I'm not complaining that Judge Bork is not an up-to-date feminist, alert to sophisticated theories of sex discrimination. My point is that in dealing with a concrete case, Judge Bork's understanding of the remedial purposes of title VII is primitive.

Now I would like to turn from Judge Bork's statutory interpretation to his view——

The **CHAIRMAN**. Professor, I am not going to interrupt you now, but I would like to ask you to try to summarize, and then in the questions maybe we can get to this. We are supposed to be limited and, as my friend on my right has reminded me, we are going to try to get through.

So I don't want to cut you off, but if you could summarize rather than take another 5 minutes.

Senator **THURMOND**. Mr. Chairman, let me say this. I understood when you started out today we had 3 and 4 is 7 and 5 is 12 and 5 is 17, 19 witnesses, and you're going give each one 5 minutes and each Senator 5 minutes. If we are going to do it, it'll take 8 hours to do that.

I don't mean to discriminate against you ladies. It's nice to have you ladies here. But it's just a matter of time. And I think you ought to give the same to everybody, men and women, whoever they are. But we just can't go on forever and ever.

The **CHAIRMAN**. I agree, and that means you can go on because we gave men more time also. But try to summarize it.

Ms. **BABCOCK**. I will try. My written statement, which you all have——

The **CHAIRMAN**. It will be entered in the record in its entirety.

Ms. **BABCOCK**. Well, it talks about my next point, which is an essential point also, but I will cover it very quickly. Judge Bork's statutory interpretation aside, we must look at the constitutional protections for women that he would provide.

And here I believe is the major reason that women should not and, on the whole, do not support this man despite his excellent resume.

A woman's right to choose when and whether to bear a child is central if we are to assume our rightful place in society. On the critical issue of reproductive freedom, Judge Bork fails. This cannot be glossed over as some, including Judge Bork, have tried to do.

The abortion case is based upon the right of privacy. Judge Bork has said so often and so vehemently that the right to privacy is not included in the Constitution; that he cannot recant that statement.

If the right to privacy does not cover the right to reproductive freedom, where is Judge Bork to find it? He suggested he will review legislation limiting the right to abortion under his "new reasonableness" standard. And what I suggest and spell out in detail in my written testimony is that under his flexible content-free standard of reasonableness review, Judge Bork would have to decide whether he thinks any legislative decision impinging upon the right of a woman to choose has a reasonable basis. This in effect would require him to decide what he thinks about the right to an abortion.

This is the kind of unfettered judicial discretion that, until last month, Judge Bork has rejected as outrageously unprincipled.

To clarify, to summarize, I'm not suggesting that it is impossible or even wrong as a legal matter to place the right of choice somewhere else that in the right to privacy. Judge Bork has suggested perhaps the equal protection clause. But I am saying that we cannot trust Judge Bork once he has jettisoned privacy analysis, to salvage the most basic of women's rights through his totally untested theory of reasonableness review.

We have no idea of how he would handle his new tool, but we do know that it is one he believes himself unfit to wield. Much of his writing and speaking over the last 20 years reveals him as a man who loves bright lines and abhors flexible tests and unwritten constitutions.

Now, on the matter—and this is the last word I want to say——

The CHAIRMAN. Please summarize in the next minute.

Ms. BABCOCK. These are my last words.

I do want to speak to the matter of his previous expressed thought. We now hear that this was merely Professor Bork speaking. I would not demean Professor Bork as one who speculated about the law simply to be provocative and make people think. We law professors are free from a client's interest, free from a place in a hierarchy. We are free to say exactly what we think, and we hope to persuade others to think as we do. We write as advocates, not of clients, but of ideas.

And the ideas that Professor Bork advocated, when unconstrained by the role of lower court judge or government lawyer, may be the very best predictors of what he will do if he finally ascends to the highest court. Those ideas, which gave women no significant protection at all under the Constitution, are totally unacceptable. Judge Bork understands this, as his recent change of position shows.

[The statement of Ms. Babcock follows:]

TESTIMONY OPPOSING THE CONFIRMATION OF JUDGE ROBERT BORK

Barbara Allen Babcock
Ernest W. McFarland Professor of Law
Stanford Law School

I will focus on the issue of gender and justice. In the early 70's I was one of the first law teachers in the then-new area of sex discrimination and published a law text on the subject with three other women in 1977. No doubt my views have also been influenced by my experience as a woman lawyer.

* * *

Judge Bork's rhetoric is now a good fifteen years behind the times on women's rights, just as it was on civil rights for blacks. When he responds to questions about how sex discrimination differs from the paradigm of race discrimination by constantly returning to the example of uni-sex toilets, he fails to acknowledge the real difficulties in analysis when a court tries to apply discrimination law to women: a group that is not a minority and whom the majority does not consciously despise and fear.

Judge Bork has not had occasion on the circuit court to deal with many sex discrimination cases, and in only one case has he grappled with difficult issues and unsettled law. In that case, he showed fundamental lack of understanding. I will spend a little time on the case because he was interpreting Title VII of the Civil Rights Act. His handling of that statute negates the argument that his alleged deference to the legislature will make him responsive to sex discrimination claims.

The case is *Vinson v. Taylor*, 753 F.2d 141, *rehearing denied*, 760 F2d 1330 (D.C.Cir. 1985), *aff'd sub nom. Meritor Savings Bank v. Vinson,* 106 S.Ct. 2399 (1986). The case is on the frontier of Title VII law; it deals with sexual harassment and particularly with the claim that a hostile work environment can amount to harassment. Judge Bork dissented from the whole court's refusal to re-hear the case, stating that he thought the panel decision in favor of the woman plaintiff was wrong. It was just the sort of hard case that goes to the Supreme Court; in fact it did go to the Supreme Court which found unanimously that the plaintiff was right.

Now, Judge Bork's supporters argue that it is unfair to look at Vinson as an index to his approach to sex discrimination because he didn't really say anything about who was right; he was talking only about what kinds of evidence should be considered, and when an employer can be held accountable for the actions of his employees. More incredibly, his supporters say that the Supreme Court's opinion accords with Judge Bork's, when in fact it is dramatically opposed in approach and tone, and definitely dissimilar in its holdings.

Judge Bork's first point was that voluntariness and solicitation should be defenses to a sexual harassment charge because otherwise "sexual dalliance, however voluntarily engaged in becomes harassment..."

In so many words the Supreme Court rejected Judge Bork's suggested defenses. The Court held:"....the correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary" 106 Sup.Ct. 2406.

Instead of Judge Bork's alarm that a voluntary "sexual dalliance" might be transformed into harrassment, the Supreme Court's response was: "Respondents allegations in this case--which include not only pervasive harassment but also criminal conduct of the most serious nature--are plainly sufficient to state a claim for 'hostile environment' sexual discrimination." id

Judge Bork argued that evidence of Mechele Vinson's dress and behavior should be admitted on the defenses that he proposed. On the evidentiary point, the Supreme Court found that testimony about the complainant's dress and behavior was relevant to whether the sexual advances were unwelcome. Such evidence, the Court said might be admissible if its probative value outweighed its prejudicial effect. The Court's holding was that there is no per se rule against admissibility.

Judge Bork's other point was that traditional agency principles could insulate an employer from liability for sexual harassment by supervisors because such acts do not further the employer's business interests and because the employer knew nothing about the conduct. In this connection, he notes:..[T]he employer could not have done more to avoid liability without actually monitoring or policing his employees' voluntary sexual relationships".760 F.2d 1331 n.3.

The Supreme Court specifically found that the employer could have done much more, and gave examples such as including prohibition of sexual harassment in its non-discrimination policy and providing a meaningful grievance procedure. 106 S.Ct.at 2409

Generally, on the liability of the employer, the Supreme Court found the record insufficient to decide definitively, unlike Judge Bork who was ready to rule. The Court held that there are some limits on the acts of employees for which employers may be held responsible. These will be defined in future cases on adequate records. The Court also held that absence of notice does not necessarily insulate the employer.

The big picture is the receptivity to the sexual harassment claims, and here the Supreme Court's decision contrasts vividly to Judge Bork's crabbed and reluctant approach. At the very threshold, Judge Bork doubts that sexual harassment is actually covered under Title Vll. He writes in a footnote about "the awkwardness of classifying sexual advances as `discrimination'. Harassment is reprehensible, but Title Vll was passed to outlaw discriminatory behavior and not simply behavior of which we disapprove".760 F.2s at1333.

The High Court has no doubt about the applicability of Title Vll to sexual harassment: it was unanimous on the question. Here are justices who do not find it "awkward" to recognize and define discrimination in situations that the legislature could not have envisioned when it included sex in Title Vll. Robert Bork tells us in Vinson that he is not such a judge.

Now some of Judge Bork's proponants dismiss this point by saying "it's just a footnote". My question is why did he write this footnote? Was he doing it just to be provocative and make people think? This is hardly the function of a judge.

I'm not complaining because Judge Bork is not an up-to-date feminist, alert to sophisticated theories of sex discrimination. My point is, rather, that in dealing with a concrete case, Judge Bork's understanding of the remedial purposes of Title VII is primitive.

Now I would like to turn from Judge Bork's statutory interpretation to his view of Consitutional protections for women. And here, I believe is the major reason that women should not and on the whole, do not, support this man despite his excellent resume. A woman's right to choose when and whether to bear a child is central if we are to assume our rightful place in society. On the critical issue of reproductive freedom, Judge Bork fails. This cannot be glossed over as some, including Judge Bork, have tried to do.

The abortion case is based on the right to privacy. Judge Bork's stand against this right, his inability to locate it in the Constitution, has been stated so often and so vehemently that it cannot be recanted. We are told, however, that we cannot be sure Judge Bork will vote to overrule Roe v. Wade. With his great respect for precedent, he may well identify another place to locate this critical right.

We cannot be comforted by this offer. In response to Senator Heflin's question about where he might locate the right to choose, since he rejects the privacy doctrine, Judge Bork said:

> "...[S]ome groups I think are trying an Equal Protection argument. Only women have this specific burden and forcing a woman to carry a baby to term, some of the groups are arguing I suppose is a form of gender discrimination...
>
> ...You've asked me if one could begin to talk about where one might root such an argument and I think the right to an abortion might--you might attempt to root it there. sucessfully or not I don't pretend to guess.

> But it's easier than a general right to privacy."

When the right to choose is located in the Equal Protection Clause, Judge Bork would review anti-abortion legislation by a test of reasonableness.

Let us suppose that a state legislature passes a bill requiring a woman and her doctor, who must be a board-certified gynecologist, to fill out elaborate forms under oath before she can choose a first-trimester abortion. Second, let us assume that the record shows that this procedure seriously interferes with the woman's choice.

Parenthetically, but importantly, this legislative action is not so hypothetical. On the subject of abortion, the legislative process is peculiarly subject to malfunction in its reflection of the majority will. Powerful single-issue groups are regularly able to obtain legislation undercutting the right to choose, often rendering it meaningless. This is true in spite of the fact that the majority of people in this country, and the overwhelming majority of women favor the right to choose.

The case challenging the legislation comes to the Supreme Court. The present Court would review the legislation to determine whether it interfered with the right to privacy as enunciated in Roe v. Wade and the result would be predictable. Judge Bork, however, would review it --so he now says --for whether the legislature had a reasonable basis for passing the law. Under the Court's case law, a reasonable basis is extremely easy to find for any law purporting to protect health. Undoubtedly our imaginary legislature would have some members stating reasons for the accumulation of information about health, and for the erection of safeguards around such a serious procedure as abortion.

Using his flexible, content-free standard Judge Bork would have to decide whether he thinks the legislature's scheme has a reasonable basis, and that in effect would require him to decide what he thinks about the right to an abortion. This is the kind of unfettered judicial discretion that until last month, Judge Bork has rejected as outrageously unprincipled.

To clarify and summarize my point, I am not suggesting that it is impossible or even wrong as a legal matter to place the right of choice in the equal protection clause. But I am saying that we cannot trust Judge Bork, once he has jettisoned privacy analysis, to salvage this most basic of women's rights through his totally untested theory of "reasonableness" review.

We have no idea of how Judge Bork would handle his new "reasonableness" tool, but we do know that it is one he believes himself unfit to wield. Much of his writing and speaking over the last twenty years reveals him as a man who loves bright lines and abhors flexible tests and unwritten constitutions.

On the matter of his previous expressed thought, however, we now hear that this was merely "Professor" Bork speaking. But I would not demean Professor Bork as one who speculated about the law simply to be provocative and make people think. We law professors are free from a client's interest, free from a place in a hierarchy, free to say exactly what we think. We hope to persuade others to think as we do; we write as advocates not of clients, but of ideas. Judge Bork himself has written,"intellect and discussion matter and can change the world". (Speech at Catholic University, March 31, 1982).

The ideas that Professor Bork advocated when unconstrained by the role of lower court judge or government lawyer may be the best predictors of what he will do if he finally ascends to the highest court. Those ideas, which gave women no significant protection at all under the Constitution, are totally unacceptable. Judge Bork understands this, as his recent change of position shows.

The CHAIRMAN. Thank you very much. I apologize for your having to curtail your statement but we do have to move on. And in the question and answer period, hopefully you'll get a chance to elaborate on the points you did not.

Ms. Law, as we move down the line, the rule gets stricter. Please try to stay as close to the 5-minute rule as you can.

And I say to the panel that there is a vote on, so if we get up to leave to vote, it is not a lack of interest in the statement at the moment, but we will continue the entire panel.

Ms. Law.

Ms. LAW. Thank you.

TESTIMONY OF SYLVIA LAW

I'm Sylvia Law. For 14 years, I've been a professor of law at New York University.

I would like to suggest that three issues are critical to your consideration of Judge Bork's record in relationship to the constitutional guarantees of the 14th amendment.

First, how do we evaluate his dramatic reversal before this committee of his long-standing views about the 14th amendment?

Second, is Judge Bork's new theory of equality within the mainstream of our constitutional tradition.

And, third, through the decades has Judge Bork evidenced a sensitivity to the grand constitutional values of liberty and equality.

Let me speak first to the confirmation conversion.

For over 15 years, Judge Bork has forcefully asserted that the constitutional guarantee of equality prohibits only certain limited forms of racial discrimination and little else. Through these years, he has criticized the Supreme Court's privacy decisions in the harshest possible terms.

Now, these have been 15 years of great national debate about the meaning of equality, particularly for women. Judge Bork, through these 15 years, has had an extraordinary opportunity and freedom to participate in this debate as a teacher and scholar.

Last week in his testimony to this committee, he took positions on sex equality, contraceptive privacy, and reproductive freedom flatly at odds with the views that he has so frequently and forcefully taken in the recent and distant path.

For many years he has denounced the Supreme Court decisions protecting people's right to obtain contraception and abortions as unprincipled and unconstitutional. Last week, he said he only meant to criticize the Court's reasoning and simply had not addressed his mind to the question of whether there might be some other constitutional basis for protecting these rights.

Reproductive freedom is central to women's liberty and equality. Judge Bork's failure to attend to these constitutional issues is alarming. To denounce the Court's protection of these basic human liberties without also exploring whether other constitutional provisions support them suggests to me a serious lack of concern for the issues at stake in this great debate.

Judge Bork seeks to characterize all this as academic speculation causing no real injury to concrete people. But as a federal court judge, he has rejected citizens' constitutional claims on more than one occasion that are premised on the very privacy and liberty rights that the Supreme Court has recognized.

I'd like to say a few words about Judge Bork's new approach to equal protection, which he calls a reasonable basis approach. "Reasonable basis" seems, I think, to ordinary people like it must, almost by definition, be reasonable. But those of us who are lawyers know that in Supreme Court jurisprudence of the past hundred years, reasonable basis has been a standard that has upheld State power to draw lines, to discriminate, if you will, if any state of facts can reasonably be conceived that would sustain the law.

Of course, anyone clever enough to get into law school can articulate some justification for any discrimination. I'd like to give two examples of the reasonable basis standard of sex equality and of the new standard that the Supreme Court has articulated.

For most of this century, the Supreme Court applied a reasonable basis standard that upheld laws that discriminated against women. For example, as recently as 1961, in a case called *Hoyt* v. *Florida*, a unanimous Court approved a Florida law that excluded women from the civic obligation of jury service. Gwendolyn Hoyt had killed her husband in the white heat of a domestic dispute. She pleaded temporary insanity. An all male jury rejected her plea. She appealed to the Supreme Court, saying this is not fair. She said "Under the equal protection clause I should be able to have an opportunity to have some women on the jury, to have a jury of my peers." The Supreme Court, applying the reasonable basis approach, upheld the exclusion. They said because woman is still regarded as the center of home and family life, it's reasonable to relieve all women, whatever their actual situation, from the civic obligation of jury service.

The CHAIRMAN. What year was that?

Ms. LAW. That was 1961, and it was unanimous Supreme Court, and it was applying the reasonable basis test to which Judge Bork urges us to return.

Since 1971, the Supreme Court has refused to apply that deferential reasonable basis standard to laws that discriminate on the basis of sex. The Court has made this change because it recognized that women and other groups have historically been subject to irrational prejudice. Laws affecting such groups must be scrutinized carefully.

This concern for vulnerable groups goes far back, as far back as 1938. Judge Justice Stone recognized that prejudice against particular vulnerable groups may trigger the need for more searching judicial inquiry.

Sexism, like racism, is deeply embedded in our culture. It has long deprived the nation of talented women legislators, scientists and philosophers. The Court has recognized that individual liberty should not turn on compliance with gender stereotypes.

The Supreme Court's recognition that gender discrimination is presumptively wrong has had a tremendous positive impact on our lives. It has also benefitted men and children. Let me give this example of the new standards.

Steven Weisenfeld was a young widower with sole responsibility for the support and nurture of his young child. The Social Security law did not contemplate that families would ever depend on the woman's wage, and they denied him benefits. Today's reality, of course, is that most families with children depend on two wage earners.

In Steven Weisenfeld's case, Solicitor General Bork marshalled statistics to prove that it was reasonable to limit benefits to widows with children. The Court rejected that plea and awarded Mr. Weisenfeld benefits by unanimous decision.

Words are defined by convention. A reasonable basis standard for judging discriminatory laws could conceivably assure justice and equal treatment if it incorporated a principle of empathetic sensitivity to the aspirations of groups that are traditionally oppressed and excluded from our political process.

Both Justice Stevens and Justice Marshall have sought to articulate a more flexible approach to equality jurisprudence. But for them, the heart of their equality analysis is an affirmative, substantive social vision that explores the reality of historic oppression and seeks affirmatively to include disadvantaged groups in the activities and institutions of the majority.

The CHAIRMAN. Professor, let me stop you there. I am not going to stop you from completing your statement, but I am going to have to leave, and I will be back. I have three minutes left to make the vote, and you can finish your statement as soon as I come back.

We are going to recess to the call of the Chair, which hopefully will be about 6 minutes for me to get over and vote and come back.

Ms. Law. Thank you.

[Short recess.]

The CHAIRMAN. Professor, if you could finish up, and really finish up, especially before Senator Thurmond comes back and I get in trouble.

Ms. LAW. As quickly as possible.

Ms. WILLIAMS. Let me get a head start.

Ms. LAW. In my written statement, I document the vast gulf between the jurisprudence of Mr. Justice Stevens and the new theory of Judge Bork which he offered before this committee last week.

Over the years, most Justices have sought more detailed and predictable standards for determining when a discriminatory law is unconstitutional. Particularly in the area of sex discrimination, Justices have been reluctant to trust their common sense intuition. So many things that seemed natural and reasonable 20 years ago have been revealed to us today as sexist.

Judge Bork's new vision of equality is utterly unclear, which is not surprising in that it seems to have been developed spontaneously here in response to questions. Does he accept the Supreme Court's jurisprudence requiring careful scrutiny of laws that hurt vulnerable people, or does he mean that the Supreme Court should be aggressive in reviewing the rationality of all legislative classifications whether they enforce gender difference or traffic safety?

Both readings are flatly inconsistent with his longstanding views reiterated here in his testimony. Judge Bork's new equality is emphatically not that of Justice Stevens, as I have explained in my written statement. Judge Bork has always sought bright lines in the law, and now urges a standard that is extraordinarily subjective and formless.

Most fundamentally, Judge Bork's new concept of equality under law, like his work as a professor, a lawyer and a judge, do not reflect the empathetic concern for and sympathy with vulnerable and historically excluded groups.

For much of our history, women have been excluded from our political life; our voices have not been heard. Perhaps the most telling commentary on Judge Bork's indifference to women is that while he has devoted much of his intellectual life to contemplation of the meaning of liberty and equality, he has, until last week, denied that these grand ideals have any applicability to us.

Thank you very much.

[The prepared statement of Professor Law follows:]

TESTIMONY

PROFESSOR SYLVIA A. LAW

HEARINGS ON THE NOMINATION OF ROBERT H. BORK

TO BE ASSOCIATE JUSTICE OF THE

UNITED STATES SUPREME COURT

BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

SEPTEMBER 25, 1987

I am Sylvia A. Law, a professor of law at New York University, co-author of the book Political and Civil Rights in the United States, and author of several law review articles exploring the meaning of equality under law.[1]

Three issues are critical to your consideration of Judge's Bork's record in relation to the constitutional guarantee of equal treatment under the law.

* First, for over a decade Judge Bork consistently articulated a narrow and extreme view of the meaning of equality under law. Last week he offered the Committee his new theory of the meaning of equality.

* Second, Judge Bork's new theory of equality is either empty or hopelessly subjective and unworkable.

* Third, through the decades Judge Bork has not evidenced sensitivity to constitutional equality values.

The Confirmation Conversion

For over fifteen years Judge Bork has forcefully asserted that the constitutional guarantee of equality prohibits only certain limited forms of racial discrimination and very little else.[2] Through these years he has criticized the Supreme Court's privacy decisions in the most acerbic terms.

These have been years of great national debate about the meaning of equality. The Supreme Court, the Congress, scholars and ordinary people, have grappled with the difficult questions that arise when we apply constitutional guarantees of liberty and equality to women, to illegitimate children, to poor people, and to the victims of physical and mental disabilities.

Judge Bork has had extraordinary opportunity to participate in this debate. He has talked and written prolifically about the Constitution, in speeches and popular articles. He taught constitutional law, in a seminar setting, for more than a decade.

Last week, in his testimony before this Committee, he stated positions on sex equality, contraceptive privacy, and reproductive freedom that are flatly at odds with the positions that he has so frequently and forcefully taken in the recent and distant past.

For many years he has denounced the Supreme Court decision protecting married people's right to use contraceptives as unprincipled and unconstitutional. Last week he testified that he had only meant to criticize the reasoning adopted by the Supreme Court and did not necessarily believe that the cases reached the wrong results. He states that he has simply not addressed his mind to the question whether the constitution provides an alternative basis for recognizing a right to reproductive liberty and privacy.

Until last week Judge Bork described the Supreme Court decisions protecting a woman's right to choose abortion as "unconstitutional" and "a wholly unjustifiable judicial usurpation of State legislative authority."[3] Last week he testified that perhaps a woman's right to reproductive choice can be defended as an aspect of sexual equality. Again he comments that he has not really thought this through. Other constitutional scholars, including his colleague on the D. C. Circuit Court, Judge Ruth Bader Ginsburg, have explored the question of whether concepts of sex equality might protect women's reproductive choice.[4]

Reproductive freedom is central to women's liberty and equality. Judge Bork's failure to attend to this vital constitutional issue is alarming. To denounce the Supreme Court's protection of these core human liberties and equality without first considering whether it might be constitutionally supported on other grounds suggests a lack of serious concern for women, and for people.

Judge Bork seeks to characterize all of this as academic speculation, causing no concrete injury to real people. But, as a federal court judge, he has rejected citizens' constitutional claims premised on the very privacy and liberty rights the Supreme Court has recognized.[5]

Judge Bork now says that he supports the Supreme Court cases protecting women under the equal protection clause of the Fourteenth Amendment. With all due respect, the convenient timing of this dramatic departure from his prior understanding of equality seriously undermines the nominee's credibility.

Just this week, former Secretary Carla Hills and Mr. Gary Born sought to show that Judge Bork's conversion on gender equality proceeded these hearings. Their attempts only confirm that Judge Bork never, until this week, conceded that our nation's "long and unfortunate history of gender discrimination,"[6] demands that the Court scrutinize sex discriminatory laws with special care. Mr. Born offers two bits of evidence to undercut Judge Bork's longstanding explicit assertion that Equal Protection must be limited to cases of racial discrimination: an amicus brief Mr. Bork filed as Solicitor General[7] and a concurring opinion he wrote in the Circuit Court of Appeals.[8] Both are slender reeds upon which to rest a demonstration of Judge Bork's conversion prior to his confirmation hearings.

As Solicitor General, Mr. Bork filed an amicus brief in a case in which women challenged the sex segregation of public high schools in Philadelphia. The plaintiffs argued that: 1) segregation by sex, like segregation by race, is wrong, as a matter of principle, and, 2) as a matter of fact, the educational program provided the girls was inferior. The record in the lower courts had found that the educational program offered to girls was in fact inferior.[9] Mr. Born states that Solicitor General Bork's brief argued "that the Equal Protection Clause prohibits the assignment of students to separate high schools, where the schools do not provide substantially equal education facilities and professional opportunities."[10] In fact, as Solicitor General, Mr. Bork did not support either of the women's claims, but rather argued that the case should be remanded to determine whether the inferior educational program actually injured girls in future professional work.[11]

In the D.C. Circuit, Judge Bork once joined a three judge panel in holding that a class of male prisoners must be allowed a day in court to prove that women's claims for parole were judged under more liberal standards, and that this practice was unconstitutional. The case was at a very preliminary stage. Judge Bork wrote separately to reject the majority's analysis of the federal parole act. His 12 page opinion addressed the statutory questions and devoted less than one page to analysis of the sex discrimination claim. Judge Bork's discussion of the sex equality claim cites no Supreme Court cases. It says nothing whatsoever about the constitutional standards applicable to laws that discriminate on the basis of sex. Mr. Born cites this concurrence as evidence that "Judge Bork will apply some sort of intermediate scrutiny in sex-based Equal Protection cases. This is the same approach that the Supreme Court has recently adopted."[12]

Mr. Born's effort to transform this routine concurrence, required by binding Supreme Court precedent, into a commitment to applying equality norms to gender discrimination is either naive or deceitful. Further, Judge Bork himself, in his testimony before this Committee, rejects Mr. Born's speculation that he would follow the approach that the Supreme Court has adopted in the adjudication of sex equality claims.

Former Secretary Hill's effort to portray Robert Bork as a man who would apply mainstream notions of gender equality is more poetic.[13] She relies on an essay that seeks to depict him as man whose "approach to equality aligns him with leading feminist legal theorists. . ."[14] The most curious aspect of his essay, and of Secretary Hill's testimony, is the absence of concrete connection to the word or actions of Judge Bork. Neither the Essay or the testimony provide any basis for knowing how, if at all, Judge Bork's views relate to those of others whose work is cited.[15]

I am thoroughly familiar with the published feminist works on which this essay seeks to rely.[16] They grapple with difficult issues, at a high level of sophistication.[17] There is no discernable relation between this feminist jurisprudence and Judge Bork's writing or work.

Senator Heflin suggests that he needs psychiatric training to understand Judge Bork's conversion. I believe that the Senator's experience as a judge of the law and of human nature serve quite well to allow him to see through Judge Bork's new concession that equality is a basic American constitutional value.

Judge Bork's "New" Approach

Judge Bork now states that he would protect women under a "reasonable basis approach that rejects artificial distinctions and discriminations," and strikes down historic discriminations that "no longer seem to anybody to be reasonable."[18]

A "reasonable basis approach" may seem, almost by definition, to be reasonable. But, in the law, words often acquire a meaning different from the ones they have in ordinary language.

In the Supreme Court jurisprudence of the past hundred years, the "reasonable basis" standard has upheld state power to draw lines -- to discriminate -- "if any state of facts reasonably can be conceived that would sustain" the law.[19] Of course, anyone clever enough to get into law school can articulate some justification for any discrimination. The "reasonable basis" standard presumes that the state has good grounds for discrimination, and defers to legislative judgment.

For most of this century the Supreme Court applied the "reasonable basis" standard to uphold laws that discriminated against women. For example, as recently as 1961, in Hoyt v. Florida, a unanimous Court approved a Florida law excluding women from the civic obligation to serve on juries. Gwendolyn Hoyt killed her husband in the white heat of a domestic dispute. She pleaded temporary insanity. An all male jury rejected her claim. She appealed to the Supreme Court, arguing that excluding women from the jury discriminated on the basis of sex and denied her a jury of her peers. The Court, applying the "reasonable basis" approach, upheld the exclusion. The Court reasoned that because "woman is still regarded as the center of home and family life" it is reasonable to relieve all women -- whatever their situation -- from the civic obligation of jury service."[20]

Since 1971 the Supreme Court has refused to apply the deferential "reasonable basis" standard to laws that discriminate on the basis of sex.[21] The Court has made this change because it recognized that women, and other groups, have historically been subject to irrational prejudice.[22] Law affecting such groups must be subject to careful scrutiny. This concern for vulnerable groups is not new. As far back as 1938 Justice Stone recognized that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly searching judicial inquiry. . ."[23]

While women are not a numerical minority, sexism, like racism, is deeply imbedded in our culture. It has long deprived the Nation of talented women legislators, scientists, and philosophers. It has constrained men and the children from developing deep nurturing relations. The Court has recognized that individual liberty should not turn on compliance with gender stereotypes. The American commitment to personal liberty and equality requires that we treat people as individuals, not as members of statistical groups. Further, and more significant, the Court has recognized that laws incorporating sex-based stereotypes tend to be self perpetuating and hence must be subjected to searching inquiry.

The Supreme Court's recognition that gender discrimination is presumptively wrong has had a tremendous positive impact on the lives of women in this country. Under the Court's direction, the federal courts have invalidated dozens of laws excluding women from wage work and public life and devaluing the wages and benefits they receive.[24] Moreover, many laws oppressive to women have never been passed because of the Court's recognition of gender discrimination.

Equality also benefits men and children. Steven Weisenfeld, for example, was a young widower with sole responsibility for the care and support of his children. The Social Security law did not contemplate that children and men would depend upon a woman's wage and denied him benefits when his wife died.[25] Today's reality of course is that most families with children have two wage earners. In Steven Weisenfeld's case Solicitor General Bork marshalled statistics to prove that it was "reasonable" to provide greater benefits for widows than for widowers. However, the Court awarded Mr. Weisenfeld benefits because "the classification discriminates among surviving children solely on the basis of the sex of the surviving parent," and because it devalued the benefit that deceased women workers left for their families.

Words are defined by convention. A "reasonable basis" standard for judging discriminatory laws could conceivably assure justice and equal treatment if it incorporated a principle of empathetic sensitivity to the aspirations of groups traditionally oppressed and excluded from our political process.

Both Justices Stevens and Marshall have sought to articulate a more flexible approach to equality jurisprudence.[26] For both, the heart of their equality analysis is an affirmative, substantive social vision that explores the reality of historic oppression and seeks to include disadvantaged groups in the activities and institutions of the majority.[27]

But, over the years, most Supreme Court justices have sought a more detailed and predictable standards for determining when a discriminatory law is unconstitutional. The Court distinguishes cases in which legislatures have wide latitude from those in which the Court must look more closely in order to protect vulnerable people from irrational discrimination. Particularly in the area of sex discrimination, justices have been reluctant to trust common sense subjective intuition. So many things that seemed natural and reasonable 20 years ago, have been revealed to be sexist.

Judge Bork's "new" vision of equality is utterly unclear. Does he mean simply to apply the deferential "rational basis" standard that justified exclusion of women from juries, public life, and responsible work? If that is all he means, he has not conceded an inch. Or, does he rather accept the Supreme Court's jurisprudence requiring careful scrutiny of laws that hurt vulnerable people or burden fundamental liberties? Or, does he mean that the Supreme Court should be aggressive in reviewing the rationality of all legislative classifications, whether they enforce gender difference or traffic safety? Under the first interpretation, his "new" vision is meaningless, while the last two readings are flatly inconsistent with his long standing views, reiterated in his testimony here.

Judge Bork's "new" equality is emphatically not that of Justice Stevens.

> * Justice Steven's insists that the constitution must provide special scrutiny to laws that hurt "a traditionally disfavored class."[28] Judge Bork rejects the notion that we must provide special equality scrutiny for particular groups.[29]
>
> * Judge Bork would uphold sex discriminatory laws that rested on statistical generalizations, such a physical strength, that did not describe individual difference.[30] Justice Stevens would require that if an individual woman is strong enough to do a job, she should be allowed to do it.
>
> * Judge Bork perceives laws premised upon sex based stereotypes as "trivial."[31] Justice Stevens understands that stereotyped reactions often "have no rational relationship -- other than pure prejudicial discrimination -- to the stated purpose for which the classification is being made," and such classifications are likely to be the result of "habit, rather than analysis."[32]

> * Most fundamentally, Judge Bork perceives constitutional equality as limited by the social consensus that supports it,"[33] while Justice Stevens understands the vital leadership role that the Court must play in integrating excluded and vulnerable groups in to the mainstream of American society."[34]

Judge Bork, who has always sought "bright lines" in the law, now urges a vision of equality that is extraordinarily subjective and formless. Most fundamentally, Judge Bork's "new" concept of equality under law, like his work as a professor, lawyer and judge, does not reflect an empathetic concern for and sympathy with vulnerable and historically excluded groups.

Judge Bork's Public Record Does Not Reflect Empathetic Concern for Women's Aspirations for Equality and Liberty

Many witnesses before this Committee have detailed Judge Bork's long standing record of hostility toward the liberty and equality claims of vulnerable people. When American Cyanamid told its female workers that they must either be sterilized or quit their jobs, Judge Bork held that the women could prevail in challenging the employer's policy only if "the words of the statute inescapably have the meaning [the women] find in them."[35] He did not reveal the fact that the federal occupational health agency had found that exposure to lead has deleterious effects on the reproductive capacities of both men and women.[36]

By contrast, when the D.C. Circuit held that the Department of Health and Human Services' "squeal rule" violated the letter and spirit of Title X, Judge Bork sought to allow the agency to search further for a legally defensible basis for the rule.[37]

I would like to highlight one example suggesting that his views on women's equality are extremely unsympathetic.

In 1978, Mechelle Vinson was fired from her job as an assistant bank manager. She believed she was dismissed because she had resisted her supervisor's sexual assaults. She charged that for three years he had made repeated demands upon her for sexual favors, usually at the bank, both during and after business hours. He fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and forcibly raped her on several occasions.[38] She testified that the supervisor touched and fondled other women employees. Ms. Vinson sought a day in court to prove the truth of these allegations and argued that these actions created a working environment that was hostile and offensive to women. She invoked the protection of the Federal Civil Rights law.

In 1984 Judge Bork dissented from an en banc refusal to review a decision of the D.C. Circuit Court of Appeals holding that Title VII of the Civil Rights Act allows women to seek redress when they are subjected to sexual harassment in the workplace.[39] In denying Ms. Vinson relief Judge Bork rejected the settled interpretation of the law by the federal agency charged with interpretation of the Act. Judge Bork's extreme views of Title VII were unanimously rejected by the United States Supreme Court, in an opinion authored by Chief Justice Rehnquist.

Judge Bork's crabbed and baseless interpretation of Title VII was cloaked in rhetoric that demeans the grievous problems confronting thousands of women who are daily subjected to sexual harassment in the work place. Ms. Vinson's charges were gravely serious. Judge Bork, however, used as a "sexual escapade" and a "dalliance."[48]

For much of our history women have been excluded from our political life. Our voices have not been heard. Perhaps the most telling commentary on Judge's Bork's indifference to women is that, while he had devoted much of his intellectual life to contemplation of the meaning of equality and liberty, he has, until this hearing, denied that these grand ideals have any applicability to women.

ENDNOTES

1. My articles include, "Women, Work Welfare and the Preservation of Patriarchy," 131 *U. Pa. L. Rev.* 1249 (1983); "Rethinking Sex and the Constitution,"132 *U.Pa. L. Rev.* 955 (1984); "Review, Equality: the Power and *Limits of the* Law," 95 *Yale L. J.* 1769 (1986).

I am the Co-director of NYU Law School's Arthur Garfield Hays Civil Rights and Civil Liberties Program. In addition to my work as a legal teacher and scholar, I serve as President of the Board of Non-traditional Employment for Women, a New York based organization that helps poor women who seek employment in construction and other blue collar fields. I also serve on the Board of Directors of the Alan Guttmacher Institute and on the Advisory Committee of the ACLU's Reproductive Freedom Project.

In 1983 the John and Catherine T. MacArthur Foundation awarded me one of their Prize Fellowships.

2. "The equal protection clause. . . can require formal procedural equality, and, because of its historical origins, it does require that government not discriminate along racial lines. But more than that cannot properly be read into the clause." "Neutral Principles and Some First Amendment Problems", 147 *Ind. L. J.* 1, 11 (1971). In 1984, as a judge, he wrote that "[t]he Constitution has provisions that create specific rights. These protect, among others, racial, ethnic, and religious minorities." *Dronenburg v. Zech*, 741 F.2d 1388, 1397 (D.C. Cir. 1984). Women are conspicuously absent from this list. As recently as June 10, 1987 he stated, "I do think that the equal protection clause probably should have been kept to things like race and ethnicity. When the Supreme Court decided that having different drinking ages for young men and young women violated the equal protection clause, I thought that was a very -- that was to trivialize the Constitution and to spread it to areas it did not address." Worldnet Broadcast, as quoted in *New York Times*, Sept. 21, 1987, p. B-14.

3. *The Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 310 (1982).

4. Ruth Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*," 63 *N. Car. L. Rev.* 375 (1984); S. Wildman, "The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence," 63 *Oregon L. Rev.* 265 (1984); Herman Hill Kay, "Models of Equality," 1985 *U. Ill. L. Rev.* 39; S. Law, "Rethinking Sex and the Constitution," *supra* n. 1.

5. In Franz v. United States, 707 F.2d 582, addendum to the opinion for the Court, 712 F.2d 1428 (D.C. Cir. 1983)(Tamm, Edwards and Bork, concurring and dissenting), Judge Bork dissented from a decision protecting a father's right to a fair process to determine whether the needs of the government's Witness Protection Program demanded termination of his relation with his children. Judge Bork expressed a barely concealed contempt for the fact that the Supreme Court has afforded any constitutional protection against thoughtless, inept or malicious government action shattering a parent/child relationship.

In Dronenberg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984) he rejected a claim that the constitutional right to liberty and privacy prevents the government from firing a person solely because he engaged in voluntary, consensual homosexual conduct. Judge Bork refused to address the similarities and differences between the case before him and numerous other cases in which the Supreme Court had recognized a constitutional right to privacy. Rather, he simply asserted that the Supreme Court had provided "no explanatory principle that informs a lower court how to reason about what is and what is not encompassed by the right of privacy." 741 F.2d 1395.

6. Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

7. Vorchheimer v. School district of Philadelphia, Memorandum for the United States as Amicus Curiae in No. 76-37, affirmed by an equally divided Court (April 19, 1977).

8. Cosgrove v. Smith, 697 F.2d 1125, 1143 (D.C. Cir. 1983). See Born testimony, Transcript of Proceedings, U.S. Senate, Committee on the Judiciary, Hearings on the Nomination of Honorable Robert H. Bork to be Associate Justice of the Supreme Court of the United States. Afternoon Session, Sept. 22, 1987, p. 164-65.

9. The trial court found that the boys' school had "superior science facilities, a more extensive library, a more prominent body of graduates, an enhanced reputation, and a greater endowment." Vorchheimer v. Philadelphia, 400 F. Supp. 326 (E.D. Pa. 1975), 532 F.2d 880, 882 (3rd Cir. 1976).

10. Gary B.Born, Robert H. Bork's Civil Rights Record, attachment F, Essays introduced by Carla Hills, September 22, 1987, p. 34. [Hereinafter Born Essay.]

11. The Solicitor General's brief concludes, "To the extent that any professional disadvantages for graduates of Girls High result instead only from sex prejudice in the community, petitioner's complaint in this regard would seem to raise only an issue concerning the possibility that sex stereotypes in the community are reinforced by the city's sex segregated high schools -- an issue which could be regarded as having greater political than constitutional dimension, especially in light of the fact that women are not a political minority." Supra, n.7, at p. 29.

12. Born Essay, p. 33. Citing Mississippi University for Women v. Hogan, 458 U.S. 718 (1982).

13. See testimony of Ms. Carla Hills, Transcript of Proceedings, U.S. Senate, Committee on the Judiciary, Hearings on the Nomination of Honorable Robert H. Bork to be Associated Justice of the Supreme Court of the United States. Afternoon Session, Sept. 22, 1987, p. 114, et. seq. and Essay, Mary Ann Glendon, "The Probably Significance of the Bork Appointment for Issues of Particular Concern to Women," Attachment C.

14. Lucinda Finley, Transcending Equality Theory, 86 Colum. L. Rev. 1118 (1986); Herma Hill Kay, Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath, 56 U. Cincinnati L. Rev. 1 (1987); Mary Becker, Prince Charming: Abstract Equality, 1987 Supreme Court Review (forthcoming). The essay also seeks to draw an analogy between the work of Carol Gilligan and the thought of Robert H. Bork. See. p. 7-8.

15. The Essay invokes the fact that Judge Bork would defer to legislative judgment. Id. at p. 3. While it is true that women sometimes achieve legislative victories, the unique strength of our constitutional tradition is to protect individual liberty and equality when the legislative process fails. It also cites Judge Bork's dissenting opinion in Franz v. United States, rejecting a father's claim to a fair process to determine whether the Federal Witness Protection Program can terminate his relationships with his children. Id. p. 5. It asserts that his approval of this arbitrary exercise of governmental power "demonstrates his sensitivity to the needs of women. . ."

16. I have not read the Mary Backer essay that is to appear in the Supreme Court Review. However, she states, in a telegram to this Committee, "I have been, and am now, an opponent of Judge Bork's nomination. There is no basis for thinking Judge Bork will be willing to extend constitutional protection against discrimination on the basis of sex under any standard. Indeed, what evidence there is suggest that he will construe even statutory protections as narrowly as possible."

17. Lucinda Finley, for example, argues that work should be restructured to make greater accommodation to the needs of children, the old, the infirm and to the women who have traditionally cared for them. Herma Hill Kay criticizes the Supreme Court's present equality doctrine for refusing to recognize that discrimination against pregnant people is sex based. She urges a constitutional theory more in line with the approach adopted by the Congress in the Pregnancy Discrimination Act. She rejects the notion, advanced by Judge Bork, that statistical differences between men and women in relation to physical strength or social patterns of behavior. She will testify before the Committee next week and can explain her own views.

18. Testimony, September 17, 1987, as reported in the New York Times, Sept. 21, 1987, p. B-14.

19. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911). Morey v. Doud, 354 U.S. 457, 466 (1957)

20. Hoyt v. Florida, 368 U.S. 57 (1961).

21. As Justice O'Conner explained, the constitutional right to sex-based equality under law demands that: "The party seeking to uphold a statute that discriminates on the basis of their gender must carry the burden of showing an "exceedingly persuasive justification" for the classification. . . The burden is met only by showing at least that the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives." Mississippi University for Women v. Hogan, 458 U.S. 718, 724-25. (1982).

22. The Court, often unanimously, has demanded that the state provide strong justification for laws differentiating among children on the basis of the marital status of their parents.

See e.g. Levy v. Louisiana, 391 U.S. 68 (1968); Pickett v. Brown, 456 U.S. 92 (1982); Reed v. Campbell, 106 S. Ct. 2234 (1986). This is a consensus from which Chief Justice Rehnquist is alone in dissent. See Trimble v. Gordon, 430 U.S. 762, 777 (1977).

On constitutional protection for the mentally retarded see e.g. Cleburne v. Cleburne Center for Independent Living, 106 U.S. 3249 (1985).

23. United States v. Carolene Products Co., 304 U.S. 152-53, n.4 (1938).

24. See cases collected, Babcock, Freedman, Norton and Ross, Sex Discrimination and the Law (1975) and W. Williams Supplement, (1978).

25. Weinberger v. Weisenfeld, 420 U.S. 636 (1975).

26. Justice Marshall, and more recently Justice Stevens, have expressed dissatisfaction with a method of constitutional analysis under which outcome depends solely on whether a particular group can be characterized as constitutionally vulnerable. See Stevens concurring in Craig v. Boren, 429 U.S. 190 (1976). See Marshall in Cleburne v. Cleburne Center for Independent Living, 106 S. Ct. 3249 (1985).

27. Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1942, 1869 (1986) (Stevens, J., dissenting); Marshall, "A Comment on the Nondiscrimination Principle in a `Nation of Minorities,'" 93 Yale L. J. 1006, 1011 (1984). See also Michael M. v. Superior Court, 450 U.S. 464, 501 (1981) (Stevens, J. dissenting). For a general discussion see, Note, "Justice Stevens' Equal Protection Jurisprudence," 100 Harv. L. J. 1146 (1987).

> 28. "However irrational it may be to burden innocent children because their parents did not marry, illegitimates are nonetheless a traditionally disfavored class in our society. Because of that tradition of disfavor the Court should be especially vigilant in examining any classification which involves illegitimacy." Mathews v. Lucas, 96 S. Ct. 2755, 2769 (1976).
>
> 29. "Let me say something about why I prefer a reasonable basis analysis to a group-by-group analysis. It is not just that the language of the amendment refers to any person, therefore all persons. It is that if one thing is clear about the Fourteenth Amendment, it is that the Framers of that Amendment, the people who ratified it, had no intention of wiping out distinctions between men and women that we would now regard as very discriminatory." Transcript of Proceedings, Thurs. Sept. 17, 1987, p. 33.
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> 30. "[R]ational distinctions cannot be made between men and women, usually, except on physical strength or something of that sort, which is the combat example." Transcript of Proceedings, Thursday, Sept. 17, 1987, p. 35.
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> 31. See discussion of Craig v. Boren, Transcript of Proceedings, Sept. 17, 1987, pp. 134-136.

32. Mathews v. Lucas, 427 U.S. 495, 520. Michael M. v. Superior Court, 101 S. Ct. 1218, 1220 (1981).

33. "There was a time in this country when the distinction made in Frontiero, that is, we will assume that a woman is a dependent and a man is not, might have made some sense. That was a time when women were not in the marketplace. So that they would have to prove that they were in the marketplace." Transcript of Proceedings, Sept. 17, 1987, p. 142.

34. Wygant v. Jackson Board of Education, 106 S. Ct. 1842, 1869 (dissenting).

35. Oil, Chemical and Atomic Workers Intl. Union v. American Cyanamid Co., 741 F. 2d 444, 558 (D.C. Cir. 1964).

36. "Exposure to lead has profoundly adverse effects on the course of reproduction in both males and females." Preamble for the Final Standard on Occupational Exposure to Lead," 43 Fed. Reg. 54353-509, 54421 (1978).

37. Planned Parenthood Fed'n of America v. Heckler, 712 F.2d 650, 656 (D.C. Cir. 1983). As the majority pointed out, remand was wholly unnecessary since an agency is always "free to issue new and different regulations" consistent with congressional intent. Id. at 665.

38. Meritor Sav. Bank, FSB v. Vinson, 106 S. Ct. 2399, 2402 (1986).

39. Dissent from denial of rehearing en banc. Vinson v. Taylor, 753 F.2d 141, rehearing denied, 760 F. 2d 1330, 1333, n. 7 (D.C. Cir. 1985).

40. 760 F.2d 1330 and 1332.

The CHAIRMAN. Thank you, Professor.

Professor Williams—and again, Professor, you are going to see people getting up and down here. There is another vote right now. That is not for you to do anything about, but just so you know, when we are getting up and down, it is not a lack of interest in your statement.

These have been brilliant statements. I am impressed.

TESTIMONY OF WENDY WILLIAMS

Ms. WILLIAMS. Thank you, Mr. Chairman.

Judge Bork's view on women's equality under the Constitution makes his nomination for a position on the highest Court in the land, our court of last resort, a matter of deep uneasiness for persons concerned with the equality of the sexes.

This is so for a number of reasons, but I will focus on just one of them—the standard of review that Judge Bork would apply in sex discrimination cases brought under the equal protection clause.

For reasons I will outline, I believe his new one-standard approach, which he announced in these hearings, is, in sex discrimination cases, at least, just the old rationality review in disguise, old wine in a new bottle and thus a throwback to the days when any plausible generalization about sex differences was enough to justify discriminatory laws.

Until these confirmation hearings, Judge Bork believed that the rational basis or rationality standard should apply to sex discrimination cases. It is clear how that standard functioned in cases generally, and in sex discrimination cases in particular. Up until the 1970s, it was the bottom tier in what the Supreme Court and commentators were calling the two-tiered standard of review in equal protection cases.

The upper tier was reserved for legislative classifications based on race and alienage, and those classifications were "strictly scrutinized," to use the felicitous catch phrase developed by the Court. The lower tier was reserved for everything else.

The idea behind the lower tier's rationality standard was that it would provide a hedge against purely arbitrary and irrational legislative classifications, but other than that, leave social and economic judgments to the majoritarian process.

Under the rationality standard, almost any reason would suffice. As the Supreme Court expressed it on numerous occasions over the years, "A statutory discrimination will not be set aside if any state of facts reasonably can be conceived to justify it."

Legislative distinctions based on sex were of course in that lower tier and, predictably, given the way the standard worked, the Supreme Court struck down not one single statute distinguishing between the sexes in the entire time it applied that standard to such cases.

Under the rationality standard, it upheld laws excluding women from certain jobs, prohibiting them from working at night, limiting their service on juries, and restricting the hours they could work.

Until these hearings, it was this state of affairs that Judge Bork apparently endorsed. A number of times over the years, he made it clear that he felt the equal protection clause should be reserved for race and alienage cases and should not be extended to other groups.

Thus, in 1971 he said, "The Supreme Court has no principled way of saying which nonracial inequalities are impermissible."

In 1972 he said, "There being no criteria available to the Court, the identification of favored minorities will proceed according to current fads and sentimentality. This involves the judge in deciding which motives for legislation are respectable and which are not—a denial of the majority's right to choose its own rationales."

This summer he said it more simply: "I do think the equal protection clause probably should have been kept to things like race and ethnicity."

These quotes lead one rather inexorably to the conclusion that the Supreme Court's inclusion of sex in the categories that it treats with special care is, in Judge Bork's recently abandoned view, (a) unprincipled, and (b) an unwarranted concession to a "current fad in sentimentality."

Of course, both the Court and Judge Bork have changed their review standards since the state of affairs I just described. Judge Bork, as we have seen, did it last Wednesday. The Court did it in 1971. In a case called *Reed* v. *Reed,* the Supreme Court in an opinion authored by Chief Justice Burger struck down its first sex-based legislation ever. One commentator described the standard it applied there as "rationality with a bite."

After flirting briefly with the idea that the upper-tier standard should be applied in sex discrimination cases, the Court in 1976 finally settled on a formulation which has persisted. The landmark case was *Craig* v. *Boren,* and the standard the Court announced there was a scaled-down version of the upper tier.

Thus a genuine middle-tier standard emerged, an intermediate standard, if you will. And while no standard automatically dictates results, and different Justices may differ in their applications of any given standard, it is fair to say that this intermediate standard, developed within the Court's tradition of establishing levels of review and crafted to strike a middle road between existing tiers, provided a fair measure of guidance to lower courts, legislators and litigators.

Today, several years down the road, a persistent majority of Justices apply the standard, and even those who do not apply that standard have recognized the appropriateness of something more than the traditional rationality standard in sex discrimination cases. In short, a consensus has emerged on the Court that legislative classifications by sex call for a more careful look than does the social and economic legislation on which they appropriately defer to legislative majorities.

Judge Bork, even with the standard he adopted last week, stands outside that consensus. His current position is that there is one standard under the equal protection clause applicable to every case. He claims it is the standard used by Justice Stevens, asserting by implication his mainstream constitutional credentials. Justice Stevens does indeed claim that there is one standard under the equal protection clause, but the resemblance stops there.

Fortuitously, the sex discrimination case that Judge Bork discussed in these hearings at the greatest length is also the case in which Justice Stevens first announced and applied his one-standard approach. We have, therefore, the ability to compare their approaches.

In that case, *Craig* v. *Boren,* the Court struck down an Oklahoma statute which allowed women to obtain 3.2 beer at the age of 18, but made the men wait until they were 21. Judge Bork began his discussion of *Craig* by saying that the Oklahoma law, quote—and this is the important quote—"probably is justified, because they have statistics"—and here he was interrupted.

Those statistics showed, he correctly recalled shortly thereafter, that there was, as he put it, quote, "a problem with young men drinking more than there is with young women drinking", end of quote, behind the wheel.

Judge Bork's apparent willingness to uphold legislation based on average differences in the drinking habits of the sexes is striking and revealing. Since *Reed,* the Supreme Court has refused to accept such generalizations as justification for sex discrimination.

The lower court in *Reed,* following the old precedent and applying the rational basis standard, had reasoned that the statute giving men a preference as a State administrator was rational, because men generally had more business experience than women.

The Supreme Court took a different approach. For it, the constitutionally acceptable question was not what sex is on average more qualified but rather, which person before the Court in the particular case is more qualified.

The promise, in short, of the equal protection clause to women is that generalizing about the sex to which one belongs may not be used to discriminate against individuals.

The CHAIRMAN. Are you almost finished, Professor?

Ms. WILLIAMS. Yes. I have one more point, if I may.

The CHAIRMAN. Okay. Surely.

Ms. WILLIAMS. In stark contrast to Judge Bork, Justice Stevens, concurring in *Craig*, agreed with the majority that the Oklahoma law should be declared unconstitutional. Where Judge Bork saw a tenfold difference in drunk driving arrests between young men and young women—2 percent of the men and only 0.18 percent of the women were arrested—Justice Stevens sees the 98 percent of young men and the 99.2 percent of young women, the vast majority of both sexes, who do not show up in the statistics. To him, it was sex discrimination to hold that all young men between 18 and 21 should be accountable for the driving sins of the 2 percent of them.

But the gulf between the judge and the Justice are even more profound than this aspect of their reasoning suggests. And here is my final point. Justice Stevens cautions that the Court must be, in his words, "especially vigilant" in evaluating laws affecting traditionally disfavored groups. The Court, he says, must be what Judge Bork demonstrably is not in his discussion of *Craig*—careful to avoid reflexive assumptions of relevant differences among groups when none exists.

Justice Stevens' opinions are characterized by insight into subtle forms of discrimination and a substantive commitment to the ideal that groups that have historically suffered discrimination be allowed, as he put it so nicely, to quote "share in the blessings of a free society."

In *Craig*, Justice Stevens understood that the 3.2 beer statute was a remnant of a tradition of discriminating against males in the 18- to 21-year-old age bracket. He understood that this case fit within a tradition of viewing young women as more mature than young men, an assumption which harmed young men in some cases—for example, when they were treated as adults for purposes of criminal prosecution at a younger age than women—and harmed young women in others—for example, when boys were entitled to child support to age 21, but girls only to age 18.

He understands, to put it more simply, both the propensity to enact and the harm of enacting sexual stereotypes into law.

And this is my last point. By contrast, Judge Bork felt that the Constitution's invalidation of that Oklahoma law was, as he said in June and as he repeated here, to trivialize the Constitution. To him, *Craig* is merely a case about whether boys can get their hands on near beer.

To those who understand the degree to which laws traditionally have assigned to citizens burdens and benefits by gender and what that division has cost women, this constitutional case is not trivial any more than a black person's objection to drinking from one water fountain rather than another, or being assigned a back rather than a front seat on the bus was trivial. It is one brick in a mighty edifice; a symbol and a manifestation of a pervasive social arrangement which fails to accord full dignity and equality to women.

Judge Bork purports to abandon the rational basis standard. In its place, he puts reasonableness, citing the approach of Justice Stevens. But in Justice Stevens' scheme, whatever he chooses to call it, there is a special scrutiny, a special vigilance, accorded legislative classifications based on sex.

When in this hearing, Judge Bork got past generalizations about standards and revealed how his mind actually tackles a sex discrimination issue, it was just the old rational basis analysis at work. Judge Bork's testimony demonstrates that he does not share the Court's consensus that sex-based classifications deserve careful scrutiny under the equal protection clause.

The women and the men of this country deserve a better keeper of the constitutional guarantee of equal protection of the laws.

[Prepared statement follows:]

STATEMENT OF WENDY WEBSTER WILLIAMS

Professor of Law
Georgetown University Law Center
Washington D.C.

Before
The Committee on the Judiciary
United States Senate
Senator Joseph Biden,
Chair

September 25, 1987

PLEASE NOTE: This is the final version of the testimony submitted by Professor Wendy W. Williams last Friday afternoon. Because she was asked to testify at the last minute, she was unable to complete it by the time of her actual appearance before the committee. She did, however, submit a draft of her testimony. PLEASE SUBSTITUTE THIS DOCUMENT FOR THAT DRAFT.

Judge Bork's view on women's equality under the Constitution make his nomination for a position on the highest court in the land -- our court of last resort -- a matter of deep uneasiness for persons concerned with the equality of the sexes. This is so for a number of reasons, but I will focus on just one of them -- the standard of review that Judge Bork would apply in sex discrimination cases brought under the equal protection clause. For reasons I will outline, I believe his new "one standard approach", which he announced in these hearings, is in sex discrimination cases just the old rationality review in disguise -- old wine in a new bottle -- and thus a throwback to the days when any plausible generalization about sex differences was enough to justify discriminatory laws.

Until these confirmation hearings, Judge Bork believed that the rational basis or rationality standard should apply to sex discrimination cases. It is clear how that standard functioned in cases generally, and in sex discrimination cases in particular. Up until the 1970s, it was the bottom "tier" in what the Supreme Court and commentators were calling the "two-tier" standard of review in equal protection cases. The upper tier was reserved for legislative classifications based on race and alienage and those classifications were "strictly scrutinized," to use the felicitious catch phrase developed by the Court. The lower tier was reserved for everything else. The idea behind the lower tier's rationality standard was that it would provide a hedge against purely arbitrary and irrational legislative classification, but other than that, leave social and economic judgments to the majoritarian process. Under the rationality standard, almost any reason would suffice. As the Supreme Court expressed it on numerous occasions over the years, "A statutory discrimination will not be set aside _if any state of facts reasonably may be conceived_ to justify it."[1]

Legislative distinctions based on sex were, of course, in that lower tier. Predictably, given the way the standard worked, the Supreme Court did not use the Equal Protection Clause to strike down _one single statute_ distinguishing between the sexes in the entire time it applied that standard to such cases. Under the "rationality" standard, it upheld laws excluding women from certain jobs,[2] prohibiting them from working at night,[3] limiting their service on juries,[4] and restricting the hours they could work.[5] This was true in spite of the fact that our statute books, as the Supreme Court would later acknowledge, were "laden with gross, stereotyped distinctions between the sexes." [6]

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[1] (Emphasis added.) The quote is from McGowan v. Maryland, 366 U.S. 420, 426 (1961), and is routinely trotted out when the Court applies rational basis review.

[2] Goesaert v. Cleary, 335 U.S. 464 (1948) (women excluded from bartending).

[3] Radice v. New York, 264 U.S. 292 (1924).

[4] Hoyt v. Florida, 368 U.S. 57 (1961).

[5] Muller v. Oregon, 208 U.S. 412 (1908); Bosley v. McLaughlin, 236 U.S. 385 (1915).

Until these hearings, it was this state of affairs that Judge Bork apparently endorsed. A number of times over the years he made it clear that he felt the Equal Protection Clause should be reserved for race and alienage cases and should not be extended to other groups. Thus, in 1971, he wrote: "The Supreme Court has no principled way of saying which non-racial inequalities are impermissible."[7] In 1982 he said, "There being no criteria available to the Court, the identification of favored minorities will proceed according to current fads in sentimentality . . . This involves the judge in deciding which motives for legislation are respectable and which are not, a denial of the majority's right to choose its own rationales."[8]

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[6] Frontiero v. Richardson, 411 U.S. 677, 685 (1973).

[7] Bork, "Neutral Principles and Some First Amendment Problems," 47 Ind. L.J. 1, 11 (1971). See also his address to The Federalist Society entitled "Federalism and Gentrification," given in April, 1982, in which he said "When they begin to protect groups that were historically not intended to be protected by that clause, what they are doing is picking out groups which current morality of a particular social class regards as groups that should not have any disabilities laid upon them. . . . All of these are nationalizations of morality, not justified by anything in the Constitution. . . ." and his comment at the Aspen Institute in August 1985 in which he said, "In the Fourteenth Amendment case, the history of that is somewhat confusing. We know race was at the core of it. I would think pretty much race, ethnicity is pretty much what the Fourteenth Amendment is about; because if it's about more than that, it's about a judge making up what more it's about. And I don't think he should."

[8] Speech, Catholic University, 1982.

This summer he said, more simply, "I do think the Equal Protection Clause probably should have been kept to things like race and ethnicity."[9] These quotes lead one rather inexorably to the conclusion that the Supreme Court's inclusion of sex in the categories that it treats with special care is, in Judge Borks's recently abandoned view, (a) unprincipled and (b) an unwarranted concession to "a current fad in sentimentality."

Of course, both the Court and Judge Bork have changed their review standards since the state of affairs I just described. Judge Bork, as we have seen, did it in his appearance before this committee. The Court did it in 1971. In a case called Reed v. Reed,[10] the Court, in an opinion authored by Chief Justice Burger, struck down its first sex-based legislation. The standard it used wasn't what it would become in a few years, but it wasn't the old rational basis standard either. One commentator described it as "rationality with a bite."[11] After flirting briefly with the idea that the upper tier standard should be applied to sex discrimination cases,[12] the Court, in

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[9] Worldnet Interview, United States Information Agency Television and Film Service, June 10, 1987.

[10] 404 U.S. 71 (1971).

[11] See Gunther, The Supreme Court, 1971 Term -- Foreward: In Search of Evolving Doctrine on a Changing Court, 86 Harv. L. Rev. 1 (1972).

[12] In Frontiero v. Richardson, 411 U.S. 677 (1973), four members of the Court subscribed to the strict scrutiny standard of review applicable in race cases, but later abandoned that standard when a fifth vote did not materialize.

1976, finally settled upon a formulation which has persisted. The landmark case was Craig v. Boren[13] and the standard the Court announced there was a scaled down version of the upper tier. "Classification by gender" said the Court, "must serve important governmental objectives and must be substantially related to achievement of those objectives."[14]

Thus a genuine middle tier emerged, an "intermediate" standard, if you will. And, while no standard automatically dictates results and different justices may differ in their application of any given standard, it is fair to say that this intermediate standard -- developed within the court's tradition of establishing levels of review and crafted to strike a middle road between existing "tiers" -- provided a fair measure of guidance to lower courts, legislators and litigators. Today, several years down the road a persistent majority of Justices apply the standard[15] and even those who do not have recognized the appropriateness of something more than the traditional rationality standard in sex discrimination cases.[16] In short, a consensus has emerged on the Court that legislative classifications by sex call for a more careful look than does the social and economic legislation on which it appropriately defers to legislative majorities.

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[13] 429 U.S. 190 (1976).

[14] 429 U.S. at 197.

[15] Justices Brennan and Marshall have been most consistent in their application of the standard, applying it in every sex discrimination case since Craig. Justice O'Connor is a vigorous proponent of the standard, having discussed it extensively and suggested the possibility of an even higher standard in Mississippi University for Women v. Hogan, 458 U.S. 718 (1982). Justice White agreed with Justices Brennan and Marshall when they advocated "strict scrutiny" in the 1973 Frontiero decision and since then has applied the intermediate standard. Justice Blackman joined the announcement of the intermediate standard in Craig in his concurring opinion.

Judge Bork, even with the standard he adopted last week, stands outside that consensus. His current position is that there is one standard under the Equal Protection Clause, applicable to every case. He claims it is the standard used by Justice Stevens, asserting, by implication, his mainstream Constitutional credentials. Justice Stevens does indeed claim that there is one standard under the Equal Protection Clause, but the resemblance stops there. Fortuitiously, the sex discrimination case that Judge Bork discussed in these hearings at the greatest length is also the case in which Justice Stevens first announced and applied his "one standard" approach.[17] We have, therefore, the ability to compare their approaches.

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[16] See, e.g., Chief Justice Rehnquist's discussion of standard of review in Michael M. v. Superior Court of Sonoma County, 450 U.S. 484, 468-69 (1981); former Chief Justice Burger's articulation in Reed v. Reed; former Justice Stewart's statements in Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 455, 461 (1981) and Michael M., 450 U.S. at 477-78 (concurring opinion). Justice Scalia has not yet spoken on the issue. Justice Stevens' standard is discussed at some length in the text below. Retiring Justice Powell, in Craig, declined to move to the new standard announced by the majority, saying he "found it unnecessary to read that decision as broadly as some of the Court's language may imply", but made clear that he understood that "a more critical examination" than that characteristic of traditional rational basis review was appropriate in the gender cases. 429 U.S. at 210-11.

In that case, Craig v. Boren, the Court struck down an Oklahoma statute which allowed women to obtain 3.2 beer at age 18 but made the men wait until they were 21.[18] Judge Bork began his discussion of Craig by saying that the Oklahoma law "[p]robably is justified because they have statistics . . . " Those statistics showed, he correctly recalled, that there was, as he put it, "a problem with young men drinking, more than there was with young women drinking" while behind the wheel. Judge Bork's apparent willingness to uphold legislation based on an average difference in the drinking habits of the sexes is striking and revealing. Since Reed, the Supreme Court has refused to accept such generalizations as justification for sex discrimination. The lower court in Reed, following well-established precedent and applying the rational basis standard, had reasoned that the statute giving men a preference as estate administrators was rational because men generally had more business experience than women. The Supreme Court took a different approach. For it, the constitutionally acceptable question was, not what sex is on average more qualified, but rather, which person before the court in the particular case is more qualified. The promise of the Equal Protection Clause to women is that generalizations about the sex to which one belongs may not be used to discriminate against individuals.[19]

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[17] Judge Bork's tenure on the federal Court of Appeals has, unfortunately, yielded no Bork opinions in which he embarked on a full blown equal protection analysis in a sex discrimination case. The only cases in which he has dealt with the substance of a sex discrimination claim have been statutory cases, and on these one finds a striking lack of sensitivity on gender issues, as others who testified before this committee, most notably Professors Barbara Babcock and Sylvia Law, have explained.

[18] The colloquy on Craig began with a reference to a statement Judge Bork made this past June on a television program on the bicentennial of the Constitution. (WorldNet, U.S.I.A. Television and Film Service, June 10, 1987.) On that program three months ago, he said, "I do think the Equal Protection Clause probably should have been kept to things like race and ethnicity," then added, "When the Supreme court decided that having different drinking ages for young men and young women violated the Equal Protection Clause, I thought that was a very -- that was to trivialize the Constitution and to spread it to areas it did not address." He added, in his testimony before this committee, that "That is a case which I frankly thought was a little odd." He then repeated his assertion that the case trivializes the constitution, adding "You would have thought it was the steel seizure case the way they went at it." Then he added, "And I thought, as a matter of fact, the differential drinking age probably is justified, because they had statistics on . . . "(He was interrupted here, then continued) "They had evidence that there was a problem with young men drinking more than there was with young women drinking." He went on to suggest that his attitude about the case showed that he did not disfavor women, since, presumably, it was men who were placed at a disadvantage by the law. Having said these things, he then said he had no opinion about the case and would have to look at the evidence, a statement belied by his previous testimony and his statement on television. Thursday, Sept. 17, 1987 Transcript p. 134.

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[19] The conclusion that this simple and just principle of equality evades Judge Bork is reinforced by his statement earlier on that day that "rational distinctions cannot be made between men and women, usually, except on physical strength or something of that sort . . . ." (Thurs, Sept. 17, Transcript p. 35). Even prior to 1970 the federal courts were using Title VII to invalidate employer rules and state laws excluding women from jobs requiring the lifting of weights above a fixed maximum. The principle is the same as that in Reed and its progeny: the proper inquiry is not whether more men than women can lift these weights, but

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In stark contrast to Judge Bork, Justice Stevens, concurring in Craig, agreed with the majority that the Oklahoma law should be declared unconstitutional. Where Judge Bork saw a ten-fold difference in drunk driving arrests between young men and young women (2 percent of the men but only .18 percent of the women were arrested), Justice Stevens sees the 98 percent of young men and 99.82 percent of young women -- the vast majority of both sexes -- who do not show up in the statistics. To him, it was sex discrimination to hold all young men between 18 and 21 accountable for the driving sins of two percent of them.[20]

But the gulf between the Judge and the Justice are even more profound than this aspect of their reasoning suggests. Justice Stevens cautions that the Court must be, in his words, "especially vigilant" in evaluating laws affecting traditionally disfavored groups.[21] The Court, he says, must be what Judge Bork

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19(continued)
whether a particular applicant can do the job.

[20] Furthermore, he is not one to rely on physical generalizations, noting in Craig, perhaps with a chuckle, that to the extent that the statute reflects any physical difference between males and females it is actually perverse, because larger people have a greater alcohol capacity and men on average are bigger than women.

[21] City of Cleburne v. Cleburne Living Center, 105 S.Ct. 3249, 3261 n.6 (1985) (concurring opinion). See also, Wygant v. Jackson Board of Education, 106 S.Ct. 1842 (1986), Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 496-502 (dissenting opinion); Califano v. Goldfarb, 430 U.S. 199, 221-23 (1977) (concurring opinion).

demonstrably is not in his discussion of Craig -- careful to avoid reflexive assumptions of relevant differences among groups when none exist. Justice Stevens' opinions are characterized by insight into subtle forms of discrimination and a substantive commitment to the ideal that groups that have historically suffered discrimination be allowed, as he put it, to "share in the blessings of a free society."[22] In Craig, Justice Stevens understood that the 3.2 beer statute was a remnant of a tradition of discriminating against males in the 18 to 21 year old age bracket. Unable to locate a better reason for the law, he suspected that the actual motivation behind it was "nothing more than the perpetuation of a stereotyped attitude about the relative maturity of the members of the two sexes in this age bracket." He understood that this case fit within a tradition of viewing young women as more mature than young men, an assumption which had harmed young men in some cases (for example, when they were treated as adults for purposes of criminal prosecution at a younger age than women[23]) and harmed young women in others (for example, when boys were entitled to child support to age 21 but girls only to age 18).[24] He understands, to put it more simply, both the propensity to enact and the harm of enacting sexual stereotypes into law.

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[22] Wygant v. Jackson Board of Education, 106 S.Ct. at 1869.

[23] See, e.g., Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972) (struck down age distinction on authority of Reed v. Reed), discussed in Craig v. Boren, 429 U.S. at 197.

[24] See Stanton v. Stanton, 421 U.S. 7 (1975) (Court struck down age distinction, rejecting state's rationale that boys needed the added support so they could prepare for their expected role in the economic and political worlds).

By contrast, Judge Bork felt that the Court's invalidation of the Oklahoma law was, as he said in June and repeated last Thursday, to "trivialize the Constitution." To him, Craig is merely a case about whether boys can get their hands on near beer. To those who understand the degree to which laws traditionally have assigned to citizens burdens and benefits by gender and what that division has cost women, this constitutional case is not trivial, any more than a black person's objection to drinking from one water fountain rather than another or being assigned a back rather than a front seat in a bus was trivial. It is a one brick in a mighty edifice, a symbol and manifestation of a pervasive social arrangement, which fails to accord full dignity and equality to women.

Judge Bork purports to abandon the rational basis standard. In its place he puts one standard, "reasonableness," citing the approach of Justice Stevens. But in Justice Stevens's scheme, whatever he chooses to call it, there is a special scrutiny --a special vigilance -- accorded legislative classifications based on sex. That vigilance, when applied to the cases before the Court, has aligned him, repeatedly, with the Justices that apply the intermediate standard of review.[25] When in this hearing

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[25] See, e.g., Craig v. Boren, 429 U.S. 190 (concurring opinion); Califano v. Goldfarb, 430 U.S. 199 (concurring opinion); Orr v. Orr, 440 U.S. 268 (1979) (concurring opinion); Wengler v.
(Footnote continued)

Judge Bork got past generalizations about standards and revealed how his mind actually tackles a sex discrimination issue, it was just the old rational basis analysis at work.[26] Judge Bork's testimony demonstrates that he does not share the Court's consensus that sex based classifications deserve careful scrutiny under the Equal Protection Clause.[27] The women and men of this

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Druggists Mutual Insurance Co., 446 U.S. 142 (concurring opinion). But see Caban v. Mohammed, 441 U.S. 380, 401 (1979) (dissenting opinion). Indeed, in the Court's two most recent sex discrimination cases he has simply signed on to a majority opinion that applies the intermediate standard. Heckler v. Matthews, 104 S.Ct. 1387 (1984); Mississippi University for Women v. Hogan, 458 U.S. 718 (1982).

[26] Judge Bork, according to his testimony, still objects to an Equal Rights Amendment on the ground that "these enormously sensitive, highly political, highly cultural issues" should be decided not by judges but by legislatures. This is the same ground on which he objected to applying the Equal Protection Clause to anything other than race and alienage. Either his new equal protection standard still leaves these matters to legislative judgment or his positions on an ERA and the Equal Protection Clause, until so recently consistent, have become logically inconsistent.

[27] Interestingly, Former H.U.D. Secretary Carla Hills, who made the peculiar argument that Judge Bork will be good for women because he will leave decisions about sex classifications to the legislatures, premises her remarks on the same conclusion I draw here, namely, that whichever standard Judge Bork uses, he will defer to the legislatures in sex discrimination cases. Ms. Hills is correct about what Judge Bork's approach will be, but her conclusion about the benefits of that approach for women bears brief comment here. Beginning in the mid-1970's, it is fair to say that there was a revolution in the legislative treatment of women. Whole codes were reviewed for sexist laws, and corrections made. This beneficial overhaul was the direct result of two developments: first, the Supreme Court's new doctrine on sex discrimination under the Equal Protection Clause, which gave legislatures the clear message that the parameters in which they could operate in legislating about the sexes had changed, and second, the passage by Congress of the Equal Rights Amendment, which lead some states, in contemplation of
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country deserve a better keeper of the Constitutional guarantee of Equal Protection of the Laws.

27(continued) its ratification, to assess and revise their codes. The ERA, however, was not ratified, and should the Court return to its "anything goes" days in the sex discrimination area, the results are predictable. The persistent stereotypes about women may be submerged but they have hardly vanished any more than racism has vanished. The purpose the Equal Protection Clause was meant to serve, protection of vulnerable groups against majoritarian excesses, continues to be served by scrutiny of legislative gender lines.

The **Chairman**. Thank you very much.

I am going to yield the gavel to Senator Heflin, but I hope you will keep the panel until others get back, Senator, because I have some questions.

I am going to go vote, and I yield to Senator Heflin.

Senator **Heflin** [presiding]. I am delighted to see each of you here. I happen to have known Judge Hufstedler for a much longer period of time than I have known the other members of the panel. She was a remarkable jurist, and I am firmly convinced that had President Carter had the opportunity to appoint a member to the Supreme Court, you would be the first woman to serve on the U.S. Supreme Court. Of course, your work here in this Cabinet, as well as your background in the law, as really an outstanding leader, and we are delighted to have you here.

Unfortunately, you have been waiting a long time, and I know you want to get back home, so we will try to move along, and hopefully, everybody will comply with the timeframe on this so we can expedite it.

Let me ask you this, Judge Hufstedler. Many of the colleagues have repeatedly stated that they believe the committee should ignore or, at a minimum, discount what Judge Bork wrote as a legal commentatory and theorist and instead should concentrate on his record on the court of appeals. They maintain that his record as a judge is a better indicator of what he would do if he was confirmed.

Is this a valid argument, and what weight, if any, should be given to those earlier writings and speeches?

Ms. **Hufstedler**. I think one can understand Judge Bork's decisions as a judge on the U.S. Court of Appeals for the District of Columbia Circuit in the few sensitive cases on Constitution issues only in the light of what has been his entire history of thought on these. And that is not very difficult to detect when you look at the decisions in *Vinson*, and you look at his decisions in *Dronenburg*; what you see is a re-echoing, almost in the same terms, of those issues upon which he had spoken out the most strongly in his academic life. That is true whether you look at decisions in the antitrust area, whether you look at decisions which involve gender discrimination, when you look at the nature of the lack of charity with respect to appreciation of what happens to real human beings.

The problem which is illustrated, which is there throughout his entire history—that is, until the confirmation hearings, and even then to a significant extent—was an attitude of mind in which Constitutional adjudication in particular, and statutory adjudication in other respects is supposed to be removed from the reality of the impact of what that means.

He talks about it as an intellectual exercise. It is not an intellectual exercise. To be sure, it is an intellectual endeavor.

But you have to know that what you say about the U.S. Constitution impinges on every, single human being. When you say casually, "I cannot find any room for the right to privacy," it means to me and to every American that it does not matter to him that the Government is going to be given a seat in my bedroom and yours, in my doctor's office and yours. And I say that is something that the Founding Fathers would have found so appalling as to be unthinkable.

He has not abandoned those ideas; he is still saying them. He uses more temperate language in the confirmation hearings.

I see no distinct difference between what he says as a judge and what he said as a law teacher.

Senator **Heflin**. You ended your statement with a most interesting remark to me on the advice part of the advise and consent function of the Senate. To many, there is some confusion as to the advice. And in effect, you are saying that you exercise it by a negative approach. Is there a positive approach towards advising the President, say—I have always been confused exactly as to what "advise and consent"—how do you view the advise function of those two functions, or can you separate them?

Ms. **Hufstedler**. It is quite clear from the days of the constitutional debate over whether the Constitution would give the power solely to the Senate to appoint Justices to the Supreme Court of the United States, that the draftsmen were very concerned that the checks and balances in other instances of Government would be defeated if sole power to name Supreme Court Justices should reside either in the Senate alone or in the Presidency alone.

If what the Constitution meant was whatever the President proposes means the Senate should say "Yes" and it is a formality, there would have been no point whatsoever in talking about advice. After all, in common parlance—and it was true at the time the Constitution was drafted—as well as in the operation of advice in a lawyer's office, the advice is not only "Go ahead" or "I think you can get away with it;" the advice is sometimes, "The answer to that is flatly no. It is unethical, it is immoral, it is unwise."

The great charge given by the draftsmen of the Constitution to the Senate, and not simply to both the House and the Senate, but specifically to the Senate, was to advise not only the President. The Senate, after all, can advise the President in very different ways. The constitutional advice is not only to advise the President, but to advise the American people of either an approval or a disapproval of the choice of nominee by the President. And of course, the Senate has exercised that kind of advice on many occasions with respect to many nominees initially proposed by the President.

And I may say although one can find an occasional question of the validity of that decision, on the whole the Senate has exercised its constitutional responsibility with both thoughtfulness and restraint for the benefit of the nation.

Senator **Heflin**. Thank you.

My time is up, and Senator Kennedy is here. He is a little more senior than I am—senior to all of us—so I will turn the gavel closer to the center over there.

Senator **Kennedy** [presiding]. We have been off voting, and I apologize for missing the formal presentations, but I have had a chance to review the submissions and look forward to participating in the discussion with some of the members of the panel.

The Senator from South Carolina.

Senator **Thurmond**. Mr. Chairman, again I must object to the way we are allowing witnesses to take all the time they desire. If we are to finish these hearings this month, it is imperative that the Chair set the rules and see that all witnesses follow them.

Chairman Biden said in the beginning that each witness was to be allowed 5 minutes for their opening statements. However, this panel of witnesses took 1 hour and 6 minutes.

I would urge the Chair to see that all witnesses follow the rules, regardless of who they are, so that we can get through these hearings, and that ought to apply to everybody, those for and against Judge Bork.

Again I say let us set the rules, and let us abide by them so we can get through.

I want to welcome you ladies here. I have no questions. I will yield my time, if he wants it, to Senator Simpson.

Senator **Kennedy**. Let me just say that we have all tried to follow the time. There have been trespasses on that by both sides of the aisle during the formal presentation. I am reminded that Mr. Cutler yesterday took exceedingly longer than his period of time.

I think the point is that all of us want to make sure that all of the witnesses get a fair hearing, and as I think all of us understand, as the course goes through the day, those that will be testifying in the latter part of the day get a shorter period of time. But I think all of us, whether we have been on one side of the issue or the other, have been impressed by the quality of the witnesses and the thoughtfulness of their views. I think that has been true with regard to those who have been supportive of the nomination or opposed to it. So we are caught in a bind on it. I think the point is well made.

I will now recognize the Senator from Wyoming.

Senator **Simpson**. Thank you, Mr. Chairman. I had not looked up. I knew you were in the chamber. I smelled that cigar as you came past. I see you finally put it up on the table, and I appreciate that, instead of hiding it like you used to when we did our work in the Immigration and Refugee Subcommittee.

Senator **Kennedy**. No secrets on this panel.

Senator **Simpson**. No; none.

Thank you, Mr. Chairman, and I think remarks were fair. On both sides, we have to pull this thing closer together in time, because indeed, an 11 o'clock hearing, and we are all ready to go, and everyone is participating, and certainly the transgression has been made on both sides. And I think we are going to be here a long time, but we have dropped back to 5 minutes, and we are all doing pretty well, and I think we must enforce that on both sides.

Well, welcome to the committee. I have been listening. I have been involved in some floor activity, trying to see if we do not have to have a Saturday session, a Saturday night session. I apologize for not being present, because I enjoy my participation here.

One of the things about my own views about Judge Bork, I do not agree with him on certain things, and even though—and I think I have misspoken. I think maybe some of us misspeak when we say where he is—on this issue on abortion—he has really only said that the right to privacy is not the way to decide that decision in *Roe* v. *Wade*. He really has never said that he is antiabortion. I think that is important to remember. That gets very distorted in the land. He has only said that it was the wrong hook, as we used to say in law school, to hang the decision on, and that was the right of privacy.

I happen to be one who is pro-choice; I think a woman should have that choice, and hopefully with the concurrence of a spouse, if one, or with at least the pastoral counselor and the physician involved, and helpful, in the position and the anguish of the decision. So I think the continual reference to Judge Bork as being anti-abortion is not fair. And I do not know if any of you have said that, and I do not think you have. But I want to say it for myself, that I have found myself misusing that.

But I believe it was—and indeed, Ms. Hufstedler, the issue of these things of Judge Bork and what he has said are theory in what he has said, but it has been said that he shows no substance in backing the rights of women in anything that he has done.

Now, I can cite to you, and I do so for the record, three cases, while he was writing the majority opinion. *Osaski* v. *Wick*, where he held a very definitely pro-woman decision on the foreign service being subject to the Equal Pay Act. There is no question about that.

Palmer v. *Shultz*—inferences of intentional discrimination can be made solely on statistical evidence. That is obviously a pro-woman vote and a pro-woman decision of the most extraordinary capability.

And the real one, about *Laffey* v. *Northwest Airlines*, where he held that female stewardesses—and that is the phrase used; "flight attendant" would have been less sexist—might not be paid less than male pursers for nominally different jobs; and the Equal Pay Act, pay awards determined by calculating total job experience.

Those were decisions authorized by Judge Bork. There is no question about that; there they are. They are what we call "for the record."

You stated in your opening statement that Lewis Powell was, I believe, as I heard it and saw it, a gifted moderator.

Ms. HUFSTEDLER. That is right.

Senator SIMPSON. And that he, Judge Bork, would fill this seat, and that Powell was such a man.

And I ask you—and I am certain that you are aware—that Justice Powell agreed with the position taken by Judge Bork in 9 out of the 10 opinons written or joined by Judge Bork which have been reviewed by the Supreme Court. You are aware of that?

Ms. HUFSTEDLER. I am aware that none of the decisions we are discussing in which Judge Bork participated were heard in the Supreme Court.

Second, with respect to his authorship of *Laffey*, perhaps I have missed Judge Bork's testimony on that point. The decision is per curiam; there is no named author. I do not know whether he wrote it or whether he did not. Of course, it was not a sensitive issue in the sense that it was one that raised a set of facts which was not covered seam by seam, both by the language of the statute and all existing precedent. It would have been absolutely extraordinary if he had decided to write a dissent under such circumstances, because no matter which one of the principles he would have been applying, it would have been antithetical to everything he said if he had written a dissent.

So that I cannot find the clear bright line that my good friend, Lloyd Cutler, purports to find in the record. It is certainly possible that I missed something, but I do not find the set of concurrences which have been advertised.

What has been going on is that there will be a point taken, and they will say, well, that point was involved somehow in that case, therefore, the Supreme Court must have agreed with him. But I cannot read the record that way; I honestly cannot.

Senator **SIMPSON**. I cannot believe my time has expired. Somebody must have jabbed the button wrong.

The **CHAIRMAN**. That is all right. Go ahead.

Senator **THURMOND**. I gave him my time.

The **CHAIRMAN**. Good.

Senator **SIMPSON**. Well, it may have, but I——

The **CHAIRMAN**. This is interesting. [Laughter.]

Senator **SIMPSON**. I am not going to get into this—if you think I am not dancing around the edge of the crater on this stuff—now, wait, before I slip off into the maw, here.

The **CHAIRMAN**. You cannot say I did not warn you on the way over here.

Senator **SIMPSON**. No, no. But we have dissected the opinions of Judge Bork, and a large part of the opposition is based upon a review of nonunanimous decisions of Judge Bork which compose 14 percent of his work product. That is kind of what we have to labor under here as we slog forward.

But let me just end—and you are gracious, Mr. Chairman—but do you know that 6 of the 14 members of this panel before you have participated in a vote that excluded women and was gender-based. They are three Republicans and three Democrats. I know that is an extraordinary statement, but it is true—they are all delightful fellows—of the whole spectrum. The vote was on the draft. And in that vote, we made a gender-based distinction without any question. I did not. Nancy Kassebaum was the leader of the issue of saying that women should be included in the draft so that we did not discriminate against them; that the combat theater officers could decide what they should do or could do. I ascribe to that view.

And so I just want to make the point that this Congress was quite willing to make a gender-based distinction on that issue, regardless of how the criticisms reined down, and the dire comments come winging in from all sources. But we did that right here, in this chamber.

I just wanted to say that, and I will leave it right there and leap back into my chair.

Ms. **HUFSTEDLER**. May I respond momentarily?

Senator **SIMPSON**. Yes, please.

Ms. **HUFSTEDLER**. (a) I did not know that; (b) it did not surprise me.

Senator **SIMPSON**. Does not surprise you?

Ms. **HUFSTEDLER**. It does not surprise me. You see, going back to my Secretary of Education days, I truly believe in the value of adult education. And from my experience as chairman of the board for the U.S. Military Academy at West Point, when women were first admitted to the Academy, there was more terror concerned about how it would destroy the institution.

It took a little while for the adult education to set in, and then people discovered that in terms of serving to be trained as infantry officers, these women were outstanding. And therefore, I understand that what it took the Academy 200 years to do, it is not as easy for every Senator to learn in the course of 2 years.

Senator SIMPSON. Well, I want you to know I was in the forefront of the effort.

Ms. HUFSTEDLER. I am very grateful to know that your education was advanced earlier than some of your colleagues.

Senator SIMPSON. Thank you. I thank you, Madame Secretary. [Laughter.]

The CHAIRMAN. I am checking my vote right now.

Senator LEAHY. Alan, all of us want to know who were the good guys and who were the bad guys.

Senator SIMPSON. I have it right here.

Senator LEAHY. Are you going to put it in the record?

Senator SIMPSON. No.

The CHAIRMAN. Do you want to get a chance to ask a question, Senator?

Senator LEAHY. No.

Senator SIMPSON. But you are here.

The CHAIRMAN. Let me ask Professor Babcock a question. I was intrigued and fascinated by your analysis of the *Vinson* case. Would you explain as briefly as you can—I mean literally in 2 minutes—translate the legal jargon that you used into what it means in your view for a woman, working in an office complex, in this building, or 10 blocks from here, or 3,000 miles from here in Los Angeles, what does it mean in your view, the Supreme Court's basis for making a judgment whether or not there is sexual harassment, and as you read it, Judge Bork's test to determine whether or not she is in fact being harassed.

And before you do, let me ask you this. Did I understand you to say that Judge Bork questioned whether or not the statute applied to sexual harassment in the first instance—I mean, the threshold question?

Would you speak to both those points?

Ms. BABCOCK. Indeed, yes. Let me start with the second one, which is that Judge Bork did in a footnote say in so many words that he found it very awkward to apply title VII to sexual harassment.

The CHAIRMAN. Why?

Ms. BABCOCK. Because title VII, he says, deals with discrimination, and he does not see sexual harassment as discrimination.

Throughout his opinion, he refers to sexual harassment as "dalliance." I looked that up in the dictionary. "Dalliance" means "trifling." And you do not have to be a lawyer to read and understand the difference between the Supreme Court's unanimous opinion in *Vinson* and Judge Bork's approach. In fact, maybe it helps if you are not a lawyer, because you would really see a difference between a recognition of not a "trifling" problem, not a "dalliance," but a problem that has confronted women in the workplace, confronted thousands of women in the workplace——

The CHAIRMAN. Professor, I apologize for interrupting, but I do not want my time to be up. Let me state it slightly differently. If a woman is in an environment in the workplace where she believes that if she does not have sexual relations with her boss, that she will either not get promoted, or she will get fired, or that things will not go well for her there, and she believes that, and notwithstanding the fact that she is not physically coerced, that she voluntarily goes to bed with her employer at his request, as I read the Supreme Court case, they said that, even though she voluntarily went to bed, there can be circumstances surrounding that incident that in effect made it harassment. Is that correct?

Ms. BABCOCK. That is exactly what the Supreme Court unanimously held.

The CHAIRMAN. Well, what did Judge Bork say about that as you read it?

Ms. BABCOCK. He said, first of all– and remember, at the outset he says, I doubt that sexual harassment can create a situation that should be covered by sex discrimination law at all—he doubts that there should even be a cause of action under Title VII of the Civil Rights Act.

The CHAIRMAN. All right. Move to the second point.

Ms. BABCOCK. The second point, he says that the question should be whether the woman's acts were voluntary and whether she solicited it by provocative dress and behavior, and that those should be defenses to a charge of sexual harassment. Otherwise, he says, dalliances, trifling things might be turned into charges of harassment.

See, this is a different world view from that that the Supreme Court—Justice Rehnquist wrote—takes. The Supreme Court treats this sexual harassment and hostile environment for women in the workplace as something very serious. Now, Judge Bork says, it may be very serious for racial minorities, that there are racial epithets, that they do not get ahead, that there is an environment that is created that makes it difficult for them to work psychologically. But it is different with sex, he says. Judge Bork says this in *Vinson*.

The CHAIRMAN. Let me ask you another question, and I ask this to Professor Law. You seem pretty strong in your statement, Professor, that the actions of Judge Bork as the professor as distinct from his actions as judge, that, as I understood your point, you were saying—and correct me if I am wrong. I think it was you. One of you did, if not Professor Law—that all of his writings about equal protection up until he arrived here to testify were cool to negative as it related to women, and in all the great debates that have gone on while he was a professor, I think one of you said—I think it was you, Professor Law—that you could not find an instance where he engaged in debate on behalf of the individual, the minority or the discriminated group.

Is that accurate or inaccurate, what I am saying?

Ms. LAW. It is absolutely accurate. But the distinction I drew was not between his writings as a scholar and his writings as a judge. The distinction I drew was, rather, between his statements in whatever form prior to last week and what he said when he came in here last week. There was a sharp difference in the positions he articulated when he came here last week.

Senator Heflin says you need a psychiatrist to understand that. With all due respect, I do not think you do. Either with respect to privacy theory or with respect to equality. With respect to privacy theory, I understand that he has not said *Roe* v. *Wade* is wrong in result, but that he has just not addressed his mind to thinking about that issue.

Again, with all respect, *Roe* v. *Wade* has generated the most intense debate and people care deeply about that issue on both sides. For a person who makes equality theory and privacy the center of his intellectual work to then say, "I have not thought about it," seems to me not to reflect a respect for the issues on both sides.

The CHAIRMAN. Well, my time is up. It seems to me—and I have tried my best so far to keep from editorializing, as many of my colleagues, which they should and there is the right to—but I am going to editorialize here a bit.

It seems to me that every time—at least almost every time—the Judge has decided to weigh in in the intellectual debate, he has always weighed in against the prevailing view of the moment as it relates to privacy, sex, race, and I am probably missing something, and I invite my colleagues who have been such staunch protectors of his interest here to submit a writing where Judge Bork in those 25 years has made as equally a powerful intellectual case why and how you could break down the walls of discrimination on race, on sex, on preference, on liberty questions, where he has gone out and made that case.

It is not conclusory to suggest because he has not done that, he does not believe it. But it does—have you found any writings of his where he has been an advocate?

Ms. LAW. No. And a couple of days ago you had witnesses here who attempted to show that there was evidence in the record that Judge Bork supported equality principles for more than racial groups prior to the confirmation hearings. And the holiday yesterday gave me the opportunity to study those writings with some care and to look at the evidence that was being offered for that proposition. It is vanishingly thin.

The prepared statement that I have provided for the committee tries to discuss why the evidence offered for a concern with equality—an empathetic concern with equality—prior to the confirmation hearings. It does not support that assertion.

The CHAIRMAN. Well, my time is up. Unrelated, but before I forget, let me put in the record a letter that I received today, dated September 23, 1987. Yesterday, former Secretary Carla Hills in her testimony indicated that there were a number of legal scholars who had views similar to Judge Bork's on sex discrimination, and there have been letters and telegrams coming in—only one of which I have before me—and I ask that it be submitted for the record.

It is from Mary E. Becker, professor of law, University of Chicago, dated September 23, 1987: "Dear Senator Biden: I was distressed to hear Secretary Carla Hills invoke my name yesterday to support the proposition that Judge Bork would be good for women because he would not apply formal equality in the context of sex. This statement is very misleading. I have been and am an opponent of Judge Bork's nomination. There is no basis for thinking that Judge Bork would be willing to extend constitutional protection against discrimination to women under any standard," any underlined.

"Indeed, what evidence there is suggests that he will construe even statutory protections as narrowly as possible. I am sending this letter to other members of the Committee by regular mail. I would appreciate your sharing the contents of this letter with other members as soon as possible. Sincerely yours, Mary E. Becker, Professor of Law, University of Chicago, the Law School."

I yield to Senator Hatch.

Senator HATCH. I want to welcome all four of you here. It is good to see you, Madam Secretary, and you Ms. Babcock, as well. We have worked together when you were at the Department of Justice. We appreciate having you here.

But with all due respect, Professor Babcock, I believe you are mistaken with regard to your analysis on the Supreme Court's holding in *Vinson* v. *Taylor* and Judge Bork's opinion on the same. Unlike you, I believe that the Supreme Court agreed with Judge Bork's view for the most part in that case.

In *Vinson* Judge Bork said, essentially, three things. First, he said that the evidence that the plaintiff, quote, "solicited" or, quote, "welcomed" sexual advances by the defendant should be admitted. The Supreme Court fully agreed with his view in that case, holding that, quote, "complainant's sexually provocative speech and dress is obviously relevant to determining whether she found particular sexual advances unwelcome," unquote.

Second, Judge Bork said that at strict rule of evidence or strict rule of absolute liability for employers was inappropriate in sexual harassment cases. The Supreme Court agreed with that view as well. As a matter of fact, it held that the court of appeals, quote, "erred in concluding that employers are always automatically liable for sexual harassment by their supervisors," unquote.

Finally, the Court substantially agreed with Judge Bork's view that the definition of sexual harassment must exclude relationships that were, quote, "solicited or welcomed by the plaintiff," unquote.

According to the Court, it went on to say, quote, "the gravamen of any sexual harassment claim is that the alleged sexual advances were, quote, 'unwelcome', unquote."

Now, this is substantially what Judge Bork has urged in the lower court.

You also, in my view, I think—respectfully I say this—erroneously refer to one footnote in Judge Bork's opinion in *Vinson* to suggest that he would foreclose all sexual harassment suits. In that footnote, Judge Bork stated—and let me quote it—he said: "Perhaps some of the doctrinal difficulty in this area is due to the awkwardness of classifying sexual advancements as discrimination," unquote.

I think his only point here was that, quote, "sexual harassment," unquote, suits do not fit neatly into any traditional theories or categories of title VII discrimination and thus require a distinct conceptual analysis in terms of both liability and remedy, and I believe that is what he is saying there.

He goes on to state quote, "If it is proper to classify harassment as discrimination for title VII purposes, that decision at least demands adjustment in subsidiary doctrines," unquote.

I think that is a very specific, I think, reference to that.

Now, that hardly suggests any desire for wholesale exclusion of sexual harassment claims, particularly in light of his acceptance of the panel's decision to allow such suits. I think, rather, what Judge Bork was doing, he was simply flagging the unique conceptual difficulties posed by harassment cases. And I think that is a fair analysis of *Vinson,* instead of it being the case that you would use—to show that he is out of step with your views. I do not think you can make that case very well against Judge Bork in this matter.

Ms. BABCOCK. I did, Senator, in my prepared remarks, try and talked in what Senator Biden has referred to as "legal jargon," just in order to try to deal with those points. But I think quite aside from those points——

Senator HATCH. Well, do you admit that what I have said is basically correct here?

Ms. BABCOCK. No, I do not agree with it.

Senator HATCH. You do not?

Ms. BABCOCK. No.

Senator HATCH. Then you and I read the case differently.

Ms. BABCOCK. I have read the case many, many times. But you know what I would really suggest—and we could go down each one of the points and I could tell you the way——

The CHAIRMAN. Please do. I think this is very important. Please go down each point. The Chair grants you all the time you want for each point.

Senator HATCH. May I have equivalent time?

The CHAIRMAN. Sure, you may. I am looking forward to this debate.

Senator HATCH. I am too.

Ms. BABCOCK. Let me start with the evidentiary point, which was his first point, in which he said that evidence of provocative dress and behavior should be introduced. Now, he says it should be introduced to go to what he feels is a defense—a necessary defense—which is the defense of voluntariness.

Senator HATCH. But it is more than that. Whether she solicited or welcomed sexual advances, as well as provocative dress.

Ms. BABCOCK. And whether she solicited—two defense, solicitation and voluntariness.

Senator HATCH. You agree it is obviously relevant and you agree that the Supreme Court said it was obviously relevant?

Ms. BABCOCK. Said it was obviously relevant—not to those defenses—it says it is obviously relevant to what is the gravamen of a defense, which is whether the harassment—whether the alleged harassment—was unwelcome.

Senator HATCH. That is right.

Ms. BABCOCK. Not whether it was voluntary.

Senator HATCH. That is my point. That is exactly the way I said it.

Ms. HUFSTEDLER. May I interrupt for one second, with permission of my colleague?

Senator HATCH. Sure.

Ms. HUFSTEDLER. The problem here is the difference between what is voluntary and what is welcome.

Senator HATCH. I agree.

Ms. HUFSTEDLER. I will put it this way. A decision by a dissident who wants to leave the Soviet Union who is told, "yes, you can leave; of course, your family must stay." You can say that he stayed voluntarily. Did he stay because he welcomed that choice? That is the problem with respect to the female employee who is put into this sexual harassment situation. And the difference is, Judge Bork treated the issue of voluntariness without recognizing that when the elements of choice are so far reduced, so, you do it, you go to bed with me or you are not going to be promoted, or fired, is my way of saying that is the kind of nonchoice you get.

So that that is a very significant difference between the way Judge Bork viewed the situation and the way the Supreme Court did.

Senator HATCH. Let me just comment on that, because you, I think, made the precise point that I made. In other words, you did bring it out, I thought, almost expressly the same way that I made it. But let me just say this, Judge Bork simply did not make the obvious point that title VII does not forbid normal office romances. Accordingly, the Court has to have some way to distinguish between a genuine office romance and an unwelcomed exploitation.

The Supreme Court made the same point. In other words, he suggested—as I read the case—he suggested that an employee in fear of losing her job, there was a question of whether she would ever make a wholly voluntary decision, and I think that goes to your point as well, Judge Hufstedler. But what he was simply saying is that some employees might simply welcome office romances.

I think there is one more point that we ought to explore about that case.

The CHAIRMAN. Would you like to follow up on that point?

Senator HATCH. Well, go ahead.

Ms. BABCOCK. You see, I think that the very word, the idea that some people might welcome office romances or that there are such things, we must not get confused, we must not confuse harassment with dalliances, trifling things——

Senator HATCH. I agree with that.

Ms. BABCOCK [continuing]. Just fails to recognize the seriousness of sexual harassment as a tremendous burden to women's equality in the workplace. Judge Bork talks about voluntariness as a defense, the Supreme Court says it is not voluntariness; it is whether these are unwelcome advances.

This is just a completely different way of looking at it. The Supreme Court does not use words like "dalliance" when it is talking about sex discrimination. It uses words like "allegations of serious criminal offenses".

You see, in some ways——

Senator HATCH. But I do not think we are differing on what his interpretation was on that first point. I do not think we had said anything different.

Ms. BABCOCK. He was talking about "voluntariness". The Supreme Court is talking about whether it is "unwelcomed". But you know, in some ways, Senator Hatch, what I really think is that—what I would ask is that people read the two opinions, put them side by side.

Senator HATCH. I would like for them, to. That is my suggestion.

Ms. BABCOCK. And not as lawyers, as people, and say, which opinion believes that women have rights here to be protected from sexual harassment and which of them is a reluctant—maybe it applies, maybe it does not, it is quite awkward to apply it. I think a lay person might do a lot better reading these opinions than we do in trying to pick out exactly what the points are.

Senator HATCH. It may be. But those three points that I made I think make the case that it is a far different cry from what you have explained the case to be. And I think if you look at it as two lawyers, you are going to say that the Supreme Court upheld the Judge in those three particulars. And that footnote goes—it seems to me—a long way toward helping to resolve these problems, not as an impediment or difficulty.

Ms. BABCOCK. The footnote says—excuse me—the footnote says, I am having trouble applying hostile environment to sex discrimination, sexual harassment——

Senator HATCH. It does not say——

Senator LEAHY. Mr. Chairman, can she answer the question? Let's let her complete the answer.

Senator HATCH. Wait just a second. I certainly was not trying to interrupt her. We have been having a good back and forth and I do not need your suggestions.

I will be happy to give you any time you need, and I am certainly not trying to be rude here. It is interesting. We are kind of having a back and forth here. It is stimulating to me and there is no question that you have read these cases.

I do not think there is any question that I know a little bit about them, either. But I certainly have not meant to interrupt you, and I do not appreciate being interrupted by my colleagues.

The CHAIRMAN. The only question is whether you can finish a sentence. Why don't you go ahead.

Senator HATCH. That is not the only question and you know it.

Ms. BABCOCK. No. I am sure I interrupted you. It is really one of my habits. But in the footnote, he is saying that there is a real difference between hostile environments for racial minorities and hostile environments for sexual harassment and for women. And he is saying it is quite awkward to apply these principles to women.

And he raises real doubts. He says harassment is reprehensible but title VII was passed to outlaw discriminatory behavior and not simply behavior of which we disapprove. Now, that certainly is saying, I have doubts about whether title VII even applies to sexual harassment, which the Supreme Court held in *Vinson* that it did.

Now, I do want to reach, as a technical matter, Senator Hatch, your last point, because this is a point that I think is really, well, just plain wrong, which is that the Supreme Court upholds Judge Bork on what some people have said is his major point, that traditional agency principles would limit the employer's liability for the acts of his employees.

The Supreme Court said, we decline the invitation to reach that issue because the record is insufficient. The record is insufficient. They said, certainly some agency principles should apply. Some traditional agency principles should apply. We are not saying which ones. We are going to wait for another day when there is a sufficient record.

They certainly did not move ahead to apply the agency principles which Judge Bork wanted to apply.

So the Supreme Court on that point does not hold anything. They certainly do not hold what Judge Bork held, or would hold.

Senator HATCH. Well, let me just make one other comment because my time is up, and my colleagues would like to go on. As you know, he did not write the opinion in *Vinson,* Bork did not.

Ms. BABCOCK. He wrote a dissent from the refusal of the Court to rehear the case.

Senator HATCH. He merely suggested that the case be reheard, and because the Supreme Court reversed the D.C. Circuit Court opinion, I think it proved that Bork was correct, it needed to be reheard, and that is the point I am making, is that this is not a simple little case of—that Bork is insensitive to harassment cases.

I think, if anything, he is sensitive to them. If anything, he has raised valid legal points. If anything, three of them, it seems to me, were adopted by the Supreme Court.

The main three points, and in the process, the matter was resolved by an effective opinion by the Supreme Court.

Be that as it may, you and I both differ on the thrust and the import, and I might say, the reasoning of the cases.

Ms. BABCOCK. Let me just say one word. He reached out to write this opinion. This is another example of what I would really call his activism. I mean, the case was decided by a panel, no one else writes an opinion about the rehearing. Yet Judge Bork dissents.

No one else writes an opinion, on either side. He dissents from the whole court's hearing it, and then lays out these theories—voluntariness, solicitation should be a defense, maybe it should not be in title VII at all.

Senator HATCH. Which the Court adopts.

Ms. BABCOCK. The Court did not. The Court said the opposite, Senator Hatch.

The CHAIRMAN. Well, thank you all very much. We will visit this again, I am sure.

I yield to the Senator from Massachusetts.

Senator KENNEDY. Thank you very much, Mr. Chairman. Maybe just in the time that we have, I would be interested in the thoughts of each of the members of the panel on the equal protection clause.

We recognize that there are a number of standards—strict scrutiny, intermediate scrutiny, and rational basis scrutiny. And obviously the rational basis, a test which has been, was a law for many years, going into the 1890's, was used as a device in terms of discriminating against women.

Judge Bork has indicated that he thought that he could use the rational basis test, and still effectively reach the outcome where the Supreme Court is today in terms of the protection of women's rights.

And I am just wondering if each of the panelists would comment, as distinguished jurists, in some cases, all individuals who are very well experienced in the law, as to whether you believe that is something which we can take at its face value.

Can you really reach where the Supreme Court is now if you continue with a rational basis test in terms of providing the kinds of full protections which the Supreme Court has established under the equal protection law?

Ms. WILLIAMS. Well, Senator Kennedy, he said it, but it is very hard to believe. It is hard to believe because of the extensive history in the Court of the use of the rational basis standard.

Prior to 1971, that standard was applied to sex discrimination cases, and in not one instance in the whole history of the court did it strike down a sex discrimination case under that standard.

Now in 1971 it elevated the standard and the results in those cases changed.

Now maybe what Justice Bork thinks is that he can call it rational basis and just do what the court has done. That is obviously a possibility. He could do that. But there is every reason, in everything he has ever said about sex discrimination, to believe that he will not do it, most particularly his comments on the case of *Craig* v. *Boren,* which I discuss in my testimony, indicate that he is still very much in the traditional way of thinking.

He was willing, in that case, to disagree with the majority of the Court, and with Justice Stevens, who he says uses that same test, and to say that gross statistical differences between the sexes are sufficient to uphold sex-based legislation.

That is the old approach, that is rational basis, and that is still what he is up to. So the answer to your question, simply put is, there is no basis to think he has changed his views, when we look at what he actually says about a particular case.

Senator KENNEDY. I would be interested in the rest of the panel—I guess he used reasonableness as well. Do you see, first of all, a distinction between the two, and if not, I would appreciate the rest of the panel commenting on the initial question.

Ms. HUFSTEDLER. If Judge Bork sees a distinction between rational basis and reasonable basis, he has never articulated what it is.

Second, it is of course possible, when you insulate yourself from any of the existing law on an issue, to decide to use a new or an old word in a Pickwickian sense. It is of course quite possible to say, "Now what I mean by 'reasonableness' in a particular case is the outcome which the Court reached in a heightened scrutiny case."

But that is not a principled way to do it. What I am saying is that I cannot reconcile a distinction which is never articulated between a new form of reasonable basis test and the old-fashioned rational basis test.

We know where the decisions went on these sensitive issues, not only with respect to gender, but also with respect to race, when the Court was adopting the rational standard test.

We know where the Court has been and how it has gotten there on heightened and intermediate scrutiny. This announcement is a way in which to say, "I reject the present tests. I do not wish to have a super-heightened test. I am comfortable with a return to a different test, but I want to leave myself flexible to reach whatever results I may choose to when I am confronted with a problem."

I do not believe that that is responsible constitutional adjudication. I do not believe it shows any deference, either (a) to the legislature, or, (b) to the law of precedent in the Supreme Court.

So, you know, unless you are going to say I am going to use it in a brand new sense which I am not going to share with you, then I cannot see how he can reach the results that have been reached currently.

Ms. **Babcock**. And I would just add, very briefly, that my problem with it really is what the content of it is. It is a content-free standard, and particularly when he talks about placing the right to choose in the equal protection clause, which he would then review by the reasonableness standard, and how does he come out? How would he possibly come out on a bill that is passed on a health matter to regulate abortion by his reasonableness standard?

We do not know. He can come out however he wants to, whatever he thinks. There is no content at all to this standard.

Ms. **Law**. All we know about his new theory is what he told this committee last week. Through his career, I think he has had a tendency to advance opinions without placing them in the context of the fully reasoned opinions of other people who think about subjects, whether they are Supreme Court Justices or scholars.

There has been a lot of writing about equality, both in the Supreme Court and amongst academicians. But Bork did tell us some things last week about his new reasonableness theory.

He told us that he thought it was like Justice Stevens, but, at the same time, the heart of Justice Stevens approach is to recognize, substantively, that the constitutional equality guarantee protects vulnerable groups of people.

Justice Stevens asks not does this law seem reasonable in some free-form way, but would it seem reasonable to the group that is being heard.

Bork, by contrast, explicitly rejects any jurisprudence that is concerned with particular vulnerable groups. As another example, Bork indicated last week that he would uphold sex-discriminatory laws that rested on statistical generalizations.

In discussing *Craig*, for example, he said we need to know more about the facts. In talking about physical strength he said that physical strength differences might justify a sex-discriminatory law.

Stevens rejects that. Stevens understands that while statistical generalizations are true, that does not make them right.

And most fundamentally, Justice Bork indicated in his testimony last week that he perceives that constitutional equality is limited by the social consensus that support it.

He said of course we could not approve the kind of law that was struck down in *Frontiero* that assumed that no women work. Because women got out and into the wage-labor market, and they worked, we can not now assume they do not work.

Justice Stevens I think understands that the Constitution does more than simply reflect social consensus. The Constitution, particularly in this area, is a source of moral leadership for the nation.

Senator Kennedy. Thank you very much for your really superb responses which will be very helpful to the committee.

Senator Humphrey. Mr. Chairman, a parliamentary inquiry with all due respect to Senator Grassley. We have transgressed now on both sides I think equally.

Can we return to the rule so that other Senators have a chance to ask questions? And not only that, but so that the other witnesses, of whom there are a great many waiting, will have a chance to be heard today.

Can we now return to the rule on both sides?

Senator Kennedy. We will ask both the minority and majority staff to watch the clock, and at 5 minutes left, to indicate to the particular Senator. We will instruct a member of the staff to sit next to the witness table and pass a note to whomever is speaking at the time. Reluctantly we will do that.

I will ask both the majority and the minority staff to follow and keep the time, and I will ask the staff to have a member of the staff notify the witnesses.

The Senator from Iowa.

Senator Grassley. Thank you.

Secretary Hufstedler, based on what you said about the right of privacy, I have got to ask about what you think is covered by the generalized right of privacy; because, quite frankly, I have some problems with a right that seems to strike without warning?

Let me ask you, for instance, does a right of privacy, as you view it, and know it, protect, in the bedroom, the right to commit incest?

Ms. Hufstedler. Pardon me? I did not hear it. The right——

Senator Grassley. Does it allow for a right to commit incest in the privacy of the bedroom?

Ms. Hufstedler. Certainly not.

Senator Grassley. Or does it permit the consumption of hard drugs in the privacy of the home?

Ms. Hufstedler. The right of privacy has never been so defined. A right of privacy does not embrace a right to commit what is a crime against another person. It has never been so interpreted.

Senator Grassley. And that is my understanding of it, but I am relieved to hear you say that, because when you make the statements that you do, I just wonder how far you expect, or want, the courts to take that right of privacy?

Ms. Hufstedler. It does protect the right as defined by Justice Brandeis. It is the right to be left alone, the grandest right there is for most human beings who wish to preserve their dignity.

But when a person's notion of the right to be let alone means a right to commit a crime against another human being, nobody has got that right, and it is not valued in civilized society, and of course it is not included in the right of privacy.

Senator Grassley. And just exactly what you said about Justice Brandeis, is a statement that I think Judge Bork made last week, and I think we ought to take note of similarities.

Professor Law, you have brought up a lot of the debate about what Judge Bork might share or might not share with Justice Stevens on equal protection matters.

In fact, I think every witness, to some extent, has offered his or her views on that.

Do you think that Justice Stevens himself is qualified to speak to the issue of whether or not he shares Robert Bork's views?

Ms. LAW. Obviously Justice Stevens is qualified to speak to that issue, and I understand that Justice Stevens did make a comment about this nomination to a bar meeting in the West a few months ago.

Justice Stevens is not, however, I think now free to comment on the way in which you, or I, or any of us might misinterpret what he says. He is a Supreme Court Justice and he has to allow us to debate his views without offering us a correction, if that is in order.

Senator GRASSLEY. But, I think when people are trying to make the point that Judge Bork might be far and away different than Justice Stevens, I think we ought to give some weight to what Justice Stevens says, and this is what he says.

"Judge Bork's judicial philosophy is consistent with a philosophy you will find in opinions by Justice Stewart and Justice Powell and in some of the things that I have written."

Do you think that Justice Stevens would support Robert Bork, if he thought Robert Bork had a radical view of the equal protection clause?

Ms. LAW. I did not and I do not know what to make of that remark by Justice Stevens. It occurred very early. This debate has been a wonderful education for all of us. I think that most of us had not read the complete works of Judge Bork at the time that Justice Stevens made that remark, and I really do not know on what it was based.

Senator GRASSLEY. Well, you have got to have some understanding of Justice Stevens as a personality. Is he someone to make rash judgments, or statements on important matters such as this?

He is not that kind of a person, is he?

Ms. LAW. No, he is surely not that kind of a person, but all I am saying is that it seems to me entirely conceivable, that in an informal, or a semiformal conversation with a small group of people, early on in this process, he might have offered a judgment based on what he then knew, which might not have been as much as we now know about Mr. Bork.

Senator GRASSLEY. Judge Bork has been attacked for his questioning of the logic of the so-called "three-tier" equal protection analysis. That has been a subject of lots of questions here.

We know that Judge Bork favors the approach taken by Justice Stevens; and this is what I would like to have some comment on.

I would like to read from Justice Stevens' concurring opinion in *Craig* v. *Boren*, where he states, "There is only one equal protection clause. It requires every State to govern impartially. It does not direct the courts to apply a standard of review in some cases, and a different standard in other cases. I am inclined to believe that what has become known as a two-tier analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion."

"I also suspect that a careful examination of the reasons motivating particular decisions may contribute more to an identification of that standard than an attempt to articulate it in all-encompassing terms."

Now what I just read to you is rather critical of the multi-tier test, isn't it?

Ms. LAW. It is.

Senator GRASSLEY. I think that is the only answer you can give, Professor. My time is up Mr. Chairman. However, let me conclude by saying this.

I think that this criticism of Juge Bork vis-a-vis Justice Stevens can only mean one thing: today, Justice Stevens is very fortunate that he is not before this same Congress to have his views torn apart, and an incorrect analysis of them given.

That is the only conclusion I can give.

Senator DECONCINI. Thank you, Senator Grassley. Thank you, Professor Law.

Professor Babcock, you go into the right of privacy at some length in your statement here, and you indicate—correct me, but this is the way I understood your observations of Judge Bork's decisions and his writings—that you feel certain that he would not find the right of privacy, nor the equal protection clause adequate as to a strict enough test to come to any conclusion other than to reverse the *Roe* v. *Wade* case. Is that a fair assumption?

Ms. BABCOCK. I think that you cannot say, absolutely, what someone would do, but he has rejected the right of privacy, absolutely, and he cannot recant that because he has done it so vehemently, so constantly.

And I think when you try to locate the right to choice, somewhere other than in a right to privacy, that you then subject it to reasonableness review, and I think in terms of reasonableness review, any kind of restriction that a legislation passes on the right to choice, even if it is a restriction that renders that right meaningless, can be found reasonable under the Court's case law.

Senator DECONCINI. Did you find the same conclusion? Did you analyze, say, Justice Scalia and Justice Rehnquist when they were offered for nomination to Chief Justice and Associate Justice? Did you find that same lack of being able to find a right of privacy, because they have either written or held positions opposite than what the majority of the Court has held in *Roe* v. *Wade*?

Ms. BABCOCK. I did not at the time of those nominations oppose those nominations.

Senator DECONCINI. You did not?

Ms. BABCOCK. I did not, or deal with their work. In fact this is the first nomination that I have ever opposed, because I feel that this is the most extreme.

Senator DECONCINI. So your opposition here is not based solely on his belief as to *Roe* v. *Wade*, but rather, his incapability of finding a right of privacy, and even though Justice Rehnquist and Scalia, and others on the Court have indicated in somewhat similar or closely related opinions, that they might reverse *Roe* v. *Wade*, if they had an opportunity, still, you do not find that out of line if they have been able to find some right of privacy, or, apply the strict test in the 14th amendment, the due process clause? Is that a fair observation?

Ms. Babcock. That is fair, but I do think that from Judge Bork's whole judicial philosophy, that it would be very difficult for him, rejecting the right to privacy as he does, to locate a right to choice anywhere in the Constitution. It would be against the whole trend of his writing and thinking for the last——

Senator DeConcini. What if he found a right of privacy, but he still felt that in the case of abortion, that the right should not apply there?

What would your feelings be then towards Judge Bork?

Ms. Babcock. Well, since I do think that the right to choose is absolutely fundamental to women's equality, I would be tremendously upset. But I think that that flowing from the right to privacy, once you find that, it is very hard to find that freedom of choice, reproductive freedom is not included. A right to privacy must include that most basic, most private decision: when and whether to bear a child.

Senator DeConcini. But my hypothetical is, is really if you do find a right to privacy, or if you use a strict standard and justify *Roe* v. *Wade* under the equal protection clause or some place else—if you do come to that conclusion, then, if you, however hold differently on the case from your constitutional interpretation, it is not the issue of abortion, is it?, rather than how they come to the conclusion of deriving either the right of privacy or the application of the equal protection?

Ms. Babcock. See, I have lost the ball in the sun here.

Senator DeConcini. Well, my concern is this, is that I do not know, quite frankly—I think I do know—I do not know whether the *Roe* v. *Wade*, the abortion issue, is such a prominent issue with you, that anyone, regardless of how they might come down on privacy or equal protection could never satisfy you, that they should be qualified to sit on the Supreme Court.

Ms. Babcock. I think it is an absolutely central issue, but no, I would not say that a person's disbelief in the right to abortion would disqualify them from sitting on the Supreme Court.

Senator DeConcini. So it is not the abortion issue per se with Judge Bork, as it is his constitutional interpretation of whether or not the equal protection clause applies, or whether or not a right of privacy can be sustained by his own judgment and his testimony.

Ms. Babcock. Yes.

Senator DeConcini. I am sorry, I have run out of time, and I am the enforcer. I find myself dying to ask you another question on the equal protection clause, Secretary Hufstedler, but I will yield to the Senator from Pennsylvania.

Senator Specter. Mr. Chairman, the buzzer is about to go off on the last half of the vote.

Senator DeConcini. No, the Senator has ample time. The buzzer just started. The second buzzer has not started, so the Senator can use his 5 minutes now, if he likes.

Senator Specter. I shall proceed until the second buzzer goes off.

Madam Secretary Hufstedler, let me begin with you, if I may.

You have been a judge in your very distinguished career, and one of the issues that has been discussed at some length in these proceedings involves the capacity of Judge Bork, if confirmed, to apply principles that he does not necessarily agree with.

And you have made a remarkably good case for adult education. I think that there has been a lot of adult education in this room in the course of the past 2 weeks. We have had it in the past 2 hours with this panel. I have had quite a lot in the last 2 weeks, and maybe there has been some education or shift by Judge Bork in the course of these proceedings.

Chief Justice Burger testified on Wednesday of this week, that it was frequently necessary for the Supreme Court to apply principles of law which the individual Justices did not agree with.

Now Judge Bork has had a significant shift on the freedom of speech issue, and he has had a significant shift on the applicability of equal protection of the law to women, for example, and let's bypass, for a moment, what standard he is going to apply. That is a subject of very extended debate.

But assuming he accepts—he has taken an oath, he does not want to be disgraced in history. And I ask this to you, Madam Secretary, because you have been a judge.

Isn't it common for judges to apply, in good conscience, principles of law that they do not agree with? And if that is so—and I am going to put a second question in, although I do not like to—but for purposes of brevity, isn't there some reason to believe that Judge Bork would have the capacity to do that, even though it would be contrary to personal philosophies he has expressed in the past?

Ms. HUFSTEDLER. As to the first question, as a judge, and other persons who sit on U.S. courts of appeals, are frequently called upon to enforce law announced by the Supreme Court of the United States and by one's colleagues on other panels, even though one devoutly disagrees with it.

Ofttimes that is expressed—however, I agree under the compulsion of, and explain reasons why, if it were an original question you would reach a different result.

The same kind of constraint does move Justices of the Supreme Court of the United States to pay some attention to stare decisis.

Judge Bork, and sometimes Professor Bork, has indicated that there was not the same kind of compulsion to follow stare decisis in terms of constitutional adjudication, a principle with which I primarily disagreed.

Change should never be made quickly, but change eventually must be made.

Senator SPECTER. But he has pretty much made a commitment to this committee on that subject. Whether it is accepted, or not, is another matter.

But he has articulated a pretty standard doctrine for applying stare decisis, as he testified here.

Ms. HUFSTEDLER. Senator Specter, I always believe there is a possibility for a revelation on the road to Damascus. I am not so sure there is on the road to the Supreme Court.

One cannot bind oneself, as a Justice of the Supreme Court of the United States, to obey any promise made to any constituency at any time, including the presidency of the United States, or one is unfit to serve as an independent member of the Supreme Court of the United States.

Senator SPECTER. Well, it is not a promise that is enforceable by a specific performance, one lawyer to another——

Ms. Hufstedler. It certainly is not.

Senator Specter [continuing]. But he might be constrained by being disgraced in history. He has made a fair number of commitments—and I am not saying that is sufficient—but he has made a fair number of commitments to this committee.

Ms. Hufstedler. I have to say, Senator Specter, that I have grave doubt about any candidate's making a commitment to a confirming committee, as if that is the proper thing to do.

I do not suggest to you that I believe that Judge Bork is a man who has no principle or that he is a dishonest man. But I also know in human experience, going back to the marriage analogy, people do promise with the deepest devotion to love, honor, and obey for life, and the divorce rate in the United States is extraordinary.

And that even by those who say so, who believe, or believe they believe, that marriage is a covenant with God.

Senator Specter. Well, there is a lot of experience that promises are not kept, but the shift in position is one which I ask you about because it is something that we have to evaluate.

Professor Babcock, let me ask you a question in the brief time I have remaining——

Senator DeConcini. I am sorry, Senator Specter. We are trying to enforce the rule here, and the Senator from Vermont wants to proceed before the vote, too, and your 5 minutes has elapsed.

Senator Specter. Thank you very much.

Senator DeConcini. The Senator from Vermont.

Senator Leahy. Thank you, Mr. Chairman. Normally, I would not mind, but I know we have only got about 6 minutes left in this rollcall, so that is going to enforce me, too.

This has been an extraordinary panel and I am very, very happy that all four of you are here. Madam Secretary, it is nice to see you back here on the Hill.

Ms. Hufstedler. Thank you very much, Senator.

Senator Leahy. Professor Law, let me just ask you a couple of basic questions on this, because we have heard all kinds of claims up here that we should sort of put aside Judge Bork's scholarly writings, and instead look at his decisions as a circuit judge.

And it has been claimed that if we do that, we will see him in the forefront of equal protection for women.

Now I spent a good hunk of the month of August back in my home in Vermont reading his decisions and that escaped me, and I know on Tuesday, Professor Born gave a glowing appraisal of his civil rights rulings. Again, on Wednesday, Senator Simpson repeated the claim that Judge Bork had been right in there with the claims of women and minorities in rulings on the circuit court.

Let me ask you, you have read these cases, have you not, Professor Law?

Ms. Law. Yes, and I have read Mr. Born's submission. For the most part, Judge Bork's sex-equality decisions as a circuit court judge are "bread and butter" cases that could not have been decided in any other way, in which he joined a unanimous panel.

One difficult case is *Vinson* which has been discussed here. The two bits of evidence that Mr. Born points to as confirming that

Judge Bork was committed to sex equality prior to his nomination are these.

One, his concurrence in dissent in a case called *Cosgrove* that raised complex issues of equal treatment of male prisoners housed in different facilities here in the District.

A sex-equality claim was raised about the alleged difference in treatment of male and female prisoners in relationship to standards for parole.

The case came up at a very, very early stage in the proceeding. Judge Bork went along with the decision remanding the case to the District Court for factfinding on the equality claim. He said nothing in that remand about the standard of review. He cited no Supreme Court case. He just went along with a majority judgment in a fairly bread and butter case.

Senator LEAHY. In fact in any of these did he lay out an analysis of the equal protection clause of the 14th amendment?

Ms. LAW. None whatsoever. He just went along.

The second example that is cited relates to an action he took as Solicitor General in a case called *Vorchheimer* v. *City of Philadelphia School Board.*

That was a case in which a young woman sought to go to the all-boys high school in Philadelphia. She proved, and the court found, that the boys' high school was superior in relationship to its library, its facility, its science facility, and in several significant respects.

She argued two things. One, that where the girls' school and the boys' school are in fact unequal, it discriminates to keep a girl out of the better school, and two, that with sex, as with race, as a matter of principle, segregation is wrong.

Judge Bork filed an amicus brief for the United States which Mr. Bork describes as demonstrating his commitment to equality for women. Now what Solicitor General Bork in fact did in that brief—a brief that is curious in that it is signed only by him—was to urge that the Supreme Court remand the case for further findings of fact.

He did not support any of the equality claims that the plaintiffs there had made, and he concluded that brief saying this, which I find very disturbing.

"To the extent that any professional disadvantages for graduates of girls' high result only from sex prejudice in the community, Petitioner's complaint in this regard would seem to raise only an issue concerning the possibility that sex stereotypes in the community are reinforced by the city's sex-segregated high school, an issue which could be regarded as having greater political than constitutional dimension, especially in light of the fact that women are not a political minority."

Essentially he is saying here that unless the woman can show that the inferior high school is going to hurt her down the road in her career she has no claim, because it could just be that she was hurt as a result of sexism generally, rather than the bad school.

Senator LEAHY. In the little time remaining, let me ask you this, as a yes or no question of each one of you.

You have read all of the decisions by Judge Bork. Do those decisions put Judge Bork in the forefront of civil-rights jurisprudence? Professor Williams?

Ms. **Williams**. Absolutely not?

Senator **Leahy**. Secretary Hufstedler.

Ms. **Hufstedler**. No.

Senator **Leahy**. Professor Babcock?

Ms. **Babcock**. No way.

Senator **Leahy**. Professor Law?

Ms. **Law**. I think not.

Senator **Leahy**. We will stand in recess, subject to the call of the Chair. Thank you.

[Recess.]

Senator **Heflin**. If we could come to order, the panel that was here, I believe Senator Humphrey has some questions. If they would return, we will try to expedite it as much as we can and prevent the loss of time because of voting.

Would you like to go with Judge Hufstedler, or do you have somebody else?

Senator **Humphrey**. I would prefer to wait for all of the witnesses, Mr. Chairman.

Senator **Heflin**. All right.

[Pause.]

Senator **Heflin**. All right. Senator Humphrey, if you would like to go ahead.

Senator **Humphrey**. Thank you, Mr. Chairman.

I would like to address some questions to Professor Babcock. Professor, you seem to postulate a very broad right of privacy. I return to this subject because it is a legitimate concern of all citizens; we all value our privacy. We all know the necessity of privacy for dignity and even freedom.

But the question, I think, is is privacy vast and unencumbered. I think not. In the context of ordered liberty, it is not.

But you seem to postulate a very, very broad concept, doctrine, of privacy rights. Is there nothing, then, under your concept, your doctrine, which legislatures may properly proscribe?

Ms. **Babcock**. Oh, certainly, there is. And as the exchange with Secretary Hufstedler said, certainly, criminal acts, and——

Senator **Humphrey**. Yes. But I am not talking about acts which involve violence, assault upon another person, or fraud, but other activities, consensual activities.

Ms. **Babcock**. I would like to defer to one of the other panelists. My concern with privacy, my major concern with privacy here, is with that as the basic doctrine that protects a woman's right to choose, and——

Senator **Humphrey**. I understand, I understand, but I am not going to permit you to evade the question, if I can help it.

You spoke on the issue of privacy and engaged in an interchange about decisions that hinged on the right to privacy and how broad or how narrow that is. Indeed you have written, in the Journal of Human Rights back in 1973—and I hope you do not mind us going back that far, and assuming you do not, if you changed your mind, I am not going to hold that against you or accuse you of opportunism or campaigning—but you wrote back in 1973, to quote you, in the Journal of Human Rights, page 293, "It seems likely that the right to privacy and equal protection arguments made in the Rosenbleat and Pariente article in this issue, will be raised with increasing frequency and success, perhaps affecting for all practical purposes the decriminalization of prostitution."

Well, let us seize on that example which you use in that article. Do you feel that the doctrine of privacy is so broad that legislatures may not proscribe prostitution?

Ms. BABCOCK. I really would have to have a case on that, and——

Senator HUMPHREY. But you made a very general statement here. Are you backing away from that?

Ms. BABCOCK. Yes. I do not even remember that article, but I think that that is a possibility, that I was probably talking about the possibility of decriminalizing prostitution in terms of the administration of the criminal law.

Senator HUMPHREY. Well, my question is under your doctrine of privacy, and your scope of the privacy right, may legislatures properly proscribe prostitution or not?

Ms. BABCOCK. Well, certainly they can, certainly they may, yes.

Senator HUMPHREY. They can. But you seem to be changing position from your 1973 article.

Ms. BABCOCK. No. I said that is something that might occur in terms of the administration of criminal law. I apparently said that. I do not know what context it was in. But I say certainly in terms of the right to privacy, that legislatures could do that.

Senator HUMPHREY. Could proscribe prostitution.

Ms. BABCOCK. Certainly—and they do—without any problems with the right to privacy.

Senator HUMPHREY. Yes, indeed they do. But in that case, you seem to be saying that there are legitimate grounds for judges to proscribe to some extent the right to privacy; that is to say, it is not completely unbounded.

Ms. BABCOCK. Absolutely right, absolutely.

Senator HUMPHREY. Then, if you want to go beyond the explicitly stated rights of privacy in the Constitution to a much broader general right to privacy, how do judges decide which things legislatures may properly proscribe and which things they may not properly proscribe, except on the basis of personal values of the judge?

Ms. BABCOCK. I think they do it on the basis of both looking into the history of our country, the values of our country, the values as they are evolving.

Senator HUMPHREY. But that is very much a subjective decision, is it not, in a case like this?

Ms. BABCOCK. Of course it is subjective. It is no more subjective, however, than a test of reasonableness.

Senator HUMPHREY. Well, the point I am trying to make in this rhetorical question is that Judge Bork is not against privacy rights. He is certainly in favor of those explicitly defined in the Constitution. But the important distinction for people to understand is that some—and I thought you, but apparently not—advocate an unlimited, unencumbered right to privacy, and that is unworkable except in the context of judges deciding—that is to say, if you do not adopt that broad context and that broad right, then the situation is unworkable. If you say judges can proscribe in some cases and some not, it is chaos. And that is Judge Bork's point.

Ms. BABCOCK. Judge Bork's point as I understand it is that there is no way to find a right to privacy in the Constitution, and he cannot find such a right. And he says he has looked, and it is just not there anywhere.

Senator HUMPHREY. Yes. Well, if you look in State constitutions, you will see a number of very explicitly broad rights to privacy, which you will not find in the Constitution. And so Judge Bork is right in that respect, it seems to me.

Ms. BABCOCK. That is right that it does not say it in so many words, but the values that are implicit in the Constitution, many, many Justices have found do include a right to privacy.

Senator HUMPHREY. It is a real thicket, it is a real thicket. And the better alternative is for legislators to explicitly define further rights of privacy, as we have in Congress and have State legislatures for their part.

Ms. HUFSTEDLER. May I add something——

Senator HEFLIN. You have about 1 minute.

Senator HUMPHREY. I have already gone over my time, but if the Senator wishes to grant the witnesses more time, I have no objection.

Senator HEFLIN. Are those all your questions?

Senator HUMPHREY. Yes.

Senator HEFLIN. Thank you. We appreciate all the members of this panel being here. I believe this concludes it. Thank you very much.

Ms. HUFSTEDLER. Thank you.

Senator HEFLIN. The next panel is Professor Daniel Meador, Professor George Priest, Professor John Simon, Professor Ronald Rotunda, and Professor Forrest McDonald, if they will come forward.

I am told that Professor McDonald is to go first. We are delighted to have Professor McDonald, Professor of History at the University of Alabama, who is quite an outstanding scholar.

First, if each of you will stand and raise your right hand, we will swear you in. Do you solemnly swear that the testimony you will give will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. MEADOR. I do.

Mr. PRIEST. I do.

Mr. SIMON. I do.

Mr. ROTUNDA. I do.

Mr. McDONALD. I do.

Senator HEFLIN. Thank you. Professor McDonald, we are honored that you are here with us, as well as all the other professors.

Please go ahead.

TESTIMONY OF A PANEL CONSISTING OF FORREST McDONALD, DANIEL MEADOR, GEORGE PRIEST, JOHN SIMON, AND RONALD ROTUNDA

Mr. McDONALD. Thank you, Senator.

I want to try to place these hearings and the qualifications of Judge Bork in some historical perspective, if I may.

I have studied the Constitution of the United States and the history of the Constitution of the United States all my adult life. In the past few weeks, I have been intensively studying a particular aspect of the subject just for this purpose.

What I did was, I went through such records as I could find about the eight Justices of the Supreme Court in this century who are uniformly—or almost uniformly—by scholars regarded as the great ones. This would be: Justice Holmes, Justice Brandeis, Justice Hughes, Justice Stone, Justice Cardozo, Justice Black, Felix Frankfurter, and Earl Warren.

Now, there is a large body of writings by both them and Judge Bork, and I have compared these just to see about lucidity, learning in the law, and intellectual keenness. And here is the result of such a comparison.

It has to be admitted that Justice Cardozo and Justice Holmes were both considerably better qualified than Judge Bork in these terms. And Justice Frankfurter would have to be regarded as just about an equal to Judge Bork. Judge Bork is clearly superior in these terms to each of the other five.

As to judicial experience, once again Cardozo and Holmes had more distinguished legal careers than Bork has had so far. But none of the other appointees or nominees had had any judicial experience at all, except that Hugo Black had had a brief time, 18 months or so, as a police court judge in Birmingham in his youth.

What other criteria have been brought to bear, what historically have been brought to bear, what should be brought to bear? Well, obviously, the political party. Democrats nominate Democrats 90 percent of the time, and Republicans nominate Republicans 90 percent of the time.

A few Presidents have looked into what Theodore Roosevelt called the "real politics" of the man; that is to say, his ideology, his political philosophy, even how he is expected to rule on particular controversial cases.

Whatever the merits or demerits of such an approach might be, it has the singular flaw that it is absolutely and totally unreliable.

Justice Brandeis, after a very bitter hearing, was confirmed despite the fact that he was expected to be kind of a wild man on antitrust law. Well, the fact is that Brandeis on the bench, and a long and distinguished career on the bench, only wrote one antitrust opinion.

My favorite case, I think, is Harlan Fiske Stone. Calvin Coolidge read some books and articles that Stone had written while he was a law professor and decided, "This man is a reactionary, and that is my kind of man." And he was appointed to be a reactionary. He turned out in fact to be so liberal that in 1941 when Justice Hughes retired, Franklin Roosevelt, no less, appointed him Chief Justice.

And what would one make of Justice Hugo Black, the great, distinguished jurist from the State of Alabama? Hugo Black had been a member of the Ku Klux Klan. He admitted he had been a member of the Ku Klux Klan. Who could have predicted on the basis of that that he would have been a great civil libertarian?

And what would one make of Earl Warren, for goodness' sake? Earl Warren's only record in regard to race was in the persecution, the vigorous persecution, of Japanese during World War II as attorney general of the State of California.

In other words, you cannot know how Judge Bork is going to rule, and it is fruitless to inquire. You just do not know when a man puts on the judicial robes what it is going to do to him. It transforms people.

Finally, it seems to me that the crucial element to be taken into account is judicial philosophy, not political philosophy. Judge Bork has made his judicial philosophy perfectly clear. He believes in restraint, he believes in deference to the democratic bodies, or democratically elected branches of Government, and he believes in the rule of law—the Constitution, statutory enactments, and judicial precedents, in that order of priority.

In propounding judicial restraint, Bork places himself squarely in the mainstream of a hallowed tradition—I quote Hugo Black—A decision "based on subjective considerations of 'natural justice' is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights."

And Brandeis: "We must be ever on guard lest we enact our prejudices into legal principles."

And Frankfurter: "I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard."

As to deference to the democratic branches, this is also a long and hallowed tradition. I could quote you a lot of people on the subject. But my favorite is Justice Holmes who, when Justice Stone came onto the bench at the age of 61, said to Stone: "Young man, about 75 years ago, I learned that I was not God. And so, when the people want to do something I can't find anything in the Constitution expressly forbidding them to do, I say, whether I like it or not, 'Goddammit, let 'em do it.' "

As for following the Constitution, I quote you Thomas Jefferson: "Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction."

If that is too old timely for you, I quote you Frankfurter again: "The ultimate touchstone of constitutionality is the Constitution itself, and not what we have said about it."

And Earl Warren: "Every exercise of governmental power must find its source in the Constitution."

And I would close with this remark—two remarks. One is that—I quote John Dickinson, who was a very distinguished statesman from the State of Delaware, our Founding Father——

The CHAIRMAN. I thank you for acknowledging that.

Mr. McDONALD. He pointed out that the Constitution is written, quote, "in the most clear, strong, positive, unequivocal expressions of which our language is capable. While the people of these States have sense, they will understand them; and while they have spirit, they will make them to be observed."

Now, gentlemen, this is a very, very important hearing, but it is not the most important hearing regarding the Supreme Court that the Senate ever conducted. That took place early in the year 1805, the impeachment of Justice Samuel Chase.

Samuel Chase was impeached by the House for purely political reasons; they did not like his politics and they did not like his decisions. And the whole subject of the independence of the judiciary was on trial. Fortunately, the Senate had the decency and the courage and the reverence for the Constitution to acquit Justice Chase on all charges and thereby save what I regard as the sacred principle of judicial independence.

I would quote you one last sentence from the man who presided over that trial of Justice Chase, Aaron Burr, Vice President: "If the Constitution be destined ever to perish by the sacrilegious hands of the demagogue or the usurper, which God avert, its expiring agonies will be witnessed on this floor."

Thank you.

[Statement of Professor McDonald follows:]

Statement: Forrest McDonald

I quote the senior senator from Massachusetts: This man "may be keen of intellect . . . but his record impeaches him on far higher grounds than those of intellectual ability." And the Detroit Free Press: Of all the recent appointees, he is "perhaps the least fit for the calm, cold, dispassionate work of the Supreme Court." And the New York Times: "To place on the Supreme Bench judges who hold a different view of the function of the court, to supplant [moderation] by radicalism, would be to undo the work of John Marshall and strip the Constitution of its defenses."

The subject of these observations was not Judge Bork, but Louis Brandeis, on the occasion of his nomination by President Wilson in 1916. It was repeatedly charged, during the bitter four months of hearings, that Brandeis lacked a proper "judicial temperament," and six former presidents and the then-current president of the American Bar Association pronounced him "not a fit person to be a member of the Supreme Court." Yet Brandeis proved to be a great justice.

I mention the case of Brandeis because, as a historian I believe I can place the qualifications of Judge Bork in historical perspective. It happens that there is a strong consensus among scholars as to the merits of past justices. In 1970, sixty-five experts on the Court evaluated the performance of the ninety-six justices who had served from 1789 to 1969. Justices were categorized as "great," "near great," "average," "below average," and "failure." Of the twelve classified as great, eight were appointed during the 20th century: Oliver Wendell Holmes, Charles Evans Hughes, Louis Brandeis, Harlan Fiske Stone, Benjamin Cardozo, Hugo Black, Felix Frankfurter, and Earl Warren. Materials are at hand for making a fair comparison of Judge Bork's credentials with those of these great justices at the time of their nominations.

The first criterion--after integrity, intelligence, and lucidity--should be the depth and breadth of learning in the law. In a comparison of Bork's writings with their, though his are voluminous and formidable, he must be ranked below both Holmes and Cardozo. Holmes' book on the common law (1881) still stands as a classic, as do three of Cardozo's books. Frankfurter was a very learned student of the law; I think most knowledgeable people would rank him and Bork roughly on a par. Hughes, Brandeis, Stone, Black, and Warren were men of obvious ability but none, with the possible exception of Stone (who was dean of Columbia Law School), had pretentions to great legal learning; and all must therefore be regarded as inferior to Bork in this respect.

Another criterion is judicial experience. Judge Bork has served on the Circuit Court for five years. The standard measure of the quality of a lower court judge's performance is the frequency with which his decisions are overturned. Bork has written upwards of 100 majority opinions and none has been overruled. He has also written six dissenting opinions which, on appeal, were upheld against the majority opinion.

Comparing that record with those of the "great" 20th century justices, we find again that Holmes and Cardozo were better qualified. Holmes had served with distinction on the Supreme Court of Massachusetts for nearly twenty years; Cardozo had served with equal distinction for eighteen years on the New York Court of Appeals. Black has served briefly as a police court judge; the other five had had no previous judicial experience.

What additional criteria can be applied? Constitutionally the president and the Senate are at liberty to employ any standards they please. Historically, presidents have usually taken politics into account--naming justices occasionally as rewards for political services or even out of croneyism, often with a view toward appealing to ethnic, religious, or other voting blocs, and nearly nine-tenths of the time with regard to party affiliation.

Some of the stronger presidents have been guided by what Theodore Roosevelt described as "the real politics of the man," meaning his political philosophy or even his expected stand on specific issues. That has generally been accepted as legitimate--Franklin Roosevelt appointed nine justices, and in every instance the first criterion was support of his New Deal programs--but it has the signal disadvantage of being unreliable. Jefferson and Madison, between them, appointed to the then-seven-man court five justices whom they thought shared their political philosophy, yet the Court remained under the domination of the Hamiltonian Federalist, Chief Justice Marshall. Lincoln appointed Salmon Chase as chief justice, at least in part to assure that the Court would uphold the wartime legal tender laws, which as Secretary of the Treasury Chase had fashioned; but the Chase Court promptly declared the acts unconstitutional, Chase himself writing the opinion. Theodore Roosevelt appointed Holmes as a prospective trust-buster; a year later Holmes voted against the government in its Northern Securities Company antitrust suit, inspiring the president to declare that he could carve out of a banana a backbone firmer than Holmes'. Brandeis, chosen in large measure for his strong antitrust convictions, never wrote an antitrust decision.

The Senate has used various criteria in determining whether to confirm. The only nominee of George Washington's to be rejected was John Rutledge because he was rumored to have become insane. None of John Adams' three nominees was rejected, although Federalists in the Senate preferred that Justice William Paterson be moved up to the Chief Justiceship instead of John Marshall. But they reluctantly agreed to support Marshall when Adams remained adamant.

During the 19th century the Senate rejected 22 out of 67 nominees. Some were rejected because of gross incompetence; most were rejected on political grounds. In this connection, it is important to recall that from the 1830s almost until the end of the century, American politics was notoriously corrupt and vicious, that most presidents served only one term, and that the executive branch (except under Lincoln) was regularly subordinated to the legislative.

In this century the confirmation process has been nonpartisan, though considerable controversy and opposition have attended some nominations. The Senate has rejected only four nominees. The first rejection is regarded by most scholars as having been a mistake. In 1930 President Hoover nominated Chief Judge John Parker of the Fourth Circuit Court of Appeals. Parker was attacked vehemently by the AFL and the NAACP as being anti-labor and racist, and he was turned down by a two-vote margin. Subsequently, continuing to sit on the Fourth Circuit, he handed down a number of landmark decisions favoring the rights of blacks. This example should remind us that Hugo Black's nomination was attacked because he had been a member of the Ku Klux Klan, yet he proved to be a great champion of civil liberties.

The second not to be confirmed was Lyndon Johnson's nomination of Justice Abe Fortas to succeed Chief Justice Warren in 1968. Fortas was not specifically rejected: instead, after three months of acrimonious debate he withdrew his name from consideration. The third and fourth rejectees, Nixon's back-to-back nominees, Clement Haynsworth and G. Harrold Carswell, were refused confirmation on grounds of racism, incompetence, and questionable ethics.

It should be added that in one instance the Senate more or less imposed its will upon a president. When Holmes retired, Hoover sought to replace him with someone who would retain the ethnic, regional, and ideological balance of the Court. For that reason, he ranked Cardozo ninth despite Cardozo's superior qualifications. To the Senate's credit, it insisted that efforts to preserve some hypothetical balance should not take precedence over a man's qualifications.

Most scholars agree that another quality that should be considered is that elusive something called judicial temperament. This is almost impossible to evaluate except on the basis of performance as a judge because lawyers, by the nature of their calling, engage in adversarial activity. Quickness, shrewdness, and combativeness are at a premium. Brandeis had these qualities in abundance; they explain both his phenomenal success at the bar and the charge that he lacked a judicial temperament. On the bench, however, he proved to be a model of evenhandedness and propriety.

In the case of Judge Bork we have definitive evidence in advance. As lawyer and teacher Bork was every bit as fiery and combative as Brandeis had been. He was acting as advocate, as properly he should. But when he took off his advocate's hat and put on his judicial robes, he was obliged to, and did, behave with decorum, moderation, and restraint.

A more reliable indicator than either political ideology or temperament is judicial philosophy. Bork has made his judicial philosophy clear: judges must exercise restraint; in doubtful cases they should defer to the democratic branches of government; they should always be guided by the law as prescribed by the Constitution, legislative enactments, and judicial precedent.

By restraint, Bork means that judges must not allow their personal beliefs, policy preferences, or notions of morality to govern their decisions. No judge can ever be entirely free of prejudice, but every good judge strives to be; and on the Circuit Court Bork has more than once issued rulings that were contrary to what I am sure were his preferences. This does not mean that judges should be rigid, compassionless automatons, but Bork shares Sir William Blackstone's view that "the liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. And law, without equity, though hard and disagreeable, is much more desirable for the public good, than equity without law: which would make every judge a legislator, and introduce most infinite confusion."

In propounding the concept of judicial restraint, Bork places himself squarely in the mainstream of a hallowed judicial tradition. The greatest of all English jurists, Lord Mansfield phrased the principle in this manner: "Whatever doubts I have in my own breast with respect to the policy and expediency of this law . . . I am bound to see it executed according to its meaning." Scholars are almost unanimous in condemning the Supreme Court under Waite and Fuller (1874-1910) for reading into the Fourteenth Amendment laissez-faire economic doctrine, and in large measure it is because the Court returned to the principle of restraint that the great justices are regarded as great. I quote Hugo Black: A decision "based on subjective considerations of 'natural justice' is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights." And Holmes: "This court always had disavowed the right to intrude its judgment on questions of policy or morals." And Brandeis: "We must be ever on our guard lest we enact our prejudices into legal principles." And Frankfurter: "I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischevious I may deem their disregard."

Restraint is a logical corollary to the second proposition, deference to the democratic branches, and both arise from the conception of the separation of powers. Montesquieu set forth the classic formulation: "There is no liberty, if the judiciary power be not separated from the legislative and executive. . . . In despotic governments there are no laws; the judge himself is his own rule . . . in republics, the very nature of the constitution requires the judges to follow the letter of the law." Hamilton quoted Montesquieu in Federalist 78, the essay which enunciates the principle of judicial review. But Hamilton added that judicial review does not "suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both." Justice James Wilson in his 1791 law lectures said that "the judge will remember, that his duty and his business is, not to make the law, but to interpret and apply it."

Justice Holmes put it with characteristic saltiness: "About 75 years ago I learned that I was not God. And so, when the people . . . want to do something I can't find anything in the Constitution expressly forbidding them to do, I say, whether I like it or not, 'Goddamit, let 'em do it.'" Justice Stone rephrased that position in language quite similar to that used by Bork in a recent article: "Courts are concerned only with the power to enact statutes, not with their wisdom . . . . For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the process of democratic government." A modern justice, classified as "near great," John Marshall Harlan, said much the same thing: "There is not under our Constitution a judicial remedy for every political mischief. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives." So did another "near great" justice, William O. Douglas: "Congress acting within its constitutional powers has the final say on policy matters. If it acts unwisely the electorate can make a change."

In reality, of course, judges do make law in the process of interpreting, expounding, and applying it; and all too often they also make law because, in the absence of external restraints they lack internal restraint. Recognizing this, the Emperor Justinian, in promulgating his code in 535 A.D., strictly forbade judges from any "interpretation." But beginning with "glossators" who merely explained the meaning of individual words, judges gradually expanded their activities until, by the 17th century, every nation and principality in Europe had different laws even though all nominally adhered to the Justinian Code. The English common law was entirely judge-made, though from time to time it was confirmed or amended by parliamentary enactment. The Napoleonic Code of

1802 flatly prohibited judicial interpretation but was nonetheless totally transformed--murdered, Napoleon called it--by a single generation of judges. And it is obvious that the Supreme Court has read into the Constitution things that are not there--as it did, for example, in the Dred Scott case.

And yet one of the virtues of our Constitution is that it is not a rigid code but a flexible set of rules for the exercise of power--flexible enough so that when justices make mistakes they can rectify them. In the *New York Times* Anthony Lewis took Bork to task for criticizing various Supreme Court decisions, and he cited Frankfurter's words about the importance of precedent. What he did not point out was that Frankfurter, during his first four years on the Court, participated approvingly in the reversal of twenty-five previous rulings. Indeed, between 1810 and 1984 the Court overturned its own previous decisions more frequently (150 times) than it declared Acts of Congress or parts thereof unconstitutional (134 times). As Justice Black said, "This Court has many times changed its interpretation of the Constitution when the conclusion was reached that an improper construction had been adopted . . . .A constitutional interpretation that is wrong should not stand."

Which brings us to Bork's third principle of judicial philosophy. He describes himself as an originalist, by which he means that in expounding the Constitution and applying it to democratically enacted laws, the judiciary should be guided by the Constitution as the Supreme Law. If it does otherwise it undermines the very basis of its authority. The proposition should be self-evident. As Thomas Jefferson said, "Our peculiar security is in the possession of a *written* constitution. Let us not make it a blank paper by construction." Or as Washington declared, "If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed." And as Marshall wrote in Marbury v. Madison, "The judicial power of the United States is extended to all cases arising under the Constitution. Could it be the intention of those who gave this power to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises? That is too extravagant to be maintained. . . . Why does a judge swear to discharge his duties agreeably to the constitution . . . if that Constitution forms no rule for his government?"

Lest it be thought that position be outdated, let us again refer to Justice Frankfurter: "Judicial exegesis is unavoidable with reference to an organic act like our Constitution, drawn in many particulars with purposed vagueness so as to leave room for the unfolding future. But the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." And, finally, Chief Justice Warren: "Every exercise of governmental power must find its source in the constitution."

Never has the Senate rejected the nomination of a justice for the reason that he will take seriously his oath to uphold the Constitution. It would be an irony and a tragedy if it were to do so in this our bicentennial year.

The **Chairman**. Thank you very much, Professor.

Is there a preference in which you would like to go?

Mr. **Priest**. Mr. Chairman, my name is George Priest, and I teach at Yale Law School. I have been appointed as something of a monitor for this panel, to try and keep everyone within their time limits.

The **Chairman**. And you, I can see, are having as much trouble as I am. But go ahead. Who is next?

Mr. **Priest**. We do have an order.

The next speaker will be Daniel J. Meador, who is the James Monroe professor and the director of the graduate program for judges at the University of Virginia.

The **Chairman**. Yes. Professor Meador, it is a pleasure to see you here.

Senator **Kennedy**. I am a graduate of the Law School, Mr. Jefferson's Law School, and I know the high regard in which Professor Meador is held.

The Senate is now doing the defense authorization bill, and we have a series of amendments, and after the current amendment is up, I am going to have to go over to the floor and deal with those amendments. So I hope the panel will try to hear both sides, although my views are well-known about the nominee.

But I want to in advance, Mr. Chairman, apologize if I have to absent myself.

Senator **Heflin**. Mr. Chairman, since Senator Kennedy took a word of personal privilege, I would like to do it, too, on Professor Meador. He is an Alabamian and was dean of the University of Alabama Law School. He was a clerk to Justice Hugo Black, and is in my judgment one of the eminent brains of jurisprudence in America today, and we are delighted to have Professor Meador here.

The **Chairman**. And Professor Meador and others, I may also be in and out, because the Sessions nomination may be brought to the floor, which I will have to move, to be Director of the FBI; but I do not expect that to come very shortly.

Now, without any further ado, we will move forward.

Dean, it is a pleasure to have you here. Please proceed.

TESTIMONY OF DANIEL MEADOR

Mr. **Meador**. Thank you, Mr. Chairman, and members of the committee. In view of all that has just been said, perhaps I should submit my written statement and leave, and be ahead of the game. It is a privilege and honor to be here, and I appreciate those comments.

I have submitted a written statement. I will just try to summarize the essence of it in a few minutes.

Senator **Kennedy**. The entire statement will be placed in the record as if read.

Mr. **Meador**. Thank you, sir.

These proceedings seemed to me, as I have watched them, to have become an unintended celebration of the bicentennial of the

Constitution, and I want to take that as my takeoff point. It is becoming increasingly difficult here to say anything new, and I don't pretend that I have something wholly new, but I do think I have a point that has not been addressed very much and I deem it to be one of supreme importance. I would like to try to offer just a thought or two that may be of some help to the committee and the Senate as a whole.

It has to do with the constitutional process that is involved here, a process expressly authorized in article II of the Constitution, signed just 200 years ago this month, and that is that provision that the President shall nominate, and by and with the consent of the Senate, shall appoint judges of the Supreme Court.

We have a situation in which the sole power of selection lies with the President. The Senate's role is one of consenting or not consenting. Under that arrangement, the Senate is essentially in a reviewing posture. It is not in a selecting or initiating posture. And there is a crucial question here, as to the way in which the Senate should approach that reviewing role.

It seems to me important that there be some kind of reasonably objective standards which can guide Senators in a principled way, and that can apply whatever the political configurations may be; you may have a Democrat in the White House and a Republican majority in the Senate. The process shouldn't turn on the happenstances of this. Unless we do have principles and reasonably objective standards, the stage is set for unseemly political fights and confrontations and idiosyncratic results.

What I want to do, and what I have done in my paper, is to try to put forward a suggestion as to some objective standards that I think can and should be applied. I will pass by the conventional ones we have long agreed on, I think, such things as character, legal ability, experience, integrity, judicial temperament. There seems to be no serious issue here in this case about all of those.

The focus is on judicial philosophy. Properly understood, that is a reasonable subject for Senate inquiry. By "properly understood," I mean the nominee's conception of the role of courts under the Constitution and the nominee's approach to the task of judging. I suggest three tests that are objective that can be applied by Senators to determine whether the nominee is acceptable in this respect.

We have heard a lot of talk here about the "mainstream," and I think that is a useful shorthand for determining whether the judicial philosophy of the nominee is within the acceptable range of contemporary American legal thought. There seem to me to be three questions that the Senate can ask about any nominee for the Supreme Court that will test the mainstream judicial philosophy point.

First, I would ask this: Is confirmation of the nominee supported by a substantial array of lawyers and legal scholars, who are themselves well regarded professionally, and who come from various parts of the country and diverse legal settings? If the answer to that is "yes," it seems to me that suggests rather strongly that the nominee is in the mainstream; otherwise, he would not have that kind of substantial and broad-based support for confirmation.

Second question: Do the nominee's views about various legal doctrines and the task of and approach to interpreting the Constitution have substantial support among other judges, lawyers and legal scholars? That is, does the nominee have some professional company in his various legal views?

On both of those questions, it seems to me that the evidence before this committee has to lead to an affirmative answer. Those are objective questions, and the virtue of them is that they relieve the Senators of having to referee these debates that are going on here day after day, and which are impossible of definitive resolution. You don't ask who is right and who is wrong, do I agree or not agree; you ask whether there is a substantial body of opinion supporting confirmation among knowledgeable and widely diverse lawyers, and does the nominee have professional company in his various views.

Third question: Where the nominee is a judge already on a lower court, as is the case here, the question can be asked—should be asked—has he been a lone wolf, an eccentric, continual dissenter with very little company among his judicial colleagues, and has he been reversed a significant number of times by a higher court? If the answer to all that is "yes," it would suggest that he is outside the mainstream. Here though, the evidence is to the contrary as to Judge Bork.

These are three tests that I submit would be useful to the Senate. They would permit Senators to make a meaningful scrutiny of the nominee in their constitutional consenting function, and yet would get them out of an unseemly political fight, which ultimately relies on political influence and idiosyncratic judgments of the moment about the nominee. I believe these tests would serve the smooth functioning, the effective institutional meshing, of President and Senate under article II of the Constitution in a way that would benefit the country and the Court.

Thank you, Mr. Chairman.

[Prepared statement follows:]

STATEMENT OF DANIEL J. MEADOR
BEFORE THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE
ON THE NOMINATION OF ROBERT H. BORK
TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT
SEPTEMBER 25, 1987

Mr. Chairman and Members of the Committee:

It is a privilege to participate in these hearings on the nomination of Judge Robert H. Bork to be an Associate Justice of the Supreme Court of the United States. By way of a witness's customary identification of himself, I should state that I am and have been for many years a member of the law faculty at the University of Virginia. My major professional interests relate to the processes, structure, and jurisdiction of courts, federal and state. In addition to law teaching, my work has included service as law clerk to Justice Hugo L. Black (1954 Term), Dean of the University of Alabama Law School (1966-70), member of the Advisory Council on Appellate Justice (1971-75), Council on the Role of Courts (1979-84), and Board of Directors of the State Justice Institute (1986-present). I served as Vice-Chairman of the American Bar Association Action Commission to Reduce Court Costs and Delay (1980-84). From 1977 to 1979 I was Assistant Attorney General in charge of the Office for Improvements in the Administration of Justice. Currently I am Chairman of the ABA Standing Committee on Federal Judicial Improvements. Of course I speak here only for myself and do not necessarily represent the views of the organizations with which I am or have been affiliated.

In order to explain how I have reached the conclusion that the Senate should consent to the appointment of Robert Bork to the Supreme Court it is necessary to begin with a brief indication of how I view the Senate's role in this constitutional process. The starting point under the constitutional scheme, for me at least, is that the sole power to select a nominee for a Supreme Court Justiceship is vested by Article II in the President. The Senate's sole constitutional function is that of consenting or not consenting to the President's choice. In terms of raw power, either the President or the Senate could dismantle the Supreme Court and all federal courts--the President by not making nominations, and the Senate by not consenting to nominations. The President traditionally has, and must have, wide latitude in selecting potential Justices. The Senate is in a reviewing posture, evaluating persons already selected by the President. The Senate's role may be roughly analogous to that of an appellate court's reviewing a trial judge's exercise of discretion; the question is not whether the appellate court itself would have made the same decision, but rather whether the trial judge has abused his discretion or acted arbitrarily. In other words, Senators do not need to decide whether they themselves would choose the particular nominee for a Supreme Court seat.

It is important that the Senate approach its reviewing task in a principled manner. If it does not, and if the Presidency and the Senate are under the control of different political parties, as they have often been, then filling vacancies on the Court may be obstructed by sheer political party interests. In the statement that follows I have tried to identify criteria that can be applied by the Senate in a more or less objective fashion, thus enabling this constitutional process to work rationally whatever the political configurations may be in the White House and the Senate.

By custom and general agreement the Senate appropriately considers a nominee's character, intellect, legal ability, and judicial temperament. There seems to be no significant question concerning the acceptability of Judge Bork on these grounds. Of a more amorphous nature and more potentially open to controversy is what is referred to as judicial philosophy. Properly understood, that subject is an appropriate one for inquiry by the Senate, and that appears to be the major focus of these hearings.

By "judicial philosophy" in this context I refer to (a) the nominee's conception of the role of the federal judiciary, and especially the Supreme Court, under the Constitution and (b) the nominee's understanding of the art and craft of judging. I do not find it useful to talk in terms of "liberal," "conservative," "activist," "restraint," or any other over-simplified labels. They get in the way of clear and realistic thinking. Putting such emotion-laden tags aside, the ultimate question for the Senate, I submit, is whether the nominee, based on all available evidence, is likely to function as a Justice in the way that we believe a judge should function under Article III of the Constitution.

In determining this we start with the fundamental premise that this is a government under law. As we have had several occasions to be reminded in our time, all officials are under law, no matter how high or low, and this includes judges. A judge's only legitimate commission is to apply law to the facts of cases brought before him under proper judicial process and to render a reasoned, unbiased decision. The law that a Supreme Court Justice is to apply consists of the Constitution, the Acts of Congress, and the prior decisions of the Supreme Court. From available evidence, I conclude that Judge Bork understands this to be the judicial role.

It is important to remember that the Constitution is a written document. Indeed, the establishment of a written Constitution has long been viewed as one of the unique and enduring contributions of America to the art of government. Increasingly other nations around the world have adopted the concept of a written constitution, inspired largely by the American experience. Not only is our Constitution a written document, its text has the status of law and is not merely an exhortation. It is law that can be and indeed must be applied in the courts. The evidence amply supports the conclusion that fidelity to the written constitutional text is a central tenet of

Judge Bork's approach to judging. It is perhaps the clearest theme in his thinking.

To appreciate the importance of this fundamental concept in the work of a judge, we need only imagine its opposite. Suppose, for example, that a judicial nominee announced to this committee that a judge was not bound by the text of the Constitution. Rather, in passing on the constitutionality of actions of the Congress, state legislatures, and the President, the judge could decide cases without regard to the constitutional text, resorting instead to other sources, such as morality or public opinion or sociology. This would not be government under law. This would be judicial action without regard to law. It would be possible, of course, to construct a government with judges empowered to act in that way, unbound by any written Supreme law. But it would be a government different from that established in this country.

This conception of the judicial role is perhaps the key question to be resolved by the Senate. Do we want to adhere to the original concept that judges are confined to deciding properly litigated cases under a written constitution, bound like all other officials by the terms of that document? Or, on the other hand, do we want to shift to a form of government under which judges are not so bound but can instead invalidate legislative and executive action on grounds not commanded by the constitutional text and the authoritative decisions rooted in it? At times the Supreme Court has drifted in the latter direction, but such a tendency has almost always resulted in grave difficulties for the Court and the nation. That is what happened in the Dred Scott decision and in the mid-1930's. Yet there are those who advocate such a style of adjudication, loosening the judges' allegiance to the constitutional provisions themselves (where this style of adjudication produces decisions favorable to their interests). The rejection of this nominee would, I fear, amount to a validation of that position. This development would be fraught with long-range dangers to the independence of the judiciary and thus to government under law.

The reason that a move in that direction would be dangerous is that the American people are not likely to tolerate indefinitely an unelected body of life-tenured officials making decisions, without clear warrant in law, affecting their well-being and ability to govern themselves. Such an anti-democratic body as the Supreme Court can exist only if the people believe that its judges act objectively under law and that the judges are bound by law. Judge Bork's central tenet that a judge can invalidate the actions of democratically elected officials only when there is warrant for doing so in the Constitution itself is a powerful protection for the independence of the judiciary. If we had a majority of judges with the other view, we would increasingly hear a popular clamor for an elected judiciary or for appointments for a limited term of years, with periodic reconfirmation by the Senate. The Supreme Court would become hopelessly politicized.

An important part of the body of law that a Justice must apply consists of the Supreme Court's own prior decisions interpreting the Constitution and statutes. Nothing in the evidence suggests that Judge Bork is deficient in the skill of analyzing and applying precedents. Moreover, he seems to have as much attachment to the principle of stare decisis as most American judges do. His view, as I understand it, concerning the overruling of past decisions is quite orthodox. That view is that before overruling a prior holding the judge must consider at least two questions: (1) whether the prior decision is clearly wrong, giving due regard for the judgment of those who rendered it, and (2) whether, even if the decision were clearly wrong, there has been such extensive reliance on it, including the nature and degree of institutional or social arrangements that have grown up around it, so that to overturn it now would do more harm than good or would be unduly disruptive to society. This view is similar to that set out over twenty years ago in a nationally used law school teaching book written by two University of Pennsylvania law professors (Mishkin & Morris, On Law in Courts 85, Foundation Press, 1965). Judge Bork also shares the conventional view held by the Supreme Court for many decades that decisions on constitutional questions carry less precedential force than decisions on statutory questions, but any overruling would be governed by the considerations mentioned above.

The statements and advertisements appearing in the news media over the past two months in opposition to this nomination have been disturbing. They reveal a disquieting view of the Supreme Court. Reading this outpouring of material one would think that a seat on the Supreme Court is like a seat in Congress or, for example, on the NLRB or a city council. The premise of these arguments is that the Court is simply another political body and persons are put there to carry out some kind of platform or agenda and to implement certain policies that a particular constituency wants. Nothing could be more alien to the rule of law. That premise bears an unhappy resemblance to the view of courts taken in Marxist-Leninist societies. Not long ago I spent three months in East Germany studying legal education and the courts. The view there is that the role of courts, like the role of all governmental agencies, is to implement the will of the ruling party. They reject the concept of an independent judiciary. But in this country we hold it to be fundamental that a judge implements no program other than that which the law commands or forbids. It is especially strange to hear arguments that Judge Bork would hold against or for this group or that group or that he would frustrate progress. The virtue of his approach to judging is that it does not put a judge in the position of making such choices, because its thrust is to leave to the elected branches such policy decisions. To hold that no constitutional limitation is violated means simply that the contending parties must look to their democratically elected representatives to work out an accommodation. The rejection of this nominee by the Senate would, I fear, seem to a large part of the population to be based on the Senate majority's view that the nominee was not pledged to what the majority regards as the right program, that he was insufficiently committed to "deliver" the specific decisions desired by certain political organizations. Such an appearance would be damaging to the rule of law.

The Supreme Court cannot function by fiat or simply by the announcing of results, however desirable they may be to a lot of people. Its legitimacy depends entirely on its adherence to the special characteristics of the judicial process. Critics of Judge Bork seem to overlook this necessity, a necessity that exists because of the separation of powers and the desirability of an independent judiciary. The judicial process, to which Judge Bork seems committed and which is essential for legitimacy, consists of a judge's first identifying the authoritative starting point for decisionmaking (either in a constitutional provision or in a statutory provision) and then applying accepted techniques of legal reasoning from that authoritative premise to a result. To be valid the reasoning must withstand critical analysis and must be capable of being generalized in a principled way, avoiding an idiosyncratic tailoring to reach a specific result in the case at hand. In his appearance before this committee, Edward Levi presented these ideas quite well. Judge Bork's critics do not seem to appreciate the importance to the rule of law of the process of sound reasoning from an authoritative text. It is to be hoped that the Judiciary Committee will rise above the unthinking clamor to reaffirm this concept of the judicial role. The Senate has an opportunity here to teach the country an important civics lesson about the special nature of a judicial body, as distinguished from a political body.

For a dozen years I have attended legal meetings where Robert Bork was a speaker or was a panel discussant. My collective impression from hearing him in person is that he is a careful, judicious thinker. One of the impressive things about him is that he, as much as anyone in this country, and more than all but a relatively few others, has spent almost his entire adult life struggling to work out one of the knottiest problems of our polity, namely, the appropriate method of interpreting the Constitution and statutes so as to minimize as much as possible the judge's own policy views. No one can achieve this with perfection, but it seems to me that he has come about as close as anyone else to a sound approach.

There has been much talk in these hearings about whether the nominee is in the "mainstream" of American law. I suggest that there are three objective tests that Senators can employ to determine this.

First: Is the nominee's confirmation supported by a substantial array of lawyers and legal scholars, who are themselves well-regarded professionally, who are independent of the administration, and who come from varying political backgrounds? An affirmative answer suggests that the nominee is within the mainstream, even though there may be professional opinion in opposition to confirmation. (Unanimity is unlikely in any case.) Substantial, informed professional support of that sort is clearly evident in this case, as judged by witnesses who have appeared in these hearings and by commentary in the news media.

Second: Does the nominee's conception of the role of courts, his views of legal doctrine, and his approach to the techniques of judging correspond to views on these matters held by a significant number of other well-regarded judges, lawyers, and legal scholars? If a nominee has a substantial amount of professional company on such matters it can hardly be said that he is eccentric or outside the mainstream. I have heard more than half of Judge Bork's five-day testimony before this committee. In all of that I have not heard him say anything that is not shared by a significant number of respected Justices, lawyers, and law teachers. In other words, his views are not bizarre or isolated. There will, of course, always be disagreements over such matters, but that is not the point.

When, as here, the nominee is already serving as a judge on a lower court, there is a third inquiry that is useful in determining whether he is in the legal mainstream: Has the nominee, as a judge, frequently taken different positions from the other judges on his court, often been a lone dissenter, and often been reversed by a higher court? An affirmative answer to this question would suggest that the nominee does indeed have eccentric legal views outside the acceptable range. But this is not the case with Judge Bork; his positions have been in line with those of a substantial number of his judicial colleagues, and there have been no reversals of his decisions by a higher court.

The value of these three tests is that they provide an objective way for a Senator to determine whether a Supreme Court nominee's legal outlook is within the acceptable range. The use of these three tests is a way for the Senate to avoid a partisan, unprincipled controversy over a nominee's judicial philosophy in the confirmation process. An affirmative answer to the first two questions and a negative answer to the third would indicate that the nominee is sufficiently in the mainstream to be confirmed. This principled approach could be applied equally well if the President were a Democrat and the Senate under Republican control.

For those Senators not content to rely upon the above-described tests for assurances on judicial philosophy, I suggest that they look to the three most important bodies of data available to the Committee. These consist of Judge Bork's record as Solicitor General, his decisions and written opinions as a judge on the U. S. Court of Appeals, and his five-day testimony here, the most comprehensive ever presented to the Judiciary Committee by a Supreme Court nominee. A Senator who has examined these materials can say with confidence to his constituents that in the record of Judge Bork as a high-level public servant and as a witness before the Committee there is nothing to suggest that he will not fairly hear and decide constitutional claims of all kinds. This evidence enables any Senator to say with confidence that Judge Bork's actions and views show that as a Supreme Court Justice he will enforce the Bill of Rights and the Fourteenth Amendment effectively to protect the interests of all persons, specifically including those of minority groups and women. Careful consideration of the objections of some of these latter groups to this nomination reveals that they are not well-grounded in the realities of Judge Bork's record and current views. Most of the argument presented against confirmation has been based on his writings and speeches off the bench or when he was not in public office; indeed, the opponents seem to avoid as much as possible entering into any discussion of the most important parts of the evidence before the committee--service as Solicitor General and as appellate judge and the testimony presented under oath to this Committee. That evidence provides ample foundation for Senators to conclude that Judge Bork will enforce fully the First Amendment and the Equal Protection Clause as to all persons, as well as all other constitutional provisions.

The importance of the Senate's taking a principled approach to evaluating nominees can be illustrated by two unfortunate episodes in our history, episodes in which the Senate did not operate in a principled way but rather in a purely partisan, political fashion.

One was President Grover Cleveland's nomination to the Supreme Court of L. Q. C. Lamar exactly one hundred years ago, in the fall of 1887. Cleveland was a Democrat, but the Republicans had a one-vote majority in the Senate. The Republicans decided to make a party fight over the confirmation. The main argument they used against Lamar was that, as a former Confederate officer, he could not be relied upon as a Supreme Court Justice to view the 13th, 14th, and 15th Amendments as having been validly adopted or to interpret those Amendments fairly. There was no foundation for such arguments, as later proved to be the case when Lamar took his seat on the Court. However, he was almost rejected by a straight party vote. Such an outcome was narrowly averted when, on the eve of the Senate vote, two Republican Senators (and the one Independent then in the Senate) announced that they would vote for confirmation.*

The other incident is that of President Herbert Hoover's nomination of Judge John J. Parker. The President was a Republican, but the Senate was under Democratic control. The main argument leveled against Parker's confirmation was that in one of his decisions on the U. S. Court of Appeals for the Fourth Circuit he had affirmed an injunction against a labor union (although the ruling followed Supreme Court precedent) and that there was some evidence of racial insensitivity in his earlier years. Parker was rejected by the Senate, but he served for years thereafter as Chief Judge of the Fourth Circuit. His record in that position showed that the arguments against him had been baseless. It is commonly agreed now that Judge Parker was one of the outstanding American judges of the twentieth century.

Looking back, it can be seen that in both of these instances the opposition to confirmation was on a partisan, party basis and was without substantial foundation. The opposition in both instances is now regarded as having been a mistake, and those Senators who opposed confirmation are viewed as having been short-sighted and having acted in an unstatesmanlike way.

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* This episode was the subject of the annual lecture to the Supreme Court Historical Society, which I delivered in May, 1986, published as "Lamar to the Court -- Last Step to National Reunion," 1986 Yearbook of the Supreme Court Historical Society, p. 27.

For all of the reasons stated, and trying to view the question of constitutional "consent" from the Senate's standpoint, I conclude that Judge Robert Bork's nomination for the Supreme Court should be confirmed. Considering all of the evidence fully and fairly, it is difficult to find a principled basis of substance on which to reject this nominee. Indeed, the nominee's commitment to law and rational legal process, his intellect, and his rich legal experience provide ample evidence from which one can objectively conclude that in many respects he is unusually well-fitted for a Supreme Court seat.

TESTIMONY OF GEORGE PRIEST

Mr. **Priest**. Mr. Chairman, as I mentioned, my name is George Priest. I am the John M. Olin professor of law and economics at Yale Law School. I am speaking today, however, solely in my personal capacity.

I first met Judge Bork in 1980, when I joined the Yale Law School. I work in the field of antitrust law and, although I have never taken a class from Judge Bork, I have been a student of his writings since my days in law school in the early 1970's. But despite these mutual intellectual interests and despite our overlapping service together at Yale in 1980 and 1981, I would not regard us to be close personal friends.

Although I am happy to address Judge Bork's substantive views, especially in the antitrust field, I wish today to address a broader question, which I believe to be of central importance to the committee and to the public with respect to the evaluation of this man; and that is, the relationship between the very strong positions that he has taken in his academic writings, the positions he took as Solicitor General and has taken as a circuit judge, and the positions he announced in his testimony before this committee.

There are, as everyone knows, differences—even great differences—among these expressions in terms of substance. But there is, I think, a more important difference, indeed, an extraordinary difference, between the style and temperament of these elements of Judge Bork's work.

Judge Bork's academic writings are slashing. They are hypercritical. They are extreme. In contrast, his work as a judge and his statements before this committee have been on the whole moderate and temperate and reasonable. I believe that these differences are the source of the extraordinary conflict in opinion about Judge Bork among academics and among the public.

The critics of Judge Bork have focused almost exclusively on his academic writings, and are concerned that if confirmed, Judge Bork will resurrect the style of extreme criticism of established law that characterizes his academic work. I believe this to be a very legitimate concern. But I think that to adequately understand Judge Bork, it is helpful to have some view of the nature of the style of modern legal scholarship.

Judge Bork is the first truly prominent modern legal scholar to be put forward for the Supreme Court, and to understand his writings, it is important to recognize that since World War II there has been a vast change in the style of modern legal scholarship. There has been an increasing sophistication in scholarship, legal scholarship, that derives from a much greater focus on underlying theories or conceptual ideas in the manner of the social and natural sciences.

Those scholars competing in the front rank on the frontier of legal scholarship have very self-consciously adopted the style of research and scholarship of the natural sciences. This scientific style consists of the development of a generalized theory that provides a unifying method for thinking about phenomena, and then the further demonstration that the new theory or conception is superior to all previously accepted theories or concepts; and just as in the sciences, this style generates and has generated a fierce competition among the most ambitious of legal scholars.

The competition among these scholars is over who will announce and who can confirm some dominant theory of the law, and these scholars compete much like athletes seeking records or much like 17th and 18th century explorers seeking new discoveries. They compete to promote new theories and new ideas around which fields of law will be reorganized.

It is essential to this task and to this form of scholarship that the writer be skeptical of previous learning and to challenge the accepted wisdom.

Senator KENNEDY. Professor, I regret I will have to recess. I imagine the chairman, Senator Biden, ought to be back momentarily, but we have probably a couple minutes left before this vote expires, and we have to go to the floor, so we will just recess.

[Recess.]

The CHAIRMAN. The hearing will come back to order.

Gentlemen, I sincerely apologize for the interruptions of the votes; that is why everybody is getting up and down. The defense authorization bill is up, and we just voted just this moment on the Sessions nomination, so there will be more interruptions but, hopefully, not as many as you have had thus far.

I ask staff to tell me where we left off? Professor Priest has about 2½ minutes left on his testimony. Please proceed, Professor.

Mr. PRIEST. I was making the point—I certainly won't repeat what I have said before, given the small amount of time I have left. I was making the point that to understand Judge Bork's academic work and, in particular, to understand what I view to be great differences between his academic work and his work as a judge, his work as Solicitor General, and his expressions before this committee, it is necessary and helpful to have some view of changes in legal scholarship since World War II.

And the point I was making was that Judge Bork is, I think, really the first of the truly prominent legal scholars to be put forward for the Supreme Court, and that his scholarship and his academic writings are characterized by a different style of legal scholarship that has been increasingly prominent after World War II, and that style consists of an emulation of the style of scholarship in the natural sciences: a development of a generalized theory that provides a unifying method for thinking about phenomena, and then the demonstration that this theory is superior to all previously accepted theories and concepts.

And the point I was making about this different style of legal scholarship is that it leads to a different form and a competition among legal scholars that was largely unknown in earlier years. It is essential to this form of scholarship that the writer be extremely skeptical of previous learning and to challenge accepted wisdom. Indeed, to assert the primacy of his or her own ideas, the scholar must insist that the accepted wisdom is of little value at all.

This scholarly style leads quite obviously to conceptual exaggeration, but it is an exaggeration with a purpose. The scholar pursuing the importance of an idea can only learn its full importance when the idea is pressed to an extreme which exposes the idea to the harshest possible light.

Since World War II this form of scholarship has contributed, and I think, in part, generated, major changes in the law that have affected broad areas of American life: the equality revolution, important to the development of *Brown* v. *Board of Education*; the revolution in tort law, in antitrust law, in corporation law, in the regulation of industry. In each of these cases, however, the style and substance of legal scholarship has been radically different from the work of judges and legislators, who have implemented the ideas embedded in the legal scholarship.

Judges and legislators, obviously, have little interest in the purity of an idea. They rely on new ideas and they implement them, but they must implement them in ways that accommodate the concerns of a diverse society. As a consequence, there is a great divergence between the culture of the legal academic and the culture of the judge.

The legal scholar must be single minded and radical; judges must be moderate and temperate. Judges must be respectful of previous authority; in contrast, legal scholars, if they are to make any mark whatsoever, must be hostile to authority. There is no stare decisis in legal scholarship. All ideas are up for grabs, and the most successful of legal theorists are those that challenge existing ways of thinking most radically.

There is no credit given in academics for the proposal of some well-crafted incremental change in the law, which is the hallmark of the excellent judge.

Robert Bork was a major academic prior to his appointment as Solicitor General, and later as judge, but I believe Robert Bork would never have achieved the academic prominence that he did if he had not mastered the academic style that I have described. Robert Bork's most important academic contributions in the field of antitrust law have generated a total rethinking of the field, which the Supreme Court has largely adopted.

And like his writings in the field of constitutional law, his antitrust writings are slashing, they are extreme, they challenge that there is any wisdom at all in 85 years of Supreme Court precedent, and they focus single mindedly on one set of concerns—consumer welfare—to the exclusion of all others. But I believe it is only through this form of scholarship that new ideas can be established.

Judge Bork's judicial opinions are, I think, entirely different. They are reasonable and moderate and generally respectful of previous authority. Most importantly, though, I think one can say that Judge Bork's opinions demonstrate in themselves no academic achievement. On the basis of his judicial writings, Judge Bork could not obtain appointment in any major American law school. Though I admire his academic work, his previous academic work, and though I support his appointment to the Supreme Court, his abandonment of this slashing and extreme style in favor of a judicious incremental approach to thinking about the law I think disqualifies him for a reappointment at Yale Law School, if he were to seek it.

But, again, I view this not as criticism, but as a compliment of his accommodation to the different role that he plays as a judge. I think these differences in style are important because the harshest of criticisms of Judge Bork have derived from his academic, rather than his judicial writings. But I think this takes exactly the wrong approach.

The best way to predict how Robert Bork will behave on the Supreme Court is to examine how he has behaved as a judge. Now some have argued that the different style of Judge Bork's judicial writings reflect the necessary subordination of a circuit judge to the Supreme Court, which can at any time overrule him. Certainly the opinions of a circuit judge can be overruled, but there remains a very substantial range of discretion in the opinions of any circuit judge. There is no feasible way for the Supreme Court to overrule all, or even a substantial majority, of the opinions of any circuit judge.

Others have argued that Bork's ideology will be unleashed if he is confirmed to the Supreme Court, but I think this mistakes the nature of the Supreme Court and the nature of Robert Bork. I believe Robert Bork to be an ambitious man. And for any person, and surely for the ambitious, appointment to the Supreme Court is an extraordinary opportunity for influence.

But influence requires the concurrence of at least four colleagues, and the concurrence of four colleagues requires a moderation, a reasonableness, and a persuasiveness that a radical ideologue could never summon.

The opportunity provided by appointment to the Supreme Court I think would be wasted if a Justice were to pursue some radical idiosyncratic ideology. Indeed, in the history of the Supreme Court we have no instances of a renegade Justice pursuing a personal ideology to the exclusion of all else. The appointment of Robert Bork I believe will be no different.

[Statement of Professor Priest follows:]

Hon. Joseph H. Biden, Jr., Chairman
Judiciary Committee
United States Senate

Re: The consideration of Robert H. Bork as Justice of the United States
Supreme Court

Testimony Of George L. Priest
September 25, 1987

My name is George L. Priest. I am the John M. Olin Professor of Law and Economics at Yale University. I am speaking today, however, solely in my personal capacity. I first met Judge Bork in 1980, when I joined the faculty at Yale Law School. I work in the field of antitrust law. Although I have never taken a class from Judge Bork, I have been a student of his writings since my days as a law student in the early 1970s. Despite our mutual intellectual interests, and our service together at Yale in 1980 and 1981, I would not regard us to be close personal friends.

Although I am happy to address Judge Bork's substantive views, especially in the field of antitrust in which I have some particular expertise, I wish today to address a broader question, which I believe to be of central importance to the Committee and to the public with respect to the evaluation of this man and to the prediction of what he will do if he is confirmed as a Justice of the United States Supreme Court. The central question in the interpretation of Robert Bork is the relationship between the very strong positions he has taken in his academic writings, the positions he took as Solicitor General and has taken as a Circuit Judge, and the positions he announced in his testimony before this Committee. As has been pointed out, there are many differences in these various expressions. And although Judge Bork has explained these differences as representing an evolution of his ideas, the question still remains. Moreover, there is a more important difference in these various expressions that extends beyond the substance of his views. There is an extraordinary difference between the style and the temperament of these various elements of Judge Bork's work. His academic writings are slashing. They are hypercritical. They are extreme. In contrast, his work as a Judge and his statements before this Committee have been moderate, temperate, and reasonable.

These differences in substance and style are crucially important, because I believe that they are the source of the extraordinary differences in opinions about Judge Bork among academics, among the public, and among members of the Committee. The critics of Judge Bork have focussed almost exclusively on his academic writings, which I believe to be clearly extreme and often intemperate.

The critics, quite sensibly, are concerned that if confirmed to the Supreme Court, Judge Bork will resurrect the style of extreme criticism of established law that characterizes his academic work. In contrast, the supporters of Judge Bork seek to minimize the relevance of his academic writings and have focussed instead on his efforts as Solicitor General, his judicial opinions, and his testimony before this Committee. Supporters claim that it is the moderation, the reasonableness, and the sensitivity to existing institutions and to existing ways of life that are more central to Judge Bork's work and to his personality. There is no easy reconciliation of these different positions. But I think that to adequately understand Judge Bork, it is helpful to have some view of the nature of the current academic world and of the style of modern legal scholarship.

Since World War II (although there are some examples before) there has been an increasing sophistication of legal scholarship. The increase in sophistication has derived from a much greater focus on underlying theories or conceptual ideas about the law and about rules to govern the legal system. Much of this sophistication comes from the application to legal contexts of social science theories. But the more general development has been the adoption by legal scholars of the style of the sciences. Those scholars competing in the front rank, on the frontier, of legal scholarship have very self-consciously adopted the style of research and scholarship of the natural sciences.

This scientific style consists of the development of a generalized theory that explains some phenomena or provides a unifying method for thinking about phenomena and, then, the further demonstration that the new theory or conception is superior to all previously accepted theories or concepts. This style of scientific research and scholarship has been tremendously important in encouraging new ways of thought and is described familiarly in Thomas Kuhn's Structure of Scientific Revolutions, and, more popularly, in Watson's The Double Helix. As described in these books, this style has generated a sense of extraordinary competition among aggressive scientists.

The style of competition in the sciences has been consciously emulated by the most ambitious of legal scholars. There remains a range of legal scholarship which, like the typical legal scholarship prior to World War II, is largely descriptive, recommending modest improvements in the law. But the principal development since World War II has been the emergence of aggressive legal scholars, who compete with each other for dominant theories of the law, competing much like athletes seeking records or like seventeenth and eighteenth century explorers seeking new discoveries: competing to promote new theories and new ideas around which fields of law will be reorganized.

It is essential to this task and to this form of scholarship that the writer be skeptical of previous learning and to challenge what is the accepted wisdom. Indeed, to assert the primacy of his or her own ideas, the scholar must insist that the accepted wisdom is of little value at all. This scholarly style leads, quite obviously, to conceptual exaggeration, but it is an exaggeration with a purpose. The scholar pursuing the importance of an idea can only learn its full importance when the idea is pressed to an extreme. Pressing the idea in this manner serves to expose it to the harshest possible light.

Since World War II this form of scholarship has contributed, and in part generated, major changes in the law that have affected broad areas of American life. Scholarship of this nature has contributed to the "equality revolution" of which an important development was Brown v. Board of Education in 1954. Similarly, such scholarship is largely responsible for the revolution in tort law, a field that has been radically transformed since the 1960s. And there have been similar examples in antitrust law and corporation law and the legal approach toward the direct regulation of industry.

In each of these cases, however, the style and the substance of legal scholarship have been radically different from the work of judges and legislators who have implemented the ideas embedded in the legal scholarship. Judges and legislators, quite obviously, have little interest in the purity of any idea. They have little interest in the extreme articulation of the idea that is of crucial importance to the legal scholar. Judges and legislators rely on new ideas, and implement them, but they must implement them in ways that accomodate the concerns of a diverse society. Judges must be sensitive to new ideas, but they must use new ideas with practicality and moderation.

As a consequence, there is a great divergence between the culture of the legal academic and the culture of the judge. The legal scholar must be single-minded and radical. Judges must be moderate and temperate. Judges must be concerned with the relationship of a current decision to previous decisions and to the approaches of previous courts. They must be respectful of previous authority. In contrast, legal scholars, if they are to make any mark whatsoever, must be hostile to authority. There is no stare decisis in legal scholarship. All ideas are up for grabs, and the most successful of legal theorists are those that challenge existing ways of thinking most radically. Indeed, there is little role for practicality or judgment in academics. There is no credit given in academics for the proposal of some well-crafted incremental change in the law which is the hallmark of the excellent judge. There is no credit given in academics to fidelity to previous ways of thinking. The difference between judges and legal scholars is the difference between the applied and the theoretical. It is the difference between the practicing engineer, who must accommodate his or her efforts to the conditions of the job: the compactness of the soil, the level of the water table, and the gradient of the land, and the physicist, who begins his or her work by presuming a vacuum.

Robert Bork was a major academic prior to his appointment as Solicitor General, and later as Judge. Robert Bork would never have achieved the academic prominence that he did if he had not mastered the academic style that I have described. But in the evaluation of Robert Bork as a candidate for the Supreme Court, it is important to distinguish his academic work from his work as Solicitor General and as a Judge in which he has been responsible for applying the law to real problems.

Robert Bork's most important academic contributions have been in the field of antitrust law in which his work, along with that of Richard Posner who now sits on the Seventh Circuit Court of Appeals, has generated a total rethinking of the field, which the Supreme Court has largely adopted. Robert Bork's academic writings in the antitrust field are characteristic of the new academic style. They are slashing, they are extreme, they challenge that there is any wisdom in eighty-five years of Supreme Court precedent. They focus single-mindedly on one set of concerns, consumer economic welfare, to the exclusion of all others. But it is only through this form of scholarship that new ideas can be established. Robert Bork's writings have had a tremendous influence on antitrust law. Indeed, what was certainly extreme when Bork began his writings in the 1950s has become the orthodox view of the 1980s, and it represents the greatest achievement to which any academic can aspire, an achievement which could not have been gained by judicious recommendations of moderate changes in the law.

Judge Bork's work as a Solicitor General, and his efforts as a Judge on the Circuit Court of Appeals, however, have been entirely different. There is none of the slashing disregard of previous opinions, none of the single-mindedness, none of the extreme fidelity to the purity of an idea. Judge Bork's opinions reflect his position as a Judge. Judge Bork takes positions that are strongly stated and well-crafted, but his positions with few exceptions are largely supported by his colleagues because they are reasonable and moderate and respectful of previous authority.

Most importantly, Judge Bork's opinions demonstrate, in themselves, no academic achievement. On the basis of his judicial writings, Judge Bork could not obtain appointment in a major American law school. But I mean this not as a criticism of his work, but as a compliment to his adaptation and accomodation to his role as a Judge. Though I greatly admire his previous work, and though I support his appointment to the Supreme Court, his abandonment of the slashing and extreme style in favor of a judicious, incremental approach to thinking about the law disqualifies him for reappointment to the Yale Law School, were he to seek it. But, again, I view this as high compliment.

The difference between the academic style and the judicial style is important because virtually all of the criticism of Judge Bork has derived from his academic rather than his judicial writings. In these hearings, there has been a virtual neglect of his judicial opinions and of the briefs he drafted as Solicitor General. This, I believe, takes exactly the wrong approach. The best way to predict how Robert Bork will behave as a Justice on the Supreme Court is to examine how he has behaved as a Judge, and how he behaved as an officer of the Supreme Court when serving as Solicitor General. I believe that when one looks at Robert Bork's performance as a Solicitor General, and as a Circuit Court Judge, his ideological uniqueness disappears. One may not agree with the particular positions he has taken, and I do not in every case, but one does not see an individual that is subversive of legal traditions, or that has views radically out of the mainstream of legal thought. One sees, instead, a practicality, a reasonableness, a fidelity to existing law that is highly attractive in a judge, but nothing of what one sees in his earlier academic writings or what the Yale Law School or other law schools are seeking in a legal scholar.

Some have argued that the different style of Judge Bork's judicial writings reflects the necessary subordination of a circuit judge to the Supreme Court which can at any time overrule him. Certainly, the opinions of a circuit judge can be overruled. But there remains a very substantial range of discretion in the opinions of any circuit judge. There is no feasible way for the Supreme Court to overrule all, or even a substantial majority, of the opinions of any circuit court judge. Moreover, as we know, the Supreme Court, far from overruling, has endorsed many of his specific views.

Others have argued that Bork's ideology will be unleashed if he is confirmed to the Supreme Court. This mistakes the nature of the operation of the Supreme Court, and the nature of Robert Bork. I believe Robert Bork to be an ambitious man. For any person, and surely for the ambitious, appointment to the United States Supreme Court is an extraordinary opportunity for influence. But influence requires the concurrence of at least four colleagues. And the concurrence of four colleagues requires a moderation, a reasonableness, and a persuasiveness that a radical ideologue could never summon. The opportunity provided by appointment to the Supreme Court would be wasted if a Justice were to pursue some radical idiosyncratic ideology. Indeed, we have no instances in the history of the Supreme Court, of a renegade justice pursuing a personal ideology to the exclusion of all else. The appointment of Robert Bork will be no different.

The CHAIRMAN. Thank you very much, Professor.

Mr. PRIEST. Mr. Chairman, the next speaker on our panel is my friend and colleague, John G. Simon, who is the Augustus E. Lines professor of law at Yale Law School.

The CHAIRMAN. Professor, welcome.

TESTIMONY OF JOHN SIMON

Mr. SIMON. Thank you, Mr. Chairman. I will give a 5-minute abridgement of the statement I have submitted in order to stay within the deadline.

The CHAIRMAN. All of your statements, by the way, will be printed in the record in full.

Mr. SIMON. Thank you.

Robert Bork and I began to teach law at the Yale Law School 25 years ago this month. We were colleagues for 11 years until he became Solicitor General, and then for another 4 years after his service in that job. I should add that we are friends, but not close ones, and we are not philosophical or jurisprudential allies.

One other thing I am not is a constitutional law specialist or a thorough reader of Judge Bork's body of judicial and other writings. Accordingly, my testimony will focus on certain personal attributes that I observed over the years, attributes that strike me as relevant to your deliberations.

I should like to talk about courage and about candor. Robert Bork's intellectual courage was reflected in his willingness to take unconventional positions on a number of questions of law and constitutional theory and also politics, such as his support for Barry Goldwater in 1964, almost alone in the Yale faculty. Even in a university committed to notions of pluralism and academic freedom, it was not easy to be an unorthodox dissenter, but Judge Bork stood his ground with both dignity and good humor.

Robert Bork's candor was related to this courage. After all, a timorous person may shape and shade beliefs to please or appease the crowd. At Yale and elsewhere, in gatherings large and small, I never heard Robert Bork utter a sentence that had even the earmarks of dodging or trimming, nothing that suggested that what he said or did was influenced by either fear or favor. It was and continues to be my belief that with Robert Bork, what you get is what you see and hear.

In the long run, Judge Bork's attributes of courage and candor will serve the Court and the country well. From time to time, it is of importance that a Justice be willing to resist prevailing passions. It is too bad, for example, that more Justices didn't support the plaintiffs' rights in the Japanese-American internment case of 1944. Judge Bork called this decision a "constitutional disaster," and he would, I believe, have the courage to buck the tide should history present the Court with another such test of its mettle.

Judge Bork's habit of candor makes it clear to me that when he testified before this committee, explaining or elaborating on prior positions, this was, indeed, the real Robert Bork. Why, then, did some of that testimony seem to read differently from earlier Bork writings?

Professor Priest has provided one answer, a difference between scholarly writing and judicial work. There are other reasons you have heard about. Here is one more.

When most of us are about to take unpopular positions, we go through preparatory throat clearing to show that we are really good guys. We say, "No one wants peace more than I do," or "No one hates Communism more than I do, but * * *," et cetera. Now, that is not Robert Bork's style, even though human and social values have been important to him ever since the socialist days of his youth. He does not ordinarily devote much time or space to his personal preferences or personal angst before tackling difficult legal dilemmas.

But here, last week, in this hearing room, he was called upon to set forth many personal beliefs and convictions. His response to these requests accounts for some of the tonal changes from prior writings, rather than any expedient theatrics. He is simply too honest for that.

The candor point is important because, in recent days, some people, troubled by some of Judge Bork's earlier writings, have said that they would be reassured by the amplifications expressed by Judge Bork at these hearings if only Judge Bork could be believed. My own information on Judge Bork leads me to say, yes, he is indeed to be believed.

Let me end with two thoughts on this matter of reassurance. No. 1, no reassurance should be necessary, in my view, with respect to the Bork record on racial justice. This is an area I personally care deeply about because, over the past 28 years, I have been intensively associated, as officer and trustee, with three charitable organizations committed to civil rights and equal opportunity for minority groups.

Judge Bork's writings give strong support to the central importance under the Constitution of racial equality, and have repeatedly reaffirmed the rightness of *Brown* v. *Board of Education.* Incidently, such is the nature of the distortions that get abroad in this matter—and this has become a serious problem—that I was told by a very responsible and normally well-informed person Tuesday night that it was widely known in this town that Judge Bork rejected *Brown* v. *Board of Education.*

As Solicitor General, he aggressively moved to implement the principles of racial justice, including his work in the case that created an important weapon against private school discrimination. This record, I believe, is not impaired at all by the fact that his short-lived libertarian fever led him in 1963 to call ugly both discrimination and State regulation of that discrimination. Nor is his civil rights record marred by the fact that, out of the scores of Supreme Court race cases over the past 35 years, he criticized a few—I think the correct number is 5—because of doubts that are widely shared in the scholarly world and on the Supreme Court itself.

No. 2, my reference to the reassuring aspect of the Bork testimony does not imply that, in the absence of this reassurance, the earlier writings would deserve condemnation as radically authoritarian. For one thing, it should be noted that Judge Bork's constitutional approach is informed by two powerful liberty concerns: a desire to honor the concept that ours should be a government of laws, not men—including men or women judges—and an effort to preserve respect for the Supreme Court so as to assure compliance with its decisions.

Moreover, even someone like me, who favors the general direction of recent Supreme Court decisions, will find that the Bork writings force us to come to terms with doubts we might otherwise try to avoid. There are a number of decisions whose outcomes I cheered over the years on pragmatic grounds, but whose reasoning left qualms—varieties of uneasiness that Judge Bork's Indiana article, for example, forced me to confront.

I trust that I am not alone in this respect. And certainly Judge Bork's criticisms were shared by highly respected jurists and commentators of various persuasions. In other words, these criticisms seem to me to lie within an acceptable and important universe of discourse.

As a member of the Supreme Court, Judge Bork could expected to continue to raise these hard and fundamental questions with his colleagues, and to exhibit the intellectual courage of the past—but subject, as he told the committee at these hearings, to the institutional constraints that go with the job, including a commitment to stare decisis. His candor, we may assume, would continue unabated.

For these reasons, as well as his commanding talents, Judge Bork would be a valued member of an increasingly valuable Supreme Court.

Thank you, Mr. Chairman.

[The statement of Professor Simon follows:]

STATEMENT OF JOHN G. SIMON*
ON THE NOMINATION OF ROBERT H. BORK
TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT

Mr. Chairman and Members of the Committee on the Judiciary:

Robert Bork and I began to teach law at the Yale Law School 25 years ago this month; we were colleagues for 11 years until he became Solicitor General and then for another four years after his service in that job. I should add that we are friends but not close ones -- and we are not philosophical or jurisprudential allies. One other thing I am not is a Constitutional Law specialist or a thorough reader of Judge Bork's body of judicial and other writings. Accordingly, my testimony will focus on certain personal attributes that I observed in my years of association with Judge Bork, attributes that strike me as relevant to your deliberations, along with a few related comments about the nominee.

I should like to talk about courage and about candor. Robert Bork's intellectual courage was reflected in his willingness to take unconventional positions on questions of law and politics (such as his support for Barry Goldwater in 1964, alone among Yale Law School faculty members and almost alone in the University faculty). Even in a university committed to notions of pluralism and academic freedom, it was not easy to be an unorthodox dissenter, especially for a junior, untenured faculty member. But Judge Bork stood his ground with both dignity and good humor.

Robert Bork's candor was related to his courage: a timorous person may shape and shade beliefs to please -- or appease -- the crowd. In our years together at Yale and at occasional encounters durings his periods of government and judicial service, in gatherings large and small, I never heard Robert Bork utter a sentence that had even the earmarks of dodging or trimming -- nothing that suggested that what he said or did was influenced by either "fear or favor." It was and continues to be my belief that, with Robert Bork, what you get is what you see and hear.

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I must say, therefore, that I was appalled in recent weeks to read in two different magazines the allegations that some of his judicial decisions were "job applications" or "lobbying" efforts addressed to the Attorney General and that the basis for these allegations was simply that this has "become known" or is "widely understood." "Known" or "understood" by whom? A third magazine article asserted, with no evidence, that a perceived shift in Judge Bork's views was probably an effort to suit the "prejudices of the right." Anyone who was trying to woo the right would never, I believe, have testified, as Judge Bork did, against the Human Life Bill introduced in 1982 by Senator Jesse Helms.

Judge Bork's attributes of courage and candor are significant not only in themselves but also for other reasons that merit your attention. For one thing, in the long run they will serve the Court and the country well. From time to time, it is of great importance that a Justice be willing to resist prevailing passions. It would have been splendid, for example, if more than three Justices had supported the plaintiffs' rights in the Japanese-American internment case of 1944. Judge Bork called this decision a "constitutional disaster," and he would, I believe, have the courage to buck the tide should history present the Court with another such test of its mettle.

In the second place, Judge Bork's personal characteristics make it clear to me that when he testified before this Committee, explaining or elaborating on prior positions, this was, indeed, the real Robert Bork. Why, then, did some of that testimony seem to read somewhat differently from earlier Bork writings? For an answer, one can point to:

-- the much-discussed difference between a criticism of reasoning and a rejection of result;

-- the difference between theoretical resistance to a decision and an acceptance of it as settled law;

-- the difference between what Judge Bork, on the first page

of his 1971 *Indiana Law Review* article, announced as "ranging shots" -- "speculations and arguments," "tentative and exploratory" -- and the positions he takes in the light of the institutional constraints and real-world impacts a Supreme Court Justice must consider:
-- a process of evolution and reconsideration that Robert Bork has gone through over the years.

But there is one more explanation for what may seem to be differences in tone. When most of us are about to take unpopular positions, we go through prefatory throat-clearing to show that we are really good guys: "no one wants peace [or hates Communism or loves the underdog or reveres religion] more than I do, BUT...." That is not Robert Bork's style, even though human and social values have been important to him ever since the socialist days of his youth. In his Indiana piece he did permit himself a few personal editorials (for example, on the subject of majoritarian "tyranny"). In my experience and from what I know of his writing, however, he does not ordinarily devote time or space to his personal preferences or *angst* before tackling difficult legal dilemmas. But here, last week, in this hearing room, he was called upon to set forth many of his personal beliefs and convictions as well as his constitutional views. His response to these requests accounts for some of the tonal changes from prior writing, rather than any expedient theatrics; he is simply too honest for that.

This point is important because, in recent days, some people who were troubled by some of Judge Bork's earlier writing have said that they would be reassured by the amplification expressed by Judge Bork at these hearings -- such as his acceptance of *Brandenburg* and other cases as settled law and the three-stage inquiry Judge Bork would undertake as a response to any effort to overturn *Roe v. Wade* -- if only Judge Bork could be believed. My own information on Judge Bork leads me to say: he is, indeed, to be believed.

Let me end with two thoughts on this matter of reassurance. No reassurance should be necessary, in my view, with respect to the Bork record on racial justice. (This is an area I care deeply about because over the past 28 years I have been continuously and intensively associated, as officer and trustee, with three charitable organizations committed to civil rights and equal opportunity for minority groups.) On this front, Judge Bork's writings give strong support to the central importance under the Constitution of racial equality and have repeatedly reaffirmed the rightness of Brown v. Board of Education. As Solicitor General, he aggressively moved to implement these principles, including work in Runyon v. McCrary that helped to fashion an important weapon against private school discrimination. This record is not impaired by the fact that his short-lived "libertarian" fever led him in 1963 to call "ugly" both state-imposed segregation and state-imposed control of private discrimination. Nor is his civil rights record marred by the fact that out of scores of Supreme Court race cases over the past 35 years, he criticized five or six of them because of doubts that are widely shared in the scholarly world and on the Supreme Court itself.

As noted above, there were some issues, other than racial equality, on which Judge Bork's testimony provided explanation and amplification of earlier writings. I do not want to suggest, however, that, in the absence of this testimony, the earlier writings would deserve condemnation as "radically" authoritarian. For one thing, it should be noted that Judge Bork's constitutional approach is not driven by a compulsive-obsessive preoccupation with order for its own sake, but is informed by two powerful liberty concerns: very simply put, a desire to honor the concept that ours should be a government of "laws, not men" (including men or women judges) and an effort to preserve respect for the Supreme Court so as to ensure compliance with its decisions. (On these points, and on the "mainstream" nature of Judge Bork's approach, I respectfully refer the Committee to the letter addressed to you by my colleague, Professor Geoffrey C. Hazard, Jr., dated September 16, 1987.)

Moreover, even one who, like me, favors the general direction of Supreme Court decision-making in the Warren and Burger Courts and who is not much of an "originalist," will find that Judge Bork's articles -- despite, or perhaps because of, their "ranging shot" nature -- force us to come to terms with doubts we might otherwise try to avoid and to search for sounder Constitutional avenues to preferred outcomes. Speaking for myself, there are a number of decisions whose outcomes I cheered over the years on pragmatic grounds but whose reasoning left qualms -- varieties of uneasiness that Judge Bork's Indiana article, for example, forced me to confront. I refer, for example to the *Griswold* case (with its patchwork development of a privacy right), *Shelley v. Kraemer* (with its unfortunate implications for privacy), and even -- dare I say it? -- the "clear and present danger" doctrine (as compared to Judge Learned Hand's alternative formulation).

I trust that I am not alone in finding that some chord of disquiet was touched by the Bork writings about these and other cases. Certainly Judge Bork's criticisms were shared by highly respected jurists and commentators of various persuasions. In other words, these criticisms seem to me to lie within an acceptable universe of discourse; they are not "off the charts," and, indeed, they play a useful role in that discourse. That does not mean that I agree with Judge Bork's analysis of all the cases he has criticized or that I would undo these cases if I could; for that matter, Judge Bork accepts some of them at least on *stare decisis* grounds. It does mean that Judge Bork's "ranging shots" of past years -- even without the elaboration he provided last week -- deserve respect for their capacity to help us address basic questions of the role of courts in a free society.

As a member of the Supreme Court, Judge Bork could be expected to to continue to raise these hard questions with his colleagues -- and to exhibit the intellectual courage of the past -- but subject, as he told the Committee at these hearings, to the institutional constraints that go with the job, including a commitment to stare decisis. The candor, we may assume, would continue unabated. For these reasons, as well as his commanding talents, Judge Bork would be a valued member of an increasingly valuable Supreme Court.

The CHAIRMAN. Thank you, Professor.

Mr. PRIEST. Mr. Chairman, the final speaker will be Ronald D. Rotunda, who is a professor of law at the University of Illinois.

Professor Rotunda has written 15 books on constitutional law and legal ethics, and has recently published a three-volume treatise on constitutional law.

The CHAIRMAN. Welcome, Professor.

TESTIMONY OF RONALD ROTUNDA

Mr. ROTUNDA. Thank you.

I was just thinking, the first time I participated in anything like this was many years ago. I came here to attack the constitutionality of President Nixon's proposed antibussing law. And the last time I appeared before this committee, in person in any event, was several years ago when I argued that it was constitutional for Congress to extend the ratification deadline for the ERA. Congress did so. Unfortunately the ERA was still not enacted.

And now I am pleased to come and support Judge Robert Bork's nomination to the Supreme Court.

I would like to begin by addressing the latest argument I've heard against Judge Bork. It's called confirmation conversion. The argument is that his general legal theory which he articulated before this committee is fairly reasonable. He was here for about a week. It seemed fairly reasonable and, therefore, he must have changed his theory in an effort to secure confirmation.

I think the charge is very serious, and I believe it's false. As Professor Tribe told this committee last Tuesday, he said, "I have no reason to doubt his integrity," nor do I.

I've heard a lot of Judge Bork's testimony. I've read a lot of his writings. I've reviewed his cases. I haven't been surprised by any of the testimony because I think I read his earlier writings and seen them in context, I read them, with care, without bias. We should look at what Judge Bork actually says in context rather than what others claim he said. Very often, other people seem to put their words in his mouth, and I think that's not only unsanitary but very unfair.

I've got a bit of personal testimony to add. A few years ago, Judge Bork visited our school, when he judged our moot court. We've had various judges over the years, including several Supreme Court Justices. Judge Bork was at our school for a couple of days; he spoke to one of my classes. I had lunch with him and we talked, chatted here and there for awhile.

I remember in the class the students asked him about original intent. The judge was very candid. The class was not open to the press. It was a private matter, but I will, nonetheless, break any implied confidence. Nothing the judge told us in private was any different than what he told this committee last week.

For example, one of my students, who was conservative, to say the least, asked Judge Bork about the incorporation doctrine. Some people at that time, including, as I recall, Attorney General Meese, were then arguing that it was contrary to the original intent for the Court to incorporate into the due process clause of the 14th amendment the specific guarantees of the Bill of Rights. The student wanted Judge Bork to agree with that—I had been arguing that the incorporation doctrine was correct, by the way—the Judge refused. He explained that he thought that the Court's doctrine was consistent with the original intent and, in any event, he said it was precedent; he thought it was accurate but, in any event, he said it was precedent and shouldn't be disturbed.

Similarly, in a private conservation at another point, he rejected a narrow view of the first amendment.

Now, in my class, I think the students of the far left expected a rightwing demagogue, and if they did, I think they were disappointed. And I think the students of the far right were equally disappointed.

Judge Bork's opponents have fashioned for him the clothes of an extremist, a radical, but the clothes are ill-fitting, not because he's changed his size or his height, because the opponents are bad tailors.

I've seen the real Judge Bork, and it's the Judge you saw here last week.

When President Reagan nominated Nino Scalia, some Democrats and others protested his conservatism. A few months ago, a Harvard law professor, Larry Tribe, was quoted as saying of Justice Scalia, he said, "So far, I find myself more in agreement with him than any other Justice this term. His opinions show a degree of care and attention to the actual issues before the Court that is refreshing and I wish was shown by others on the Court. The clarity of his analysis puts him in a class by himself."

Now, there's a difference, I think, between Judge Bork and Judge Scalia, a general difference I think that virtually all constitutional commentators would concede—that is, that Judge Scalia is generally viewed as being more conservative than Judge Bork.

Shortly after the President nominated Judge Bork, various groups approached me in an effort to help them oppose the nomination. I've been getting a lot of mail lately, a deluge in fact. They said that—the charge was very serious—he was radical, he is an ideologue, he's beyond the pale, he's outside the mainstream. The metaphors are mixed but the point is clear enough.

I was first told to look at his record as a D.C. Circuit judge. There, they said, you find a man who votes, not on the basis of issues, but on the basis of the parties. Tell me who the parties are, these people said, and I will tell you who will win if Judge Bork is on the panel. The charges have been repeated over and over again. I think in yesterday's Wall Street Journal, Arthur Schlesinger made similar charges.

Well, I looked at the record. Lloyd Cutler, a prominent Democratic lawyer; John Shephard, former president of the ABA—both wrote articles in the National Law Journal. They carefully checked Judge Bork's record in the D.C. Circuit, and they show that the charges evaporate. I'm not going to repeat their evidence. I want to refer to another piece of evidence, a study I found persuasive. It's an objective study published by Judge Harry Edwards of the D.C. Circuit in the Colorado Law Review about 2 years ago.

Judge Edwards—I think he's a man of absolute integrity—rejected very much the notion that the judges on the D.C. Circuit do it on the basis of politics or individuals. I'm quoting now. He said, "There's a growing perception that Federal Judges decide cases on political grounds." This view, he says, is not only wrong and a myth, but it tends to undermine public confidence in the judicial process. He went through some statistics. He showed, for example, in the period which he chose to study, that Judge Bork agreed with Judge Mikva and Judge Ginzburg 100 percent of the time. Judge Scalia agreed with Judge Mikva about 80 percent of the time, and Ginzburg about 95 percent of the time.

And then Judge Edwards took some various conservative judges, and he found out that Judge Scalia agreed with them approximately 100 percent of the time, and Judge Bork was agreeing with them maybe 80, 85, 82 percent of the time.

My time is getting near the end. I want to just make two other points, and maybe I can elaborate more in the questions.

Senator Biden, I think, asked earlier today what evidence that we have that Judge Bork has ever done anything for racial minorities. Well, I looked at his record as Solicitor General. He's often referred to as our Tenth Justice. He urged, for example, in *Beer* v. *United States* for a broad interpretation of the Voting Rights Act to help black minorities. The Court, unfortunately, rejected his proposal.

In *G.E.* v. *Gilbert*, he urged the Court to rule that pregnancy discrimination was illegal sex discrimination. The Court rejected it. The Senators and the House overruled the Court.

Bork argued successfully in *Runyon* v. *McCrary*, that private racial discrimination is illegal. Justice White dissented in that case.

In *Washington* v. *Davis*, Judge Bork argued, again unsuccessfully, that the disproportionate impact of a Civil Service test on black police candidates made it illegal. The Court disagreed and said that you had to have intent to discriminate as well.

I would be happy if anyone asked me to discuss any of his articles. I have reviewed—I won't say every single word, but pretty close to it. And I think if read in context there was nothing he was saying at the time he wrote it that you couldn't find in a lot of other contemporaneous scholarly literature or in dissents on the Supreme Court.

You have to read, I think, his legal scholarship with care. You don't read it the way you read a Jacqueline Susann novel. You have to do more than merely get the drift. If you read it with care, you find out that, for the most part, he has been attacking the rationale of the cases, he's urging the Court to find different rationales. Some of these cases, when they were written years ago, are controversial. Now we accept them.

If I may paraphrase Sir Isaac Newton, if we see further than our predecessors, it's not because we're smarter or wiser. It's because we stand on the shoulders of the giants before us. When scholars criticize the reasoning of the Supreme Court, it's not because we prefer sterile logic; it's quite the contrary. In order to promote justice and evolutionary growth in the law, we have to have the Court articulate its reasons better so that lower courts, the executive branch and the legislature can follow it.

Thank you very much.

[The statement of Professor Rotunda follows:]

TESTIMONY OF

PROFESSOR RONALD D. ROTUNDA*

INTRODUCTION

The first time I was participated in any Congressional hearing was many years ago, in order to attack the constitutionality of President Nixon's proposed anti-school busing law.[1] The last time I appeared in person before this Committee was several years ago, when I argued that it was constitutional for Congress to extend the ratification deadline for the Equal Rights Amendment.[2] Congress did so, but unfortunately the ERA still was not enacted.

I am now pleased to come in support of Judge Robert Bork's nomination to the Supreme Court. Some of my friends have told me that they hope the Senate will filibuster his nomination, in the hopes that the next President will be a Democrat. We sometimes forget that the present Supreme Court is a Republican Court. Only two of the present Justices have been appointed by Democrats.

PREDICTING A JUSTICE'S POSITION

Some people seem to think that Supreme Court Justices vote on the law the way politicians vote on legislation. It is true that a Supreme Court Justice, like a U.S. Senator, has an important job which involves indoor work and requires no heavy lifting. But there the similarity ends. The Justices are not free to do whatever they wish. They do not own the Constitution, they are merely its custodians. As Alexander Hamilton said in *The Federalist Papers*, the Justices do not make law, they interpret it; they must exercise "judgment," not "will." they may not "substitute their own pleasure to the constitutional intentions of the legislature."[3] It is the next generation, not the next election, that is their Judge. Sometimes the Justices--for example, Felix Frankfurter, appointed by F.D.R.--take position which the popular press views as conservative. Other

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Justices--for example, William Brennan, appointed by President Eisenhower--fall into what is often called the "liberal" camp. But neither group is enacting a secret political agenda. Even when they disagree, they are trying, in good faith and with all integrity, to interpret the Constitution to allow majority rule while protecting minority rights.

When Senators, or Presidents, try to predict how "liberal" or "conservative" a Justice will be, we all know that they are often wrong. We do not even know what the great legal issues will be five or ten years from now. Even less do we know what the "conservative" or "liberal" response would be.

Even in the short range, predictions are often wrong. Sandra Day O'Connor was supposed to be right wing ideologue; now she is regarded as a moderate. The news media quickly dubbed Harry Blackmun and Warren Burger (both from Minnesota) as the "Minnesota Twins." Yet they soon differed on major issues. (Burger, by the way, joined the majority in Roe v. Wade[4] and authored the decision requiring Nixon to turn over the Watergate tapes.)[5] Teddy Roosevelt, who appointed Oliver Wendell Holmes to the Court, thought that Holmes would strengthen federal power over interstate commerce. In one of the first major opinions after Holmes was appointed, the Court upheld federal power but Holmes dissented! Roosevelt replied that he "could carve out of a banana a judge with more backbone than that."[6] Holmes, the champion of free speech, became one of our greatest Justices, and the modern Court ended up adopting many of his dissents. And we often forget F.D.R's appointment of Alabama Senator Hugo Black.

Should the Senate today appoint a man who had tremendous intellectual achievements,[7] and who has experience as a judge and litigator, but a person whom a Washington Post editorial called a man of "extreme partisanship,"[8] a charge which many conceded to be true? Should the Senate confirm when the Chicago Tribune declared that the President had picked "the worst he could find?"[9] Should the Senate confirm this man even though he enthusiastically supported the President's efforts to pack the Court?[10] In case some of you are unconvinced, let me add another fact. The man had once been a member of a truly evil organization, the Ku Klux Klan. Although he resigned a dozen years earlier, he still received an unsolicited membership card, and many people charged that the resignation was opportunistic; the leopard doesn't change his spots.[11]

The man I've just described was Justice Hugo Black. Fortunately the Senate confirmed him, and he became one of our greatest Justices. Black, by the way, was an interpretivist who objected to judges making law out of whole cloth. He also was a consistently strong proponent of desegregation and free speech.

When President Reagan nominated Antonin Scalia, some Democrats protested his conservatism. Yet a few months ago Harvard Law Professor Larry Tribe said of Justice Scalia:

> "So far I find myself more in agreement with him than with any other justice this term. His opinions show a degree of care and attention to the actual issues before the Court that is refreshing and I wish was shown by others on the Court. The clarity of his analysis so far puts him in a class by himself."[12]

Larry Tribe is a liberal Democratic activist, with credentials to prove it. For example, he dedicated his first book on Constitutional law to his family and to "my friend Sargent Shriver," the former Democratic Vice Presidential candidate on the ticket with Senator George McGovern.[13] Yet Professor Tribe has become an unabashed fan of Justice Scalia. By the way, most constitutional commentators would agree that there is one important difference between Justice Scalia and Judge Bork: Justice Scalia is generally viewed as more conservative.[14]

JUDGE BORK'S RECORD AS JUDGE

Shortly after the President nominated Judge Bork, various groups approached me to help them oppose his nomination. The charges against him are very serious -- that he is a radical, right-wing ideologue; that he is beyond the pale; and that he is far outside of the mainstream. His opponents may have mixed the metaphors, but the point was clear enough.

I was told that if I look at his record on the D.C. Circuit I will find a man who votes, not on the basis of issues, but on the basis of the parties. He votes, I was told, against the little guy and for big business, against civil rights, and for government intrusion. So I looked at his D.C. Circuit record and I found that these charges were simply false. These charges have been repeated *over, and over again*. But mere repetition does not make them true.

Lloyd Cutler, the prominent Democratic lawyer,[15] and John Shepherd, former President of the American Bar Association,[16] have carefully checked Judge Bork's judicial record and their studies show that the charges against his record evaporate. I won't repeat their evidence, but I would like to add another point. An objective study which I found particularly persuasive was Judge Harry Edwards' scholarly article published two years ago, long before Judge Bork's nomination. Judge Edwards' analysis completely undercuts the loose charge that Judge Bork or any judge on the D.C. Circuit decides cases based on the personal politics of the individual judge. Judge Edwards is a man of absolute integrity. I respect him very much. He strongly objects to--and I'm quoting now--"a growing perception that federal judges decide cases on political grounds . . . ." This view, he says, is not only simply wrong, and a "myth," but it "*tends to undermine public confidence in the judicial process*."[17] Judge Edwards study showed that for the period he studied, Judge Bork agreed with Judge Mikva and Judge Ginsburg 100% of the time, but Judge Scalia agreed with Judge Mikva only 80% of the time and with Judge Ginsburg 95% of the time. When people claim that Judge Bork's decisions are based on mere politics, they make a very serious charge which is devoid of evidence to back it; they also are doing no favors to the judiciary.[18]

When that attack against Judge Bork failed, I was told to look at particular cases in order to see how outrageous Judge Bork was. Several lawyers directed my attention specifically to *Jersey Central Power & Light Co. v. FERC*.[19] I was told that this case is supposed to show how Judge Bork ignores clear Supreme Court precedent. Judge Bork's opinion in that case is joined by a majority of the D.C. Circuit. If Judge Bork is outside the mainstream, a majority of the D.C. Circuit is in drydock. In addition, Judge Ginsburg joined Judge Bork's opinion. Judge Ginsburg is a judge of proven ability and integrity. It was no accident that President Carter appointed her to the D.C. Circuit. Her legal credentials are the finest. And she earned those credentials at a time when the discrimination against women attorneys was much more blatant and overt that it is today. Whether or not Judge Bork was right or wrong in any absolute sense, it is a little ridiculous to suggest that his opinion is far outside the mainstream when Judge Ginsburg joined it.

In short, Judge Bork's record on the D.C. Circuit gives no support to those who say he is "outside of the mainstream," or "a radical ideologue." To make such a serious charge without the strong evidence to back it up is irresponsible.

JUDGE BORK AS SOLICITOR GENERAL

Then Judge Bork's opponents told me to ignore the Circuit opinions. Look instead to what he did as Solicitor General, I was told. And so I did--and it showed a fine legal mind which is hardly out of the mainstream. In Beer v. United States[20] he urged a broad interpretation of the Voting Rights Act to strike an electoral plan which would weaken black voting strength. (The Court rejected his proposal, 5-3.) In General Electric Co. v. Gilbert[21] he urged the Court to rule that pregnancy discrimination was illegal. (The Court rejected that position as well, and Congress then overruled the Court). Bork argued (this time, successfully) that private racial discrimination is illegal, in Runyon v. McCrary.[22] In Washington v. Davis,[23] he urged the Court to outlaw a civil service test given to candidates for the District of Columbia Police Department. The test had a disproportionate impact on black police candidates, and there was no evidence that demonstrated that those who passed the test were more likely to become better policemen. They were only more likely to be white. Unfortunately the Supreme Court rejected his view and required that the plaintiffs also show that the "intent" of the test was to segregate. In United Jewish Organizations of Williamsburgh, Inc. v. Carey,[24] Bork also argued that benign, race-conscious redistricting of voting districts in order to help black voting strength was constitutional; a strongly divided Supreme Court agreed.

As we know, the Solicitor General acts independently of political or partisan concerns. He is often referred to as the "Tenth Justice." There have been criticisms of our present S.G. as not acting independently.[25] Whatever one thinks of that charge is not the point; the point is that no such criticisms were ever levelled at Solicitor General Bork. Secondly, there is absolutely no evidence that Judge Bork took such liberal positions only because the President forced him to do so. That claim is silly. Finally, we know from lawyers who worked in the Solicitor General's office--including lawyers who served under both Democratic and Republican Presidents--that Bork's tenure as S.G. "was marked by intellectual honesty, integrity and a professionalism much appreciated by the Court itself."[26]

JUDGE BORK'S SCHOLARLY WRITINGS

The attack on Judge Bork has now shifted to his scholarly writings. I was told, by those who opposed Judge Bork, don't look at Robert Bork's actions; look instead at what he has written, 5, 15, or 25 years ago. And so I did. The characterization of his writings as extremist is just wrong. The attack is built on sand.

Some of the articles may seem dated now, but that's inevitable with the passage of time. We find accepted scholars to the left of Judge Bork, and others to the right--yet all within the same scholarly tradition. When he has attacked the reasoning of cases, we find many other scholars--considered much more to the left--attacking the reasoning of the same cases. They have defended other cases which Judge Bork has attacked.

In other instances Judge Bork has attacked conservative decisions which other scholars defend. For example, several years ago, the Supreme Court held, in National League of Cities v. Usery,[27] that states have a constitutional right to pay their workers below a minimum wage. Judge Bork, like the great majority of commentators attacked that decision, but Professor Larry Tribe has defended it.[28] Frankly, the constitutional "right" of the states to pay their workers below a living wage does not exist in my view. Yet Professor Tribe has argued otherwise in his writings. That is his right of free speech, and his responsibility as a commentator on the Court. We don't tar people with the title of extremist merely because they author provocative articles. As we know, the Court overruled *National League of Cities* itself two years ago.[30]

I won't review in detail all of Judge Bork's writings, for that will take too long. But I will focus on one particular article, to which the Senators have often referred, the article in The Indiana Law Journal,[31] published a little over a decade and a half ago.

We must remember that we have to read legal scholarship with care. Every word counts. It's not like a Jacqueline Susann novel. If we read Judge Bork's article with any care, it's easy to see that it's not the work of any radical.

He begins his Indiana article by explaining that he will *not* present a general theory of Constitutional Law, but merely attempt to argue that there is "the necessity for theory." He says that he is only presenting what he calls "ranging shots."[32] At the end of the article he reemphasizes that his "remarks are intended to be tentative and exploratory."[33] Some people are surprised to learn from these hearings that today Judge Bork does not embrace very word he wrote over a decade and a half ago. What would be truly surprising would be the opposite. Don't we all change some of our views over the years, especially when we have identified those views as tentative to begin with? What would it say about us if we never changed our views over the years?

I might add another reason that we should not be surprised that Judge Bork no longer embraces his Indiana article. He already told this same Committee of his change of views 14 years ago. It is no recent change on his part. In his hearings before this Committee in 1973--*14 years ago*--he emphasized, in response to a question from Senator Hart as to whether the First Amendment only applies to political speech:

> "[W]hen I wrote that article I was entering into a field for the first time, and I was trying out a theoretical concept, if you

> will. . . . It was speculative writing which professors are expected to engage in, without meaning that that is what they believed for all time or that is what they think would be appropriate for some other organ of Government to pick up at that time and it is explicitly stated to be speculative in that sense."[34]

Yet some people still refer to that article as if it were the culmination of years of thought and represented Robert Bork's most recent views and considered opinion. They appear surprised at what they falsely label as Judge Bork's sudden change of heart.

In the Indiana article, Judge Bork attacks the reasoning of many cases. There's nothing wrong with that. We not only have a free speech right to attack the reasoning of Supreme Court cases, its one of the things we Constitutional Law professors do for a living.

Scholarly criticism helps the Supreme Court in its work. Not every case will necessarily present, full-blown, the principle that the Court is developing. Constitutional reasoning often proceeds inductively. In some instances it may take several years before a later Court, or an academic, steps back a bit, looks at the trees, and sees the forest. Constitutional scholars perform a very useful service when they help justify and rationalize earlier decisions. Through such give and take in provocative scholarship, we learn to accept decisions which were once viewed as very controversial. If we today embrace decisions which once caused a great deal of controversy, if we today see farther than our predecessors--to paraphrase Sir Isaac Newton--it's not because we are smarter than they; its's because we stand on the shoulders of the giants before us. They led the way.

When different Supreme Court decisions appear to be not consistent--if the principles developed in one case are inconsistent with those developed in others--it is also a useful service to point this problem out. When we subject the Court to this criticism, we hope to encourage the Court to look more carefully at its reasoning. Also, when the Court writes clearer opinions, it is easier for lower courts, the legislature, and the executive, to implement and enforce the rights which the Court has found in the Constitution. When scholars criticize the Court's reasoning, it's not because we prefer sterile logic to the needs of justice. On the contrary, it is because we wish to promote justice, and we want to use reason not only to reach the just result, but also to guide lower courts, and to help later Justices build on the earlier caselaw in order to expand human rights.

For example, if Justice Douglas had written a more careful opinion in Evans v. Newton,[35] then I believe that the Court might never have reached the unfortunate result in Evans v. Abney.[36] In that case, in 1970, the Court allowed the state court to turn over a public park to the heirs of Senator Bacon because the park became integrated. When we Court-watchers attack the reasoning of Court cases, it's not because we want to uproot the law; it's because we want it to grow and become more just.

Some scholars initially attacked the reasoning of Brown v. Board of Education,[37] the Court's major, courageous step in overturning over a half century of error. Other scholars, for example, Judge Bork in his Indiana article,[38] tried to demonstrate that Brown v. Board of Education was indeed justified in history and in logic.[39]

Racists since the late 1950's have claimed that Brown had no reasoned historical basis, that it was created out of whole cloth. Judge Bork's defense of Brown in his Indiana article was simply one article in many seeking to demonstrate that Brown is not only morally right; it is legally right.

I was quite surprised to hear, during the course of these hearings, that some people still claim that Brown was not historically justified by logic and history. I, like many others, have looked at historical evidence. The history at times may be a little ambiguous, but there is no doubt in my mind that Brown is correct;[40] those who now say that the decision cannot be justified unless the Justices go outside of the Constitution and create new rights out of whole cloth do violence to the language of the 14th Amendment and do not help the continuing struggle for racial justice.

PRIVACY AND THE CONSTITUTION

Let's briefly turn to the Griswold case,[41] which held that it was unconstitutional for the state to forbid the use of any drug used to prevent conception. Justice Douglas wrote the opinion of the Court and invalidated the statute. Judge Bork, in his Indiana article of 16 years ago, attacked Justice Douglas' reasoning, not the result. Judge Bork, by the way, has made a similar point in his recent writings. Two years ago in his San Diego speech he attacked the reasoning of cases which said that there is a "generalized," abstract right to privacy without giving us as clues to predict how this right might work in practice. Yet, he reemphasized that he was not arguing that the privacy cases "were wrongly decided."[42]

Judge Bork's tentative attack of the reasoning of Griswold had a lot of company. Douglas' opinion spawned a cottage industry in the literature, with most scholars attacking it. In 1978-1979, several years after Judge Bork's article, Professor Kurland, for example, called Griswold a "blatant usurpation."[43]

Judge Bork's Indiana article was too tentative even to examine Justice Harlan's opinion. Harlan, like Judge Bork, did not join Justice Douglas' opinion. Like Justice Black, who dissented in Griswold, Harlan, too, attacked the Court's reasoning. However, Harlan, unlike Black, reached the same result as Douglas but by a different route. I think that Justice Harlan's reasoning has within it the beginnings of a reasoned theory of privacy. Harlan urged judicial self-restraint and argued that it will be achieved "only by continual insistence upon respect for the teachings of history . . . ." I realize that some of Judge Bork's opponents have ridiculed his references to history. Whatever one thinks about the relevance of history, it is hard to call that view "radical" and "far outside the mainstream" when distinguished Justices like John Marshall Harlan have embraced it. Unfortunately, the Court in Griswold, and the Court in subsequent privacy cases, saw no need to develop a reasoned theory of privacy: like the Caliph of Baghdad, the Griswold majority merely announced a result.

The cavalier attitude in Griswold may well have led to the result in Bowers v. Hardwick,[44] the 1986 Supreme Court decision which held that the state can forbid consensual, private sodomy. The majority opinion, joined in by Justice Powell, made no reasoned effort to distinguish *Griswold*. If the Court over the last two decades had made a real effort to elaborate on Justice Harlan's preliminary attempt in *Griswold*, perhaps *Bowers* would have been decided differently. Logically, there seems to be no real difference between *Bowers* and *Griswold*. We should not criticize but applaud Judge Bork for demanding that a Supreme Court opinion divulge its reasoning and explain its holding.

Let's spend a few moments on *Roe v. Wade*,[45] the 1973 decision which invalidated many abortion laws. Many people think that *Roe* is a woman's right case, that it's based on the principle that a woman can control her own body. If it were based on that principle, the case might be far easier to justify. However, the case explicitly did not adopt that argument;[46] and it is shocking but true that the majority in *Roe* even cited with approval *Buck v. Bell*, the 1927 decision requiring sterilization![47] In fact, the Court in *Roe v. Wade* equates compulsory sterilization with compulsory vaccination![48] The people who adopt *Roe v. Wade* in its entirety, and who criticize Judge Bork for daring to attack its reasoning have not read the case very carefully. The vacuous rationale of *Roe v. Wade* is a loose cannon which can be used by a future legislature to justify compulsory sterilization.

Various commentators have concluded that *Roe v. Wade* is not a woman's rights case; it is a doctor's right case. *Roe* itself seems to make that point clear.[49] A later case also held that the state can require a woman to have her first trimester abortion performed by a licensed doctor, even though such a doctor's requirement is more expensive and not necessary for her safety.[50] Under these circumstances, you can see why most commentators have attacked the reasoning of *Roe v. Wade*.

Professor John Hart Ely, a respected scholar, said of *Roe v. Wade* that it was a "frightening" decision, and "dangerous," and "a very bad decision."[51] He wrote that evaluation a few years after Judge Bork's Indiana article. And unlike Judge Bork who made only some tentative suggestions concerning *Griswold*, John

Ely's article represented his considered judgement. Even those who disagree with Professor Ely's evaluation of Roe v. Wade do not claim that he is some type of radical ideologue. Indeed, many law school coursebooks reprint portions of Professor Ely's article, which is thus required reading in many law schools. Professor Ely's attack does not mean that he is antagonistic to personal freedom. We'd all like the Government to get off of our backs and out of the bedroom. But the language of Roe v. Wade doesn't do that.

THE ROLE OF INTERPRETIVE REVIEW

I would like to make a brief comment regarding the legitimacy of interpretive review, which Judge Bork calls looking at the intent of the framers and the ratifiers. The proponents of interpretive review are well within the mainstream. Justice Brennan, for example, engaged in interpretative review when he argued in his recent Holmes lecture that the framers intended the Eighth Amendment to potentially bar capital punishment.[52] Justice Black was a strong supporter of original intent.

Former Representative Barbara Jordan testified that she opposed Judge Bork because he believes that all rights must be found explicitly in the Constitution.[53] If Judge Bork actually believed that, I would agree with former Representative Jordan. But Judge Bork's writings have made very clear that he does not advocate that view. Rights are found in the Constitution either explicitly or implicitly. Judge Bork's extensive scholarship, makes that clear. In fact, he regards as "useless" the view that "judges may apply a Constitutional provision only in circumstances specifically contemplated by the framers."[54]

Others, for example, Professor Philip Kurland, ridicule Judge Bork's reference to original intent by saying that what James Madison said in his diaries is irrelevant. And so it is. Judge Bork also has made clear in his writings on the subject that the Court should look to public intent, not private, subjective intent. An example of public intent would be the Federalist Papers. Justice Joseph Story said that looking at the

Federalist Papers is one of the Rules of Constitutional Interpretation.[55]

When we look at that intent, we only seek to find broad trends--what Judge Bork calls major "premises" or "core values." Judge Bork's opponents attack strawmen when they argue that looking at the original intent means that a right only exists if the framers or ratifiers thought of it. That's silly. As Judge Bork has said, "we cannot know how the framers would vote on specific cases today, in a very different world than the one they knew." Courts, he has warned, "must not hesitate to apply old values to new circumstances. A judge who refuses to deal with unforeseen threats to an established constitutional value, and hence provides a crabbed interpretation robs a provision of its full, fair, and reasonable meaning, fails in his judicial duty."[56]

I think many people are concerned about the phrases, "original intent" and "interpretive review" because they think that they are code words to mean whatever Attorney General Meese thinks. Well, the phrases and the theory existed long before Attorney General Meese was born. Justice Story was a follower of interpretive review.[57] The legal theory is well within the mainstream.

We must put Judge Bork's legal philosophy in perspective. There is a school of thought which argues that Judges should frankly engage in "extraconstitutional policymaking."[58] Others argue that there should be a "fusion of constitutional law and moral theory."[59]

Robert Bork is not a member of this school of thought. Yet that hardly makes him a radical ideologue outside the mainstream. As Justice *Brennan* stated in a 1985 speech:

> "Justices are not platonic guardians appointed to wield authority according to their personal moral predilections."[60]

Judge Bork specifically has adopted Justice Brennan's position.[62] Is Justice Brennan outside the mainstream? As one strong proponent of *non*interpretivist judicial review concedes:

> "No contemporary constitutional theorist seriously disputes the legitimacy of interpretive review."[61]

Only before some members of this Committee is interpretive review difficult to justify.

Some people fear looking to the history, the language, and structure of the Constitution because they think it will be too confining. On the contrary such limitations do not handcuff the judge; as Judge Bork has noted, the history should teach us to adopt no "crabbed" interpretation of our rights.[62]

For example, does the 14th Amendment protect women? There is no historical evidence that the ratifiers of the 14th Amendment sought to exclude women. In addition, when we look to the original intent, we should also look to the language of the amendment. One expresses intent by using written words. If the words are irrelevant, why even have a written Constitution? Thus Judge Bork has said that we must look at the "structure of the Constitution," as well as its history. Now, let's apply Judge Bork's theory to the 14th Amendment. Section 1 of the 14th Amendment refers to "persons." In fact, it says: "[a]ll persons." "Persons" have to include women as well as men. In fact, § 2 of the 14th Amendment specifically refers to "male inhabitants." The framers knew how to say "male" when they meant "male." In § 1 they did not say "male"; they said "all persons." Thus § 1 must include all persons. To argue the contrary is to ignore plain English.

By the way, you look through the Constitution in vain for a clause that says the Courts have the power of judicial review. But that power is easy to justify if we look at history and at The Federalist Papers.[63] The Court should interpret the Constitution and the Bill of Rights broadly because the ratifiers intended that; the history also makes that point quite clearly.[64]

CONFIRMATION CONVERSION

In conclusion, I would like to address the latest argument I've heard against Judge Bork. That argument is that his general legal theory articulated before this panel is fairly reasonable and therefore he must have changed that theory in an effort to secure confirmation. Such a charge is a very serious one. And it's false. As Professor Tribe told this Committee last Tuesday, "I have no reason to doubt [Judge Bork's] integrity."

I have heard a lot of Judge Bork's testimony and I've read a lot of his writings. I have not been surprised by any of his testimony because I have read his earlier writings with care, without bias. We should look at what Judge Bork has said rather than what others claim he has said.

I have a bit of personal testimony to add. A few years ago Judge Bork visited our school, where he judged moot court. Judge Bork spoke to one of my classes and they asked him about original intent. The Judge was candid. The class was not open to the press; it was a private matter. Nonetheless I will break any implied confidence. Nothing Judge Bork told us in private was any different than his public testimony today. For example, one of my students who is very conservative (to say the least) asked Judge Bork about the incorporation doctrine. Some people, including Attorney General Meese, were then arguing that it was contrary to the original intent for the Court to incorporate within the due process clause the specific safeguards of the Bill of Rights. The student wanted Judge Bork to agree with that. The Judge refused. He explained that he thought that the Court's doctrine was consistent with original intent, and that, in addition, it was precedent and should not be disturbed.

In my class, the students of the far left who expected a right-wing demagogue were, I suspect, disappointed. The students of the far-right were equally disappointed as well. Judge Bork's opponents have fashioned for him the clothes of an extremist radical. The clothes are ill-fitting, not because Judge Bork has changed his size, or height, but only because his opponents are very bad tailors. I've seen the real Judge Bork, and it's the same person who has just testified before you.[65]

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Senate Committee on the Judiciary, 95th Cong., 2d Sess., on S.J. Res. 134 (1978), at 251-62.

See also, Rotunda, Running Out of Time: Can the E.R.A. Be Saved, 64 A.B.A. J. 1507 (1978).

3. Federalist Papers, No. 78 (1788), reprinted in, R. Rotunda, Modern Constitutional Law 10 (2d ed. West Pub. Co., 1985).

4. 410 U.S. 113, 207-08 (1973).

5. United States v. Nixon, 418 U.S. 683 (1974). See, Rotunda, Presidents and Ex-Presidents as Witnesses: A Brief Historical Footnote, 1975 U. of Ill. Law Forum 1.

6. See R. Rotunda, Modern Constitutional Law 146 (West Publishing co., 2d ed. 1985).

7. Justice Black never finished high school because he went "straight into the Birmingham Medical School for one year, finishing two years' full requirements in one. Black then switched to the law, studying for three years at the University of Alabama School of Law at Tuscaloosa--where he was so bored that he took an entire liberal arts curriculum concurrently (!), graduating with high honors in 1907." H. Abraham, Justices and Presidents 212 (Oxford U. Press, 2d ed. 1985) (emphasis in original; footnote omitted). See also, id. at 211.

8. Washington Post, Aug. 13, 1937, quoted in Abraham, supra at 212, 359.

9. Quoted in Abraham, supra at 212, 359.

10. Id. at 211.

11. Id. at 212-13.

12. Adler, Scalia's Court, The American Lawyer, March, 1987, at 20, col. 4.

13. L. Tribe, American Constitutional Law, vii (Foundation Press, 1978).

14. See note, 18, infra. In fact, I have read reports that some radical conservatives had put Judge Bork on their black list for appointment to the Supreme Court. Flaherty, A Record That Speaks for Itself, Commonweal, Sept. 11, 1987, at 477, 478. Mr. Flaherty opposes Judge Bork's nomination.

15. See, e.g., Cutler, The Battle Over Bork: For, The American Lawyer, Sept., 1987, at 8 et seq.

Professor Philip Kurland responded to Mr. Cutler's factual argument with a personal, ad hominem attack on Mr. Cutler. I do not want to dignify that type of argument by answering it. See Kurland, The Battle Over Bork: Against, The American Lawyer, Sept. 1987, at 8, et seq.

16. Shepherd, In Support of Bork, Nat'l Law Jrl., Sept. 21, 1987 at 13, et seq.

17. Edwards, Public Misperceptions Concerning the "Politics" of Judging: Dispelling Some Myths About the D.C. Circuit, 56 U. of Colo. L.Rev. 619 (1985). (emphasis added).

18. By the way, it is interesting to note that Judge Edwards' study tends to support the popular perception that--to the extent the media may label judges as liberal or conservative--Judge Scalia is more conservative than Judge Bork. During the twelve month period which Judge Edwards studied, Judge Bork agreed with Judge Mikva and Judge Ginsburg 100% of the time; but Judge Scalia agreed with Judge Mikva 80% of the time and with Judge Ginsburg 95% of the time. 56 U. of Colo. at 644-45. Let's compare Judges Bork and Scalia with four other D.C. Circuit judges who are popularly labelled "conservative" by the newsmedia: Judges Tamm, MacKinnon, Wilkey, and Starr. Scalia was more likely to agree with these conservative judges than Judge Bork was.

	Scalia	Bork
Tamm	100%	92.9%
MacKinnon	100%	83.3%
Wilkey	90%	85.7%
Starr	100%	84.6%

See, 56 U. of Colo. L.Rev. at 644-45.

19. 810 F.2d 1168 (D.C. Cir. 1987) (en banc).

20. 425 U.S. 101 (1976). See summary of S.G.'s brief at 47 L.Ed.2d 605, 608 (favoring appellees).

21. 429 U.S. 125 (1976). See summary of S.G.'s brief at 50 L.Ed.2d 343, 894.

22. 427 U.S. 160 (1976). See summary of S.G.'s brief at 49 L.Ed.2d 415, 1348.

23. 426 U.S. 229 (1976). See summary of S.G.'s brief at 48 L.Ed.2d 597, 982-83.

24. 430 U.S. 144 (1977). See summary of S.G.'s brief at 51 L.Ed.2d 229, 856-57.

25. See generally, Caplan, The Tenth Justice, The New Yorker, Aug. 10, 1987, at 29 (Part I); Aug. 17, 1987, at 30 (Part II).

26. See, Stuart A. Smith, Bork Deserves to Be a Justice, N.Y. Times, Sept. 16, 1987, at 27, col. 2.

27. 426 U.S. 833, (1976).

28. Larry Tribe was one of the few commentators who tried to justify National League of Cities. See L. Tribe, American Constitutional Law § 5-22 (1978). More recently he has reaffirmed this position and argued for "islands in the stream of commerce" which would be immune from Federal regulation. Tribe, Federal-State Relations, in 4 J. Coper, Y. Kamisar, & L. Tribe, The Supreme Court: Trends and Developments, 1981-1982, at 164 (1983). See discussion in, Rotunda, The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions, 132 U. Pa. L.Rev. 289, 291 & n.9, 295 & nn.38-39 (1984); Rotunda, Usery in the Wake of Federal Energy Regulatory Commission v. Mississippi, 1 Const. Commentary 43 (1984); 1 R. Rotunda, J. Nowak, & J. Young, Treatise on Constitutional Law: Substance and Procedure § 4.10 (1986).

29. By the way, Judge Ruth Bader Ginsburg, in her book review of Professor Tribe's book, noted that it contained several instances of what she politely called "eyebrow raisers." Ginsburg, Book Review, 92 Harv. L.Rev. 340, 342, 344 (1978).

30. Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. ___, 105 S.Ct. 1005 (1985).

31. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1 (1971).

32. Id. at 1.

33. Id. at 35.

34. Nominations of Robert H. Bork to be Solicitor General: Hearings before the Senate Committee on the Judiciary 93d Cong., 1st Sess. 5, 21 (1973).

35. 382 U.S. 296 (1966).

36. 396 U.S. 435 (1970).

37. Judge Bork disagrees with Professor Wechsler's attack on Brown. See Wechsler, Toward Neutral Principles of Constitutional Law, in Principles, Politics, and Fundamental Law 3 (1961).

38. Bork, Neutral Principles, 47 Ind. L.J. at 14-15.

39. Indeed, Brown merely returned to the original intent. In 1880, in Strauder v. West Virginia, 100 U.S. 303, 307-08 (1880), Justice Strong said: "[The Fourteenth Amendment declares] that the law in the States shall be the same for the black as for the white . . .."

See, also, e.g., Black, The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421 (1960).

40. Some commentators argued that the Brown was not true to historical intent because many members of the Congress which proposed the Fourteenth amendment also supported school segregation. E.g., M. Perry, The Constitution, The Courts, and Human Rights: An Inquiry Into the Legitimacy of Constitutional Policymaking by the Judiciary at 2, 68 (Yale U. Press, 1982). However, as Judge Bork has argued, we must look at the intent of the public, the ratifiers, not merely the opinion of certain members of Congress. While the intent of the ratifiers and framers may not be entirely clear, it is true that after the Civil War, many people did intend to eliminate all vestiges of slavery. The fact that Congress enacted the broad protection of the Civil Rights Act of 1875 is proof of that. The Supreme Court unfortunately invalidated this law in The Civil Rights Cases, 109 U.S. 3 (1883).

41. Griswold v. Connecticut, 381 U.S. 479 (1965).

42. See Bork, reprinted in, The Great Debate 49 (The Federalist

Society, 1986). It is not unusual for scholars who become judges to decide cases in ways which may not be entirely consistent with their earlier writings. The beauty of common law reasoning is that the judge must decide a principle in light of a specific case and controversy. General statements in articles are like dictum in cases: the general statements must give way to concrete facts with real parties. Justice Frankfurter, a prolific scholar, noted this fact. See Note 65, infra. See also, Judge Friendly, concurring, in *Coleman v. Wagner College*, 429 F.2d 1120, 1127 & n.3 (2d Cir. 1970).

43. Judge Bork's article was published ind 1971. *As late as 1978 to 1979, Professor Philip Kurland*, e.g., called *Griswold* a "blatant usurpation." Kurland, 24 Vill. L.Rev. 3, 25 (1978-1979).

44. 106 S.Ct. 2841 (1986).

45. 410 U.S. 113 (1973).

46. The Court said:

> "In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (vaccination); *Buck v. Bell*, 274 U.S. 200 (1927) (sterilization)."

410 U.S. 113, 154 (1973).

47. Cited in 410 U.S. at 154, right after the above quoted paragraph.

48. 410 U.S. at 154.

49. See 410 U.S. at 164-65 (state can require that abortions, even during the first trimester, only be performed by physicians as it has defined them).

50. *Connecticut v. Menillo*, 423 U.S. 9 (1975) (per curiam). See also, *Roe v. Wade*, 410 U.S. at 164.

51. Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 947-49 (1973).

52. 100 Harv. L.Rev. 313, 324-25 (1986).

53. Testimony of 9/21/87.

54. Bork, in The Great Debate, supra at 45-46.

55. See R. Rotunda & J. Nowak, Joseph Story's Commentaries on the Constitution, Ch. 5 (1833; Carolina Academic Press ed., 1987).

56. Note 55 supra at 47.

57. See note 55, supra.

58. M. Perry, supra at n.40, at x, ix. See also, e.g., id at 101-14.

59. R. Dworkin, Taking Rights Seriously 149 (1977). Dworkin expresses surprise "that, incredibly, [this fusion] has yet to take place."

60. M. Perry, The Constitution, The Courts, and Human Rights: An Inquiry Into the Legitimacy of Constitutional Policymaking by the Judiciary 11 (Yale U. Press, 1982).

61. See, N.Y. Times, Oct. 13, 1985, at 36, Col. 2, quoted in, Bork, The Constitution, Original Intent, and Economic Rights, 23 San Diego L.Rev. 823, 825 (1986).

62. Id.

63. See discussion in: R. Rotunda, Modern Constitutional Law 10-13 (West Pub. Co. 2d ed 1985).

64. See e.g., McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 91819).

65. The real Robert Bork is Judge Bork, the mane who is a member of the D.C. Circuit. As Felix Frankfurter noted:

> "There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole the judges do lay aside private views in discharging their judicial functions."

Public Utilities Commission v. Pollak, 343 U.S. 451, 466 (1952).

Senator HEFLIN. Senator Biden asked me to chair while he is out, but he'll be back shortly.

Professor McDonald, you mentioned in your statement, I believe, about some of the other judges in a confirmation process, or perhaps maybe it was in an article that was written in the Wall Street Journal about Judge Parker. And as I understand it, that was quite a controversial nomination, and the action that was taken on it, of course, was highly controversial.

From a historian's viewpoint, would you sort of give us a review of that as well as maybe the Fortas, the Haynsworth and the Carswell nominations?

Mr. McDONALD. Yes, sir, I'd be happy to.

Parker was the Chief Judge of the Fourth Circuit U.S. Court. In 1930, President Hoover nominated him for a Justiceship. And there was a good deal of controversy over it. And the long and short of it was that Parker was turned down on the ground that he was a racist. The actual specific charge was that in 1920, in running for public office in South Carolina, he said that blacks should not be allowed to vote.

Well, he was rejected. That was one of the four times in this century in which the Senate has turned down a nomination or has not approved a nomination.

He still sat on circuit court for a long, long time, and it turned out that they were wrong. He had a very distinguished record as a pioneer in protecting the rights of blacks, and particularly voting right.

There's one very important case which is, I think, called *Rice* v. *Elmore*, a 1947 case, in which Judge Parker just did away with the all-white primary in South Carolina. And it was allowed to stand by the Supreme Court and it was a tremendous step forward for black voting rights.

So, in that instance, the Senate was wrong. And it's pretty generally thought that—scholars are pretty generally agreed that it was wrong.

The Justice who was appointed in his place was Justice Roberts. And it's pretty generally agreed that Justice Roberts was no great shakes.

You asked about Abe Fortas and Carswell and Haynsworth. Carswell and Haynsworth were appointees by President Nixon in 1969.

Nixon nominated Haynsworth first, and there was a great deal of trouble with that. He was generally regarded by the legal profession as having a B− or a C+ mind. There were charges that he had been a racist. And it was charged that there were some indiscretions, no crimes, but some serious indiscretions in his background. And so he was turned down.

Really out of spite, President Nixon came back with an even worse qualified man, insisting though that what the Senate was doing was turning down these people because they were conservative Southerners. It had nothing to do with that. Carswell was even shakier on questions of race. If Haynsworth had a B minus, C plus mind, here we're talking a D minus mind, and his dealings were even more questionable.

The Fortas case is a special one. Fortas was nominated in 1968 to move up from Associate Justice to Chief Justice to replace Earl Warren. But the Senate—really a segment of the Senate—was quite peeved by the nature of this. It seemed in the order of a power play because Chief Justice Warren did not resign yet. He said I'll resign, you know, if you'll put Fortas in my place. And the Senate thought this was rather toying with its affections, so to speak, and a filibuster began. There were very serious objections, and the filibuster lasted for some time. And no vote ever came because Fortas withdrew.

Well, of course, it was not in evidence in 1968 but, a year later, it turned out that Fortas had accepted, very improperly, large sums of money from Louis Wolfson who was put away as a swindler, and so he resigned under some cloud.

But those are the four times in this century in which a nomination has not been confirmed.

Senator HEFLIN. Professor Meador, you mentioned in your prepared testimony, which I read, about the instance of Justice L. Q. C. Lamar, which was an interesting thing. Would you sort of give us a little of the history of that?

Mr. MEADOR. Yes. That happened exactly 100 years ago, September 1887. When Grover Cleveland, who was a Democrat, was President, he nominated L. Q. C. Lamar. The Senate was under Republican control with a one vote majority.

Now, Lamar was pretty clearly qualified by any normal standard. The Republicans, though, made a party determination to contest it on party grounds. Their argument was that because he had been a Confederate officer and a very active one, also, and a very active secessionist before 1860, he could not be relied upon to accept the 13th, 14th and 15th amendments as valid, nor could he be relied upon to interpret them fairly. That was the argument made.

In the evidence, though, there was really no foundation for it. Lamar had long ago evidenced his acceptance of the war and the amendments in various speeches. He was saved from a straight party defeat by a switch on the eve of the Senate vote by two Republican Senators and one Independent.

I cited that case in my testimony because it, along with the *Parker* case that you just heard about, illustrates the unseemly nature of a partisan political fight over a nomination. And what I am trying to say here is that I think, institutionally speaking, we ought to rise above that, get some sort of principled standards that can be applied objectively by the Senate in its consenting, reviewing role, realizing it cannot select the nominee.

Those instances are looked upon now by historians, generally speaking, as having been mistakes. The Senators who opposed the nominations are looked upon as having acted in a partisan and a very unstatesmanlike way.

The CHAIRMAN. Senator Thurmond?

Senator THURMOND. Thank you very much. I want to take this opportunity to welcome you gentlemen here. I am very glad to see Mr. Meador here. I have been with him down at the Brookings meeting in his State and on other occasions. And I am delighted to see you other gentlemen here.

I am not going to take time to go into a lot of detail and ask a lot of intricate questions on all these different subjects and issues. The main thing is to get your opinion about this man, and I am going to ask this question. I would like for each one of you to answer it. We will start with Mr. Meador, and then we will proceed down the list.

Mr. Meador, do you consider Judge Bork qualified by reason of integrity, judicial temperament, professional competence, to be qualified to be a member of the Supreme Court of the United States?

Mr. **Meador**. Yes, sir.

Senator **Thurmond**. Do you know of any reason why he should not be made a member of the Supreme Court of the United States?

Mr. **Meador**. No, sir.

Senator **Thurmond**. Mr. Simon?

Mr. **Simon**. I answer the questions the same way as Mr. Meador, Senator.

Senator **Thurmond**. Mr. Priest?

Mr. **Priest**. I concur as well, Senator.

Senator **Thurmond**. Mr. Rotunda?

Mr. **Rotunda**. Oh, absolutely.

Senator **Thurmond**. Mr. McDonald?

Mr. **McDonald**. Absolutely.

Senator **Thurmond**. Thank you, Mr. Chairman, that is all. Thank you, gentlemen.

The **Chairman**. Thank you.

Senator Simpson?

Senator **Simpson**. Thank you, Mr. Chairman. A special welcome to you all. And it is good to see you again, Dan. I haven't seen you for several years. You are a splendid gent. We have had a lot of fun together, and I wish you and Janet the best, and it is always nice to see you. And I will come down there and say more when we finish this action, and to the others, who I do not know, but I know by reputation.

It is an interesting thing for me. I have been here now for several days. It is a very fair hearing from the Chairman. It has been a fair hearing from the participants here, and the panel.

The only unfair part of it is going out in America, and going on out in America—advertising, radio ads, about this man who is off the map, out of the mainstream, the missing link, and all sorts of other lesser and greater approbation and ridicule and so on, and it is that. And that is too bad. But apparently, that is the ground that has been chosen by the strategists to defeat Judge Bork; and they have been waiting for him since Scalia took the bench. They knew he would be next, and he is, and here he is. And that is something we just will see work its way.

I think that as this goes on and we finish our work here and it goes to the floor of the United States Senate where 86 of our colleagues will begin to chew around it, we will begin to get a greater clarity of the fact and the fiction of this one that cannot come at this point because I think Americans have been almost hammered flat. And when people come up to you and say, Is this the fellow that is going to intrude into the sanctity of our bedrooms, I say, Come on. What are you talking about.

And then you tell them, and they say, I didn't know that. I heard he was in favor of sterilization. I said, Well, Oliver Wendell Holmes was in favor of sterilization, so what is your next question on that?

Racism—from an article in 1963, when 27 U.S. Senators voted the same way. None of them are racists. Not one.

Anti-women. Absurd. Cases, amicus briefs—it is an adventure. Gets thicker and deeper, but the American people will slowly see what that is.

And Senator Thurmond has asked you the key question, and the key question is little things like integrity, judicial temperament, knowledge of the law, clarity of expression.

And, you know, here you are, all of you involved in academe, and I hope writing, and I hope writing in something other than just sterile ways; that you are writing in exciting ways and provocative ways. But watch out. Because when you do one that is requested by some university as a provocative law review article, be sure that it is absolutely pallid and like pablum, and not too controversial, because they will wrap it around you like the Law Review article of Indiana of 1971, and you won't dig out of the rubble for the rest of your professional life.

Ranging shots—you have heard me speak of that, and all the things he prefaced his article with have totally been disregarded. That is the one they have harped on and are just pecking it to death, and that is ironic.

The only thing, here is a man—and I would ask you—as I understand, and it hasn't been really touched upon with the greatest attention. I think this man has had the most profound influence on antitrust law of any man in the United States, practicing or a professor.

I note now, and I was just curious as I found this, that the Supreme Court has cited Judge Bork's work on antitrust in no fewer than six majority opinions by such diverse Justices as Justice Brennan, Powell, Stevens and Chief Justice Burger. The book has been cited by Justice O'Connor in her opinion concurring in the judgment in *Jefferson Parrish,* and by Justice Blackmun in his dissenting opinion. We don't hear much about that.

We hear about a Law Review article of 1971, and we ignore the attributes of the man, and that puzzles me. And what more disturbs me is that I have found, and, you know, I haven't really asked you the question, but this is my 5 minutes worth. The only thing that will ever upstage this event in the annals of judicial nomination will be the confirmation of Professor Lawrence Tribe at some unknown time.

And I think we want to remember that that is not in any way anything but the highest regard expressed for that man. Because he has written provocative, interesting, lucid and exciting articles, and we have set the tone—we have now set the one, and that is too bad that we just can't pick him on the basis of the real attributes that we as lawyers and professors and Congressmen should like. And we have set all the hurdles for the rest of the Supreme Court for the rest of our history with this little activity that we are now performing in our Judiciary Committee.

The CHAIRMAN. I thank my colleague. I imagine Judge Easterbrook and Judge Posner would be equally as interesting if they are here also. But there are plenty and the point made by the Senator is an accurate one.

The Senator from Pennsylvania?

Senator SPECTER. Thank you, Mr. Chairman.

I would like to commend the panel for very important testimony. I have heard a fair amount of it on television and radio; our duties require us to be elsewhere, and I am sure that many of our colleagues are listening as well.

You gentlemen have followed a panel of women, who have testified on the equal protection issue, exactly to the contrary. And, as we are past 6 o'clock this evening and the Senate is still in session, my colleagues who are not on the committee say, Are you still going? And I say, Yes, we are still going. And I again compliment the Chairman, Senator Biden, for doing an outstanding job conducting these hearings. He goes right over and comes back on the votes, and some of us detour for a moment or two.

Within a few minutes, there is very little that can be asked, although you have put much on the platter for analysis. But let me ask you, Professor Priest, I think it was you. I heard you on the radio, so I might not be accurate. I didn't see your testimony on television.

But I was very interested in your analysis of the difference in the post-World War II academic approach. That was you, was it not?

Mr. PRIEST. Yes, sir.

Senator SPECTER. And you were making the distinction, and I think a very interesting one—we certainly haven't heard that before—about evaluating his professorial writings, Judge Bork's professorial writings in a different context, and then looking at his opinions, which are very moderate.

And I have two questions and I am going to give them both to you, and I will ask you to be brief on the first one. You can be very long on the second one because my 5 minutes will be up.

The first question is, how about his speeches? I have read about 80 of his speeches, and many of them after he became a judge. So you have the professorial writings early on, the 1960's and 1970's, then he becomes a judge, but the speeches continue. And the speeches are very much in the tone of the writings—equal protection under original framers doesn't apply beyond race, and later in the speech as well, race and then ethnics.

Do we consider the speeches as well?

Mr. PRIEST. I think it is a very good question. I, too, have read a large number of his speeches. I am not sure I have read 80, but I have read a large number of them, and I agree with you that the tone of the speeches very much resembles the tone of his academic writing.

But it does seem to me, in thinking about this testimony and studying his—the corpus of his work, that there remains a difference between the speeches and the judicial work product, his opinions.

Senator SPECTER. Very much so.

Mr. PRIEST. And it seems to me, Senator, that the difference that I have described is not really a difference in timing. It is not a difference in the man—I am not his biographer, nor am I in any way able to analyze the deeper motivations of this fellow. But it seems to me the difference comes from the role that he is playing and the job that he is undertaking.

Senator **Specter**. His role as a speaker? I don't want to cut you off, but I want to go on to the second question. My time is very close to being up.

And on the prior point, I would call your attention to *Dronenburg*, and maybe somebody can give you a chance to expand upon that. Because in the *Dronenburg* opinion on the DC Circuit, he picks up on his professorial writings, and he lectures the Supreme Court pretty good. That is on homosexuality and discharge from the Navy. And he goes back in a sense to being a law professor, and he gives a little lecture about the *Griswold* case, and then there is a petition for rehearing for the court en banc, and some of the DC judges spank him a little, and then he replies. It is on the bench but pretty professorial.

But the second question I want to ask you is this. You say that the style among the professors is to be very outspoken and to use very strong language. I asked Attorney General Katzenbach that question—he used to be the editor in chief of the Yale Law Journal before you got there, Professor Priest—and he didn't think that it was in keeping with the times. But that is a very long time ago and a lot has happened Attorney General Katzenbach doesn't know about and neither do I.

But I have a real question in my mind about the tone of his criticism, and I am not talking about hyperbole and how a professor has to be attractive. We Senators think that we don't get attention. We have got a platform which we do, and I understand the necessity for speaking in forceful terms.

But his terms have been so very, very forceful. He talks about decisions of the Court being unconstitutional. He talks about the judges lacking legitimacy. He talks about the judges being guilty of civil disobedience. I don't think he uses the word "guilt," but he talks about civil disobedience. He even talks in one of the most amazing statements, and I commented about it in the opening statement, although we didn't get to a question on it, that went: "The Supreme Court lacks legitimacy." He writes, "Why make"—and this was a long time ago, back to the Indiana Law Review article. He says, "Why make an argument to an illegitimate body, a Supreme Court which lacks legitimacy, when you can make it to the Joint Chiefs of Staff, which has a better way of carrying out its decisions."

And I ask you about the stridency about this in terms of being a professor because a key point that we have to evaluate is where will he be, if confirmed, on applying settled law, which he has promised to do, in situations where he expressly says he disagrees with the philosophy and carries that disagreement forward.

Now, here we have a man who has spoken more vehemently than any I have read, and that bears on his ability to subordinate a general philosophy to apply accepted principles. And I would like your response on the two facets: this strong language characteristic of the modern professors in legal writing, and what does it tell us about Judge Bork's willingness, ability to subordinate that strong judicial philosophy to apply accepted principle which may be at direct variance with that philosophy.

Mr. PRIEST. I believe that the stridency that you have identified and that I see, too, in his academic writings and in many of his speeches, in particular, in the Indiana Law Review piece, is characteristic of the first rank of legal scholarship. It is characteristic of the style and method of what I and I think others regard as the most important legal scholarship that is being conducted today.

And the stridency comes—although again it is hard to say, I think, not from some personal characteristic of Bork himself, but rather from the effort to establish his theory in his writings, to establish his theory of the Constitution or his theory of one area of law or another as superior to all other theories.

In order to establish the primacy of the scholar's own view—and it is true of every scholar—it is necessary to be dismissive of everything else. If one is respectful of previous authority——

Senator SPECTER. Including the Supreme Court?

Mr. PRIEST. Absolutely, including the Supreme Court. Certainly. Certainly. In academics there is no value given to fidelity to the Supreme Court or to any other body of thought, to any philosophy, The ambition for the scholar of the first rank is to reject all, and to explain a new way of thinking about these matters.

Judge Bork in his testimony here described that article and some of his other speeches as speculative, as speculations. I think that it goes beyond speculation. I would interpret Bork's own writings differently than Judge Bork has, himself. I think, more than speculation, this is an attempt, and it represented a fledgling attempt in the case of the Indiana Law Review piece, an attempt to establish or to strike out toward a new theory of the Constitution, or a new theory of constitutional interpretation, which in order to become established requires that other theories be dismissed, including the theories that the Supreme Court was pursuing at the time.

You mentioned the *Dronenburg* case, and I agree with you. There is a great deal of what appears to be scholarly in the *Dronenburg* case, especially as he discusses the various lines of cases through *Griswold* and the like. But the discussion is, it seems to me, and I have read it several times and compared it to his Indiana Law Journal piece, it is different in the sense that he is discussing these cases and he is challenging or questioning what the basis for them is and how they relate to the case before him, but there is something less of the—and, again, his colleagues did view, some of his colleagues did view this as challenging the Supreme Court, but I think there is something less of stridency and less of a claim to have the best or the dominant theory in those passages in *Dronenburg* than in the Indiana Law Review piece.

The difference I see in Bork and in Bork's opinions stems not from the fact that in one case he is giving a speech or writing an article as a professor, but rather that as a judge he faces different problems. As a judge, he faces real parties. His opinions and his conclusions have real consequences that the theorizing and assertions of a law journal article or even a speech never have. I think that Bork as an individual sees that difference in role and has moderated his approach in response to that.

Senator SPECTER. Thank you very much.

Mr. ROTUNDA. Senator, I think I can add something to what——

Senator SPECTER. If you do it briefly, Professor. We have turned a 5-minute question period into 18 minutes.

Mr. ROTUNDA. I will be pithy, I guess.

The article I referred to earlier by Judge Harry Edwards in the Colorado Law Review. Here is what he says about *Dronenburg*. Judge Edwards, "To my mind, cases such as *Dronenburg* demonstrate little more than that judges are very likely to disagree in extremely difficult cases that implicate ultimate values. I would also note that in *Dronenburg* the Court did not divide simply along so-called liberal-conservative lines."

Even in cases like *Dronenburg*, I don't think it is fair to—this is the way judges sometimes talk to each other. You should read, I think, in *FERC* v. *Mississippi*, Justice Blackmun and Justice O'Connor in their opinions talking about each other.

Second point about some of Judge Bork's speeches. This morning when I was coming in by plane, for a little bit of leisurely reading I was reading a recent speech of Judge Carl McGowan on Presidential vetoes. This is the introductory part of his speech. He is not talking about this particular subject, but this is the sentence; it just appears without any footnotes, unconnected really with the article: "Congress keeps the judiciary in line through its plenary power to control the jurisdiction of the federal courts."

I think that sentence is absolutely wrong. I think if somebody brought a case before Judge McGowan, for example, trying to remove the Supreme Court's jurisdiction to order busing when it is necessary for racial integration, Judge McGowan would say, No, that is not what I meant. Just as judges in cases occasionally have dictum, judges in speeches have a lot of dictum and a lot of loose language.

If you would like to read some commentary about the Supreme Court, read either, I think, John Hart Ealey's attack of *Roe* v. *Wade* or anything Phillip Kurland has ever written, because he has a biting, some people would say, sarcastic style; yet he's a respected scholar. That's just the way some people are.

The CHAIRMAN. Thank you very much.

The Senator from Vermont.

Mr. LEAHY. Mr. Chairman, just an observation.

The Senator from Wyoming is a man with whom I agree more on this committee than I disagree, if you would move down through and tally up our votes. But I must say I disagree just a tad with his earlier statement. He talks with glee about what type of interrogation there would be if Professor Tribe should be a nominee to the Supreme Court.

Well, there are two things I should note. One, I suspect that Professor Tribe would probably be delighted to have that interrogation, knowing what it was that brought him into a position to be so interrogated. But secondly, I also think, as a constitutional lawyer, he would be the first to welcome it, knowing that that really is an integral part of the advice and consent process.

The President is perfectly entitled to pick whomever he wants. He is perfectly entitled to pick somebody whose ideology matches his own or goes with a different type of ideology. It is perfectly proper, as in this case, for the President and the Attorney General to pick somebody whose ideology was attractive to them. As they have said, that ideology was something that influenced their decision. That is totally proper.

But it is also totally proper in the advice and consent procedure for us to look at those same questions, to look at the same things that determine the choice in the first place by the President and by the Attorney General. I think that, in doing that, we fulfill the partnership that the Constitution intended in the advice and consent process.

So we may have unalterably changed the way these hearings will go, as my friend from Wyoming suggests, and there I think he may well be right. But we have Senators who come here from both parties who feel there should be an automatic rubber stamp given to any nominee.

I never felt that way. My predecessor who served here from the year I was born until the day I arrived, literally, in this Senate seat, from the year I was born until the day I arrived, was fond of saying he always voted for the Presidential nominee. I have voted against them from Democratic Presidents and Republican Presidents. I voted for the vast majority of them from both parties. But I reserved that right under advice and consent to do just that—advise and, if necessary, withhold my consent. I think the Constitution works better when we hold to that.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

The Senator from New Hampshire.

Senator HUMPHREY. Thank you, Mr. Chairman.

Gentlemen, you have presented some very interesting testimony. I regret I have only 5 minutes nominally to address questions.

I want to go directly to Professor Meador. Professor, in your statement you say something that is self-evident but which is a real jewel and which I want to develop as much as time permits. You state, "Such an anti-democratic body as the Supreme Court can exist only if the people believe that its judges act objectively under the law." As I say, that is self-evidently true and, indeed, the Supreme Court, by design, is the least democratic, most dictatorial of the three branches of government. Judges, after all, are confirmed for life, accountable to no one in the sense the elected officials are accountable periodically. So that is a statement which is self-evidently true.

But let me develop that a little further. I would refer to the exchange I had with a professor on the preceding panel who, like many Bork critics, criticized Robert Bork for his inability to find in the Constitution a vast, broad, unencumbered right to privacy. Yet the professor, you will recall, later admitted in response to my questioning that legislatures may pass laws to forbid, for example, prostitution, consensual prostitution, which takes place in private. She therefore admitted that there is not an entirely unencumbered right to privacy in the Constitution.

Now, the Bork opponents can't have it both ways, I hope. They can't claim there is a broad right to do anything one wishes in private, as long as it's lawful and consensual, on the one hand, and then on the other hand admit that legislators may, under the Constitution, proscribe certain private activities. They can't have it both ways. They would like to. They would like to have it both ways, but they cannot. And the exchange I had with the professor I think proved the point.

Then I asked the professor, "How, then, are judges to decide which activities may be outlawed and which not, except by imposing their own personal values?" And she replied that, as I recall, they must then search the values implicit in the Constitution, and agreed with me further that such a searching process is highly objective, highly objective—Excuse me. I beg your pardon. That's quite the reverse. She agreed with me that it is highly subjective, highly subjective.

Then I return once again to your statement, "such an anti-democratic body as the Supreme Court can exist only if the people believe that its judges act objectively", not subjectively, but "objectively under the law." Very true.

So the bottom line is, quite obviously, that the Bork opponents like subjective judges. They like subjective judges because, at this stage in our history, subjective judges are willing to do the bidding of the anti-Bork groups. That's the bottom line. That's the essence.

But this reliance on subjective judges is dangerous, isn't it, Professor Meador? You point out in your testimony—and here's where we come to a question, and I know you've been anxious to be asked the question—why is it dangerous? You refer to the *Dred Scott* decision as one of these subjective decisions where judges imposed personal values. To what end?

Mr. MEADOR. Well, it seems to me that the times in American history when the country has gotten in the most difficulty have come because of judges becoming, in a sense, unlinked from the Constitution and writing in novel doctrines. *Dred Scott* is clearly an illustration of that——

Senator HUMPHREY. Yes. You know, not all of us here are lawyers, and many listening and watching on television don't recall the details of *Dred Scott*.

What was the essence of *Dred Scott* and why was that such a bad decision?

Mr. MEADOR. Congress had attempted to forbid slavery in the territories of the United States, the western territories, and the Supreme Court held that to be unconstitutional. There was no clear warrant in the Constitution, nothing in the constitutional text, that sustained such a decision.

The same thing began to happen again in the 1900s, when we got into the 1930s——

Senator HUMPHREY. Yes, but don't——

Mr. MEADOR. We had liberty of contract——

Senator HUMPHREY. Would you keep your focus on *Dred Scott* because I want to make the point for black Americans especially. Why is it dangerous to have subjective judges? What was the effect on blacks of this subjective decision in *Dred Scott*?

Mr. MEADOR. Well, the effect was it deprived Congress of all power to deal with the slavery problem in the territories of the United States. It stripped Congress of power either to control, regulate, or abolish slavery.

Senator HUMPHREY. To abolish or control, it stripped Congress of that right—stripped the democratic branch of the Government to control or abolish slavery was the effect of the subjective judgment in the case of *Dred Scott*; is that correct?

Mr. McDONALD. Let me add one further thing, Senator. The case also, or at least Chief Justice Taney in rendering the decision, said that blacks are not, never can be, never will be entitled to citizenship, even free blacks. There is no way a black person could ever be a citizen of the United States. Senator Humphrey. A subjective decision, in your opinion?

Mr. ROTUNDA. He just made it up.

Senator HUMPHREY. Made it up. Post their own values.

Mr. ROTUNDA. Justice Curtis wrote a lengthy dissent, going through a lengthy history showing that Taney's decision just came out of the thin air.

Senator HUMPHREY. Out of thin air.

Mr. ROTUNDA. People don't realize, after——

Senator HUMPHREY. Kept the blacks suppressed out of thin air. How do you like that?

Mr. ROTUNDA. After the decision was published, Taney withheld it for about—it was published publicly, and then he withheld it for about, oh, 10 days, and added about 12 or 15 pages trying to counteract Curtis' argument, but he couldn't find the history to do it. He just made it up out of thin air and, as you say, it is often listed as one of the causes of——

Senator HUMPHREY. One of the worst.

Mr. ROTUNDA [continuing]. Of the Civil War.

Senator HUMPHREY. A cause of the Civil War, kept blacks as slaves for decades and generations, perpetrated, perpetuated, one of the most gross injustices in human history. That's the result of a subjective decision which the Bork opponents seem to prefer to decisions of an elected body accountable to the people, or prefer to objective judges.

Mr. ROTUNDA. Subjectivity is a knife that cuts both ways.

Senator HUMPHREY. Indeed it does. I caution my fellow citizens who happen to be black that this may be working to their advantage at the moment, but it has worked horribly to their disadvantage and to the disadvantage of children, childhood workers and others, women, when used in the other direction. It cuts both ways and it's dangerous.

The CHAIRMAN. Thank you, Senator.

I only have one comment. Professor Priest, you made a very stark distinction between Judge Bork the speaker and Judge Bork the professor and Judge Bork the judge. One thing I want to point out on what you said, so that those of us who have characterized Judge Bork's writings and speeches in the same way that you have characterized them, even though you make a distinction, you say, as judge, he should be judged, not as speaker and not as professor.

But you said—and I quote—"As a professor, he has pressed the arguments to an extreme, single-minded and radical approaches, and hostile to authority." If you are right about us looking at the judging and not the writing, then it doesn't matter. But if you are wrong, at least we both acknowledge that the writings are radical—not all, but many—and they are to the extreme, and they are hostile to authority. That is, those of us who don't share your view, that we should just judge the judging, that's the reason why we are concerned, because we agree with your assessment that the writings are radical, single minded, extreme and hostile to authority—your words, not mine. That's the only point I want to make.

I thank you all very, very much for being here, and especially this late on Friday night. The panel is dismissed.

Senator THURMOND. Mr. Chairman, may I make one statement?

The CHAIRMAN. Sure.

Excuse me, the Senator has a statement.

Senator THURMOND. I just want to commend you on your presentation. I was impressed with the three objective tests to determine whether a nominee is in the mainstream of American law. I think this could be a valuable tool and I would certainly urge my colleagues to examine their views and compare it with the tests given here. I think those are excellent and I just wanted to commend you on those.

The CHAIRMAN. Thank you very much, gentlemen.

Mr. SIMON. Mr. Chairman, I wonder if you could just indulge me for a moment.

The folks on the faculty at the law school, as you probably have already observed from the other people who are testifying——

The CHAIRMAN. Are split.

Mr. SIMON. They don't agree on everything. Now, with respect to my colleague, Professor Priest, I didn't want the record—insofar as my participation on this panel is concerned—to be left in quite the posture that it's in at this time.

If I can amend the statement you made, or at least put this gloss on it, that "hostile to authority—"

The CHAIRMAN. I wasn't speaking of your testimony.

Mr. SIMON. I know that. But I'm saying that I think I interpret my colleague, Professor Priest, as meaning that, in language, in style, in gladiatorial approach, Judge Bork's writings have the characteristics you mentioned, but that's a little different from saying that the substantive positions are necessarily radical, that the substantive positions defy authority.

I am making a distinction between the style and flair on the one hand and the positions on the other. I thank you for indulging me.

The CHAIRMAN. I am delighted to have it. The record will stand. The interesting part about getting this many lawyers together is that we all are one another's lawyer. When in doubt, we can always find one. You have all represented yourselves well and one another well, as we have attempted to do here.

Mr. PRIEST. Mr. Chairman, could I just say that I had presumed that your reading of my comment was exactly similar to that as explained by my colleague, John Simon. That is, as you can see from your careful reading of my testimony, for which I'm very grateful, I have been talking about style here, and I have been talking about the style of scholarship that I think is, as I have said, radical and extreme——

The CHAIRMAN. Not the positions?

Mr. PRIEST [continuing]. Which is of the nature of establishing a theory or trying to assert a theory that would have primacy over other constitutional theories.

The CHAIRMAN. You weren't suggesting that the theories were, or that any of the positions taken were?

Mr. **Priest**. No, sir. I am claiming that Judge Bork, as an academic, like many of us are academics that aspire to have influence over the courts and over legislators, try to establish the primacy of our views as vigorously as we can.

The **Chairman**. Sure.

Mr. **Priest**. To do that requires a style that is exaggerated, a style that is radical, and a style that is extreme——

The **Chairman**. I see.

Mr. **Priest** [continuing]. And a style that is dismissive of authority, even though, of course, all of us recognize that to have actual influence, one must build upon the authority of what has gone before.

The **Chairman**. You don't think his position on speech in 1971 was not only stylistically but theoretically radical and extreme?

Mr. **Priest**. I think his position in 1971 in the Indiana Law Review piece is not well worked out. I think the style is radical. I think that in terms of substance it needs more work before we really know where——

The **Chairman**. Well, he has worked on it.

I accept your explanation and we're going to have plenty of time to discuss it. But the hour is very late and we have two more panels. I thank you all very much.

Now, I promised those panels that are waiting we will not abandon you this evening. If you are willing to spend your Friday night with me, I am willing and anxious to spend it with you.

The next panel we have is an academic panel, again made up of the following persons. Witnesses in this group are also all professors. I haven't seen so many professors since—I haven't seen so many professors.

Senator **Leahy**. Mr. Chairman, just so everybody can save their last remark, I will interrupt just for a moment. Because the hour is so late, I will waive all my questioning time for the rest of the evening.

The **Chairman**. Thank you.

Senator **Leahy**. And I would encourage everybody else to do the same.

The **Chairman**. Our next panel is made up of Owen Fiss, who holds the Alexander M. Bickel Chair of Public Law at the Yale Law School, previously held by the nominee; Robert Bennett, Dean of Northwestern University College of Law; Tom Grey, Professor of Law at Stanford Law School; Paul Gewirtz, professor of law at Yale Law School; and Judith Resnik, professor of law at the University of Southern California, who we particularly thank for coming the distance and leaving the climate to be here, as with our friend from Stanford who came all that distance. I welcome you all.

I would like you to make your opening statements. Unless you have agreed as a panel as to a particular way, is there a spokesperson? Are we going to start with Professor Fiss first? Welcome. I mean that sincerely. I'm so sorry it's so late in the evening, but I truly am anxious to hear what all you have to say and I'm in no hurry to move you along, other than to have a chance to hear what you have to say.

Professor, welcome.

TESTIMONY OF A PANEL CONSISTING OF OWEN FISS, PAUL GEWIRTZ, ROBERT BENNETT, THOMAS GREY, AND JUDITH RESNIK

Mr. FISS. Let me first say that I can assure you that the weather in New Haven is beautiful today, too.

I would like to begin on a general note and very quickly get to specific aspects of the testimony and transcript that you have before you——

The CHAIRMAN. I beg your pardon. I'm sorry for the interruption. I did not swear you in. I'm so accustomed to trusting everything professors say, I never swear them in. But I must swear you all in. Would you all please rise?

Do you swear that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?

Mr. BENNETT. I do.

Mr. FISS. Yes.

Mr. GEWIRTZ. I do.

Mr. GREY. I do.

Ms. RESNIK. I do.

The CHAIRMAN. I'm sorry for the interruption, Professor. Please continue.

Mr. FISS. I was beginning with the observation that, in my view, when we speak about democracy, we talk about a very delicate balance between principle and preference, that a democratic constitution empowers the majority and makes the majority the touchstone of legitimacy, but at the same time places limitations upon the prerogatives of the majority.

Starting in 1971, and continuing over the next 16 years, Judge Robert Bork expounded and developed a philosophy that in my view destroys this delicate balance between principle and preference and reduces democracy to a rather crude and, in my judgment, rampant majoritarianism.

It seems to me that—and I am prepared to stand on it—that that remains a rather uncontradicted view of the public record of Judge Bork from 1971 until the date of his nomination, and in fact, until September 14. I also believe that between September 15 and September 19 the situation became strikingly complicated.

And when the moment came to decide what I could do to best help the committee, I decided to go back over the transcript of that hearing and proceeding in order to unravel the complicated structure of the argumentation and presentation of those 5 days.

The question that I asked myself is exactly the question that Senator Specter asked just a short while ago: Are we dealing with the same person that emerged from his public record during this 16-year period? My conclusion is that, by and large, we are dealing with the same person.

I believe that there are modifications, and I try in the written statement that I have submitted to you, in excruciating and, I am sure, boring detail, set forth all of the modifications, qualifications, recantations and inconsistencies that I have been able to find in that transcript. There are modifications, but my own view, after studying the record, is that the modifications are minor and quite ambiguous and that at the end of that testimony you have still before you a person who is committed, as a matter of philosophic principle, to a view that disregards the proper limitations on the prerogatives of temporary majorities.

As Senator Simpson reminded us earlier today, one of the central disclaimers made by Judge Bork in the course of his testimony was that in this 16-year period he was only criticizing the reasoning of the Court and not the result. In my view, in some cases—important ones—that distinction between the reasoning of a decision and the result is contradicted explicitly and directly by the spoken and written word.

Moreover, in many cases the criticism is so harsh and severe that it is almost impossible for me to believe that what was at stake was only the reasoning. To charge, as he did in the hearings in 1981, that *Roe* v. *Wade* is an unconstitutional decision, a serious and wholly unjustified usurpation of State legislative authority, strikes me as a total condemnation of *Roe* v. *Wade*.

In many of the cases that he has criticized there were alternatives rationales that were suggested by concurring opinions, by the lawyers, and by academics. In that context, to suggest that when he makes a blanket condemnation that all that he is talking about is the reasoning and not the result is doubtful.

In the course of his testimony he said that he was only criticizing the reasoning of the *Griswold* case and not the result. Senator Biden, you will recall, you asked him a question as to whether he had thought of an alternative rationale for that decision—in my judgement, a fair question given the importance of that case to his work, to his teaching and to his lectures, and even to his judicial work. And, in what strikes me as perhaps one of the most revealing comments in the entire testimony, his answer was, "I never engaged in that exercise."

It turns out, however, that with respect to some cases, he did in fact engage in that exercise, and in the course of his testimony before this committee, offered alternative rationales for two of those cases. One case is *Shelley* v. *Kraemer* and the second case is *Skinner* v. *Oklahoma*. In each instance I believe that those rationales are contradicted by other positions that he has taken before and that he has taken in the course of his testimony.

When he was questioned by Senator Biden about *Shelley* v. *Kraemer* he suggested that the problem was the rationale of the decision and not the result. He further suggested that a proper basis for decision was not the equal protection clause, because it had a State action requirement built into it, and that the proper basis for decision would be Section 1981.

Somewhat baffled—if I could engage in a little psychoanalysis—Senator Biden, you asked him at that point, "Did that statute predate *Shelley*?" and Judge Bork responded, "Yes." That statute did in fact predate *Shelley*, but that statute at the time of *Shelley* was encumbered by a State action requirement equal in effect and equal in scope to that of the 14th amendment. That is the precise holding of the Supreme Court in a case called *Hodges* v. *United States,* decided in 1906 and still good law at the time of *Shelley*.

Of course, it was open to Judge Bork to say that *Hodges* should be overruled. But if it were overruled and the State action requirement of 1981 eliminated, that would have posed another question:

Where does Congress get the authority to pass a statute regulating private racial covenants?

For me, that answer lies in Section 5 of the 14th amendment, but only if you accept a decision that Judge Bork has persistently and repeatedly repudiated, namely *Katzenbach* v. *Morgan*.

He also criticized *Skinner* v. *Oklahoma*, and in an exchange with Senator Simpson, suggested that there was an alternative rationale for that decision as well:

"Judge Bork: But I really wouldn't buy the way the Supreme Court there went about it, but I think it clear, and others who have worked on it think it clear, that the statute had racial animus in it and it struck, in effect, at crimes that at the time were more likely to be committed by poor blacks than by middle class white collar whites, and on that ground the statute would be unconstitutional."

"Senator Simpson: Without question?"

"Judge Bork: Without question."

Now, the alternative theory proposed in this exchange with Senator Simpson may well dispose of *Skinner* v. *Oklahoma*, but I find it difficult to understand why that rationale would be a more attractive rationale for Judge Bork, because that rationale commits him to a theory that would sweep within the scope of the equal protection clause all manner of laws that do not contain a racial classification but that may more severely affect blacks than whites. Such a position, I suggest, has a very loose toe-hold in American law, even to this day, and even more importantly, I think such a position contradicts the most elemental understandings of what is meant by judicial restraint.

In another portion of my written testimony—which I will not go into because of the time—I try to suggest why the equal protection theory that he develops, the one that speaks about reasonableness and the relationship between a classification and a legitimate end, is an inadequate rationale for purposes of protecting the equal rights of women. And I do this in the statement that I have submitted, not on the basis of questions of character, but rather on the basis of the legal doctrine and the cases and decisions that he has referred to.

Finally, in this testimony that I have submitted to you, I take up the issue of stare decisis. Stare decisis has always played a role, in my opinion——

The CHAIRMAN. Professor, I hate to do this, but I am going to have to cut you off. Why don't you sum up for 1 minute and maybe we can get to some questions.

Mr. FISS. I will finish in 1 minute.

What I wanted to say was that I acknowledge the role that stare decisis had played in Judge Bork's previous work and in the written testimony that I submit to you I tried to show that the difference here is really one of emphasis. In fact, I acknowledge that it commits him to accept a decision that he had previously rejected—namely, *Brandenburg* v. *Ohio*. But what I also do in that statement is take issue with one I think very important statement that he made in the course of his testimony, and that is that an originalist judge must have a very strong view about precedent. In my view, that is not true because what an originalist judge is committed to is to the Constitution and the values that it embodies, not the values that are embodied in the decisions of his predecessors.

Finally—and this is my last thought—it is important to understand that however much stress is placed on stare decisis and the role of precedent, that may not be the most crucial issue. I do not think that the crucial issue is whether today, in 1987, a nominee is prepared to accept *Brown* v. *Board of Education*, or even more pointedly, *Bolling* v. *Sharpe* because they worked out well.

The crucial test will come with cases and issues that are not yet confronted, and with those, what you need is not a commitment to stare decisis. What you need for those is vision and courage, and I think a proper sense of what American democracy consists of.

[The statement of Professor Fiss follows:]

Statement Before the Committee on the Judiciary,
of the United States Senate, September 25, 1987
by Owen M. Fiss, the Alexander M. Bickel
Professor of Public Law, Yale University

Democracy is a complicated blend of principle and preference. It empowers the majority and makes it the touchstone of legitimacy, but at the same time it protects individuals, minorities, and powerless groups in our society against laws and practices that are sometimes demanded by a majority but which might be deeply regretted by the people at more reflective moments.

The central task of a constitution, and of those charged with administering it, is to set this crucial balance between preference and principle. Our Constitution seeks to establish the institutions of government, the means and forms through which the majority will express its will, and at the same time, to limit the power of these institutions and to prevent tyranny by the majority. The original Constitution of 1787 was for the most part concerned with the establishment of the national government. The task of imposing limits on the majoritarian processes of this government largely began in 1791, with the Bill of Rights, and was, in critically important ways, enhanced with the adoption of the Civil War amendments. Those amendments abolished slavery, implanted in the Constitution a guarantee of equality, and extended the Bill of Rights to the states.

Finding the right balance between the prerogatives and limitations of the majority has been the perennial subject of constitutional law scholarship. It is what we write and argue about and what we teach. In 1971, Robert Bork made a singular contribution to that subject.[1] The article emerged after he taught a seminar on "Constitutional Theory" with Alexander Bickel for six or seven years, and, as recently as 1985, in an interview in the Conservative Digest, Judge Bork stated: "I finally worked out a philosophy which is expressed pretty much in that 1971 Indiana Law Journal piece."[2]

The philosophy set forth in that article has two different components and it is important to distinguish them. One component stresses that judges should use their power to give expression to the values embodied in the Constitution, not their own values. For the purposes of determining these constitutional values, Judge Bork has said that judges should be guided by text, history and structure. I do not take exception to this branch of Judge Bork's philosophy; indeed, it is hardly in dispute. I know of no judge who would conceive his or her task in any other way. Judges may sometimes fail in their assigned task and confuse their own values for those of the Constitution, but that would be a failure in character and discipline, not in any way due to the fact that they defined their job in some peculiar way.

It was not, therefore, this first component of Judge Bork's philosophy -- an insistence on judicial neutrality -- that caused the stir, but something else altogether -- a theory that would reduce democracy to a crude and rampant majoritarianism and would upset the delicate balance between preference and principle. This majoritarian component of Judge Bork's philosophy is based not on any provision or principle of the Constitution, nor even on a cursory examination of the historical material surrounding the framing and adoption of the Constitution. Rather, it stems from a more general ethical stance, reflecting his earlier conversion to free market theories and his application of those theories to the social and political domain.

Judge Bork's majoritarianism stems from a relativization of values. He turned all values into preferences and then, under what is called the Equal Gratification Principle, declares presumptively arbitrary any effort to declare one preference -- say the desire for sexual intimacy -- more worthy of gratification than another -- say the desire to maximize profits. Politics is seen as an arena in which groups with different interests or preferences clash. There is no principled way of resolving these conflicts, Bork insisted, but once the majority decides who should prevail, the will of the majority should govern simply because it is the majority. Only in the most exceptional circumstances would there be reason for a judge to set aside the majority's choice.

The details of the argument underlying this strong and virtually decisive presumption in favor of the will of the majority may not be important for your purposes. The consequences of this position, however, are critical, for they led Bork to denounce and deride almost all the decisions of the modern Supreme Court that sought to put limits on the majority as "pernicious," "unwarranted," "lacking in reason and logic and history as well" and "intellectually empty."[3] I do not want to make too much of Bork's adjectives, though they seem more fierce and insistent than the usual academic criticism. Instead, I want to stress two other points -- one is the comprehensiveness of his attack on Supreme Court doctrine seeking to curb the abuses of the majority; the other is Judge Bork's failure to explain why that attack followed from a commitment to judicial neutrality.

One example -- central to the article, central to the Bill of Rights tradition, central to American society and central to this hearing -- will illustrate my point. It pertains to Judge Bork's attempt to limit the reach of the First Amendment. The predominant theory of the First Amendment at the time of the article's publication, accepted by courts and commentators alike, depicted the underlying purpose or value of the free speech guarantee in political terms. According to this theory, the purpose of the amendment was not to assure individual autonomy, but rather to enable the people, as a collectivity, to govern themselves. Starting with this rather uncontroversial premise, Judge Bork proceeded to convert what might be the amendment's central or primary value into the exclusive one, and he then concludes that the amendment protects only "explicitly political" speech, thereby leaving unprotected most artistic and literary expression.[4] Alexander Meiklejohn, the source of this interpretation of the First Amendment that casts its underlying purpose in political terms, once said, only half jokingly, that we need to read Ulysses in order to vote. In his Indiana article, Judge Bork rejects this argument and inserts the word "explicit" before the word "political." The rationale for this move, he said, was to create a bright line. But we were not given any reason why the line should be drawn in the way he did. A desire to create a bright line could lead to a rule that includes all speech, just as easily as one that protects only speech that is explicitly political.

The second surprising result that followed from Judge Bork's emphasis on majoritarianism, but which had nothing to do with judicial neutrality, concerns the advocacy of unlawful activity. In a long line of cases, starting with Holmes's and Brandeis's dissents in the early part of this century and culminating in the Supreme Court's decision in Brandenburg v. Ohio in 1969, the Supreme Court has protected the general advocacy of unlawful activity on the condition that it does not present an imminent or clear and present danger. No one likes to risk the outbreak of unlawful conduct, but the justices also understood the importance of tolerating radical criticism in a free society. Judge Bork, on the other hand, insisted on the prerogatives of the majority acting through the legislature to define what constitutes, in his terms, "the political truth"[5] and to punish all those who urge others to act in a way contrary to that determination.

On two notable occasions during the sixteen years between the publication of the Indiana article and this nomination, Judge Bork did in fact qualify his majoritarianism. In each instance in which he spoke out on behalf of individual rights, however, the right in question seemed, at least from my perspective, to lack a secure constitutional foundation. One occasion was his insistence that the 1974 congressional limitation on campaign contributions enacted by Congress was contrary to what the Court held in Buckley v. Valeo, a violation of the First Amendment.[6] I would agree with him that campaign contributions are a form of political activity -- in the colloquial, that money is speech -- but I would also insist that the First Amendment is not an absolute guarantor of all political activity. Regulation may be upheld when it preserves the integrity of the democratic process, when it enhances rather than restricts public debate, and in my view that is precisely what the regulation on campaign contributions did.

Judge Bork also tempered his majoritarianism in his response to Bakke, the 1978 decision of the Supreme Court upholding affirmative action plans for racial minorities. What was at issue in the case was an affirmative action program adopted by the Regents of the University of California that gave preference to blacks seeking admission to medical school. A majority of the justices thought that such a program could be reconciled with the Fourteenth Amendment guarantee of equal protection and defended that conclusion on a variety of different theories. Bork rejected all of them,[7] remaining unmoved by Justice Blackmun's plea: "In order to get beyond racism, we must first take account of race. There is no other way."

With the exception of these two instances, during this same sixteen-year period Judge Bork remained faithful to the majoritarian argument elaborated in the Indiana article. An obvious and important example of the extension of his majoritarianism is his critique of the 1973 decision of the Supreme Court in Roe v. Wade, which held unconstitutional the anti-abortion statute of the states.[8] Majoritarianism also informed his critique of Supreme Court decisions protecting the freedom of religious minorities and nonbelievers through the separation of church and state. Judge Bork denounced these decisions as proceeding from a "rigid secularism." He looked to "the reintroduction of some religion into public schools and some greater religious symbolism in our public life."[9]

Some have pointed to the positions he has taken during this same sixteen year period as the Solicitor General and as a judge of the Court of Appeals, as evidence of a recognition of the limits on prerogatives of the majority. In my view, the evidence is quite mixed. The significance of his Ollman concurrence, protecting Evans and Novak from a libel action by a Marxist professor, is offset by his willingness to uphold an ordinance prohibiting picketing near an embassy. The ordinance drew a distinction between favorable and unfavorable picketing. The position that he took as Solicitor General in Washington v. Davis, in support of the "effect standard" for Title VII cases is offset by the position he took in Gregg v. Georgia and the related cases, urging the Court to reverse the Supreme Court's earlier decision in Furman. In determining precisely what his judicial philosophy is and whether placing someone with that philosophy on the Supreme Court is in the best interests of the nation, his action as a Solicitor General and Circuit Court Judge are only of limited relevance. In those offices he acted under hierarchical, collegial and political constraints that are not applicable to Supreme Court Justices. Of course, academics sometime engage in hyperbole -- as the Wall Street Journal recently pointed out -- but what professors say, not just once or twice but repeatedly, not just in law reviews but in all manner of publications, not just in their classrooms, but in the lecture halls of the nation, should be taken seriously, very seriously. Ideas do matter, as anyone who has ever spent a single day in the Yale Law School knows.

Judge Bork's idea is majoritarianism -- as first set forth in the Indiana article and as expounded in the sixteen years since. It is an idea that has led him to empty the Bill of Rights and the Fourteenth

Amendment of their most significant meaning and to dismiss the efforts of the modern Supreme Court to give those provisions life and force as nothing more than a "gentrification of the Constitution."[10] What transpired between September 15 and 19, 1987, however, complicated matters considerably. Senators Leahy and Specter spoke of a "confirmation conversion."[11] Judge Bork has taken strong exception to this characterization of his testimony, in part because of the intimation about the motivation for the change. But even more significantly, Judge Bork takes exception to the very suggestion that there has been any change at all: "For sixteen years I have been saying the same thing."[12] I have no special interest in, or expertise on, the motivation question, but I do believe that my familiarity with Judge Bork's writings and my experience as a teacher of constitutional law enable me to speak to the question of consistency.

An analysis of his testimony, as best could be done in the few days available, reveals a complex structure of argumentation. His majoritarianism is tempered, but only in a minor way. The core remains. First, he broadens his acceptance of settled doctrine in the First Amendment area, and thus qualifies some of his previous criticism. Second, he introduces new distinctions that would qualify the scope of his criticism of cases such as Bakke. Third, he tries to modify his earlier criticism of such major cases as Griswold v. Connecticut, Roe v. Wade, Skinner v. Oklahoma and Shelley v. Kraemer by relying on a distinction between the result of a case and the reasoning behind it. The significance of this distinction diminishes greatly when we examine this strategy in detail, for sometimes he is unable credibly to suggest what an acceptable rationale might be or in other instances, the rationale that he does offer conflicts with other of his positions. Fourth, he articulates what might be seen as a new theory of equal protection, to accommodate the claims of equal rights for women although, as we will see, the protective thrust of this theory is weak. Fifth, there is new emphasis on stare decisis creating the possibility -- but only the possibility -- that his majoritarianism might be tempered by a general willingness to accept decisions he previously rejected.

(a) New Acceptance of Established Doctrine. Judge Bork broadened his acceptance of prevailing Supreme Court doctrine in precisely that area where his theory purported to drive him to novel, perhaps controversial conclusions, namely, the First Amendment. Judge Bork began his retreat from his "explicitly political speech" "bright line test" before these proceedings. In a 1984 letter to the ABA Journal, he claimed that his views on the First Amendment had changed in as much as he now believed that scientific and moral discourse are protected.[13] Conspicuously absent, however, from the forms of protected discourse were literary and artistic expression. Thus, it appears that as late as 1984 Judge Bork still left a significant universe of expression without First Amendment protection. Only in these proceedings has Judge Bork been willing to accept the Supreme Court's doctrine of extending protection to all literary and artistic expression that is not obscene or pornographic. In response to a question from Senator Thurmond, Judge Bork said, contrary to the position he took in the Indiana article, that he believes "literature" should be protected by the First Amendment.[14] Why Bork has now come to agree with the stance of the Court is not altogther clear. Moreover, it is unclear how this change comports with his general insistence on the prerogatives of temporary minorities.

The meaning of the change in his second significant First Amendment postulate -- the one concerning radical political speech -- is equally difficult to evaluate. In the years since the publication of the Indiana piece, he left unmodified his previous denouncement of the clear and present danger test and related doctrine designed to protect the general advocacy of unlawful conduct. The 1984 ABA Journal letter, for example, contains no mention of this subject. In fact, during this 16-year period, he repeatedly criticized Brandenburg v. Ohio and broadened it to include another case in this line, Hess v. Indiana.[15] Commenting on another First Amendment case, Cohen v. California, Judge Bork would have preferred to treat a case of clear political expression as a mere obscenity case because the slogan on Cohen's jacket -- which was the basis of the prosecution -- contained an expletive.

In the course of his testimony, Judge Bork at first recanted his longstanding criticism of Brandenburg. He said that this criticism was impelled by excessive concern, in the early 1970s, about the risk of social violence; conditions today, however, are different. After engaging in these speculations on the risk of social disorder, he said about Brandenburg: "It's right. It's a good decision."[16] It is hard for me to understand how and why Judge Bork's assessment of the risk of disorder might be relevant to an approach that emphasizes fidelity to the values of the Constitution. Nor does the fear he experienced in the early 1970s explain his criticism of the decision in 1978 and 1979. It was therefore not at all surprising that, on the very next day, he indicated that he still thought Brandenburg was wrongly decided. What he then did was to incorporate the risk-of-disorder factor into his theory of stare decisis. He said that, if confirmed, he would treat Brandenburg as settled law.[17] This acceptance of a previously disparaged case, of course, places a new limit on his majoritarianism, but it is equally true that it leaves important questions unanswered. It is unclear, for example, whether Judge Bork has agreed to accept the Brandenburg principle, or merely the Brandenburg decision invalidating criminal syndicalism statutes. A doubt thus remains as to whether he accepts the principle that protects the general advocacy of unlawful conduct.

Finally, in the First Amendment area, Judge Bork also seems to have recanted, or at least qualified in important respects, his previous criticism of the ruling of Buckley v. Valeo, upholding the limitation on campaign contributions. In the course of his testimony, Judge Bork said that his earlier objection focused only on the level of the ceilings -- they were too low.[18] A law prohibiting contributions in excess of $1000, he reasoned, could not plausibly be justified by a desire to avoid corruption or the appearance of corruption. In his earlier remarks, he did object to the level of ceilings, but he also appeared to have a more fundamental objection to the Buckley v. Valeo decision. In a speech on March 7, 1986, before the Federalist Society at Stanford, he said:

> But in any event what I really wanted to say is that I think the Court has wavered in its devotion to the idea of free political processes. I think Buckley v. Valeo was not a major victory for those of us who think that in fact it was a major defeat -- for those of you who think that political processes are the core of the First Amendment and should be left wide open.

In that speech, he also criticized the Court's ruling allowing the Federal Election Commission to exist, provided it was reorganized to avoid a separation of powers problem. But his critique of the ruling on the campaign contributions was an important part of the speech and the above quoted passage immediately preceded a discussion of that aspect of the case. Thus, as in the other instances, the scope of his qualification remains unclear.

(b) Creating New Distinctions. In his published writings, Bork has been critical of the Bakke decision and its approval of preferential treatment for members of a racial minority. He did not withdraw that criticism in his testimony, but instead said that what he was really opposed to, as a constitutional matter, was a system of permanent preferences as opposed to some transitional scheme that might be seen as a remedial measure for the victims of past discrimination.[19] This distinction between permanent and transitional affirmative programs might be a useful one, but it is not one that Judge Bork had advanced in the article -- his criticism was a blanket one. Moreover, it is important to note that in the Bakke case the University of California was not purporting to establish a system of permanent preferences. Indeed, some of the justices who upheld the program stressed its transitional character, and yet in these earlier articles Judge Bork rejected their position too.

(c) Looking for Alternate Grounds of Decision. Every judicial decision consists of a result and also the reasons offered in support of that result. Criticism of a decision can be addressed to the result, or to the reasoning by which that result was reached, or to both the result and the reasoning. This distinction between result and reason is an important one in the law and is known to every lawyer. The problem, however, is that prior to the confirmation hearings, it never played much of a role in Judge Bork's work. In fact, contrary to what he said in the confirmation hearings, sometimes his critique was specifically and explicitly addressed to the result itself. A case in point is Griswold v. Connecticut. On several occasions, one as recently as March 31, 1982 at Catholic University, Judge Bork has maintained that "the result in Griswold could not be reached by proper means of constitutional interpretation."[20]

In other instances, Judge Bork has made no distinction between result and reasoning, but his denouncements were so sweeping, so extreme, so harsh that it would be hard to believe that his objections were limited to the reasoning and not to the result. In testimony before the Senate in 1981, he called Roe v. Wade "an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of State legislative authority."[21] This language, which appears to have been carefully chosen by him and repeated on other occasions, seems somewhat ill-suited to a critique which, as he suggested in the confirmation hearings, is deficient only in the reasoning that supported the judgment, thereby creating the impression that a new rationale might be found to support this result. I know the lawyer's mind is infinitely ingenious, but....

In many, perhaps most of the cases he has criticized, a number of rationales have been offered to support the result. Sometimes that offer came in the form of concurring opinions (in Bakke, for example, there are five opinions for the result; in Griswold, there is a majority opinion and three concurring opinions). There are also the arguments and briefs of counsel. They typically put forward a variety of possible grounds for decisions. And of course there are the law reviews; a favorite activity is for legal academics to think up new and better rationales for famous and controversial Supreme Court decisions. The alternative equal protection ground that Judge Bork mentioned in his testimony in connection with Roe v. Wade, for example, has been discussed in the academy for a number of years and some slight traces of it could be found in Justice Blackmun's recent 1986 opinion reaffirming Roe. In light of all this, a blanket, unqualified and repeated condemnation of a decision by Judge Bork that a case is "wrongly decided" might be fairly construed to constitute a condemnation of both the result and reasoning of the decision. At the very least, contrary to what he suggested in the hearings, it would be unlikely in the extreme that a rationale might soon be found that would justify the decision.

In the confirmation hearings, Judge Bork insisted that his criticism of Griswold was limited to the reason, not to the result. Senator Biden asked whether Judge Bork had found a proper rationale for the decision, a fair question given the importance of that case in Bork's work over a 25-year-period as a teacher, a scholar and even a judge. In what might be the most revealing response of this entire proceeding, Judge Bork answered: "I never engaged in that exercise."[22]

It turns out, however, that for a number of the cases that he had criticized -- Shelley v. Kraemer and Skinner v. Oklahoma, in particular -- between the 1971 article and 1987 hearings, he had in fact engaged in "that exercise." For those cases, he offered the Committee an alternate ground of decision and suggested that, with the new rationale, he would wholeheartedly embrace the results in those cases. In each instance, however, the new rationale he offered was in conflict with other positions that he had taken and continued to take in these hearings. The offer of a new rationale appears to be something of an illusion.

(i) A New Rationale for Shelley v. Kraemer?

In Shelley v. Kraemer, the Supreme Court held that the enforcement by state courts of racially restrictive covenants was a denial of equal protection. In my view, Chief Justice Vinson's opinion was not completely satisfactory, but I would have no difficulty supporting the result on a theory that located the requisite state action in the involvement of the state courts. It is true that the state courts were prepared to enforce these covenants on behalf of both blacks and whites, but, as all the world knew, this ostensibly neutral arrangement worked to the disadvantage of blacks and did so in a systematic way. One could be rightly concerned with limiting the reach of a theory for Shelley that located the requisite state action in the state court involvement, so as to make certain that the ruling does not curtail the associational freedoms that we might wish to protect. For many scholars that concern would lead to a search for limits, not a rejection of the decision as somehow violative of the principle of neutrality. But that was not Bork's inclination.

In his testimony before this Committee, Judge Bork repeated his criticism of Shelley, and the effort to locate the requisite state action in the state court involvement, but, in efforts to assure the Senators that his critique was limited only to the rationale of the decision (which he says, incorrectly, I note, will mean that "any contract action ... can be turned into a constitutional case"), he proposed 42 U.S.C. 1981 as an alternative basis of decision.[23] Obviously puzzled by why the Supreme Court did not use the statute rather than the Fourteenth Amendment, Senator Biden asked: "Did it antedate the Shelley case?" Judge Bork answered, "Oh yes, yes." What Judge Bork did not explain to the Senator was that under a 1906 ruling of the Supreme Court, in a case called Hodges v. United States, which was still regarded as good law at the time of Shelley (1948), section 1981 was encumbered with a state action requirement equal to that of the Fourteenth Amendment.

Of course, Hodges could have then been overruled, and the statute and the Fourteenth Amendment sent on their separate ways, one with a state action requirement, one without. That might seem to be a narrower ground of decision, but in truth it would raise another question altogether: Where does Congress get the power to prohibit racially restrictive covenants? One logical source of such a power might be section 5 of the Fourteenth Amendment, but that provision would be available only as construed by the Supreme Court in a case that Judge Bork has criticized repeatedly -- in his prior work and before this Committee -- Katzenbach v. Morgan.[24] That case allowed Congress, in the name of enforcing the guarantee of section 1 of the Fourteenth Amendment to outlaw conduct that the Court had not yet declared violative of equal protection.

Arguably, the power of Congress to outlaw racial covenants could be located in section 2 of the Thirteenth Amendment. Like section 5 of the Fourteenth Amendment, it gives Congress the power to enforce the general provisions of the Thirteenth Amendment, which does not have a state action requirement. The theory would be that racially restrictive contracts are a badge or incident of slavery -- not at all an implausible theory. But, once again, such an approach would have created another set of problems. It would have required the Shelley Court not only to overrule Hodges, but also to overrule an important aspect of The Civil Rights Cases of 1883. Ultimately the Court took this route, but only some twenty years later in Jones v. Alfred H. Meyer & Co. In 1948, such a construction of the Thirteenth Amendment would have seemed a momentous step, more adventurous and more unsettling than the one Judge Bork previously rejected.

(ii) A New Rationale for Skinner v. Oklahoma?

In the 1942 decision of Skinner v. Oklahoma, the Supreme Court invalidated a state statute that provided for sterilization of persons repeatedly convicted of robbery. The Court saw this measure as an unreasonable and unjustified denial of a fundamental liberty, the right to procreate and this case was swept within Bork's Indiana critique. Once again, in his appearance before the Committee, Judge Bork stressed that he was not opposed to the result, but only to the reasoning, and to make that claim credible, he offered a new rationale for the result:

> Judge Bork: But I really wouldn't buy the way the Supreme Court there went about it, but I think it clear -- and those working on it think it clear -- that the statute had racial animus in it. And it struck at in effect crimes that at that time were more likely to be committed by poor blacks than by middle-class, white-collar whites. And on that ground the statute would be unconstitutional.
>
> Senator Simpson: Without question?
>
> Judge Bork: Without question.[25]

This alternate theory might well dispose of Skinner v. Oklahoma, but it is hard for me to understand why that would be a more acceptable or preferred rationale for Judge Bork than the one actually chosen. In most of his writings, the equal protection clause is seen by Judge Bork as a bar to explicit racial classifications (that is what enables him to embrace Brown and condemn Bakke), but on the theory now advanced in support of Skinner he emphasizes motive ("racial animus") and effect. This would bring within the sweep of equal protection almost all laws that had placed a heavier burden on blacks than whites, even those that do not contain a racial classification. It would thus, oddly enough, bring Judge Bork to the frontier of equal protection law and challenge the most elemental tenets of judicial restraint. In the government's brief in Washington v. Davis,[26] then Solicitor-General Bork accepted the effect standard but only for Title VII cases, not for the Equal Protection Clause.

(iii) A New Equal Protection Theory?

In his testimony, Judge Bork offered new theories and rationales not only for individual cases, but also for an entire category of claims that seemed to be excluded or at least threatened by his earlier writings. I am, of course, referring to the equal protection claims of women. Many have found a marked hostility to such claims in his previous writings, and arguably to defuse this criticism, in the course of the hearings Judge Bork said he subscribed to a general, unitary theory of equal protection that purports to protect all persons.

Under the prevailing equal protection theory, the focus is on classification. If a challenged statute classifies persons according to or on the basis of a suspect criterion, such as race, then the law will be subjected to strict scrutiny. This means that the classification will be allowed only if it serves a compelling state interest. If the law embodies a semi-suspect criterion, then it will be allowed only if it serves an important state interest. Otherwise, the statute will be allowed, provided that the classification bears some rational relationship to a legitimate state purpose.

Judge Bork first rejects this theory on the ground that it requires the court to decide which "groups are in, which groups are out" (which is true only in the limited sense that it requires the court to decide which classifications are suspect). He then proposes to judge all classifications on the basis of a new standard, the reasonable basis test, which, he says, is a unitary standard, applicable to all persons, and which does not require deciding which groups are in and which are out.[27] The judicial task, under his new theory, is to determine whether there is a reasonable basis for the classification, namely whether it serves some legitimate state purpose.

This new standard is not as unitary as it first appears because Judge Bork is willing to accept that almost all racial classifications are presumptively unreasonable. Although few would take issue with that position, the rule that emerges in the racial context looks remarkably similar to the suspect-classification judgment under the prevailing theory. However, when it comes to equal rights for women, where this presumption is absent, everything depends on what it means to say that a means or classification is rationally related to an end. Everything also depends on what counts as a legitimate state end, for Judge Bork would allow, as a constitutional matter, sexual classifications restricting the opportunities for women if the classification served some legitimate end. Of course, the subordination of women, or the perpetuation of outmoded and archaic stereotypes is not likely to suffice; but, as Judge Bork made clear in his testimony and as he made clear in earlier speeches and opinions, he believes it entirely appropriate for legislation to further the existing cultural norms of a community or to further conventional morality. Most repressive laws for women are rooted in the idea that women have a special responsibility for the care of children and the home. As long as this idea has some continuing vitality in a community, and as long as the statute in question seeks to further that end, Bork's reasonableness test will not provide any protection against it.

On this critical issue of equal rights for women and other traditionally disfavored groups, there is, moreover, only the most superficial resemblance between Judge Bork's reasonableness test and the equal protection standard set forth by Justice Stevens in his concurring opinion in the Cleburne case. Justice Stevens does not stop his inquiry when he ascertains that there is a reasonable relationship between the classification and a legitimate end. Maintaining a special solicitude for traditionally disfavored groups, a solicitude that can be traced back to footnote 4 of Carolene Products (frequently disparaged by Judge Bork), Justice Stevens adds an additional factor: The end must "transcend the harm to the members of the disadvantaged class."

Justice Stevens also has a more circumspect and thus a more restricted concept of what might constitute a legitimate state purpose. In Dronenburg, to move to another context for a moment, Judge Bork said, "We need ask, therefore, only whether the Navy's policy is rationally related to a permissible end.... We have said that legislation may implement morality. So viewed, this regulation bears a rational relationship to a permissible end."[28] In Bowers v. Hardwick, Stevens said just the opposite: "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."

An issue has been raised as to whether the reasonableness test is new for Judge Bork. Clearly, his earlier work suggested that the equal protection clause would, by and large, be confined to claims of racial equality. But, as the passage quoted from Dronenburg indicates, there are traces of the reasonableness doctrine in his earlier work. For example, in the much quoted Indiana passage on equal protection, he acknowledges that in addition to the ban on racial classifications, the equal protection clause guarantees a "formal procedural equality."[29] He never defines that term, and conceivably it could be meant to embrace the principle of formal justice ("treating people similar who are similarly situated"), which could be the source of the reasonableness test. Some have pointed to the Worldnet interview of June 10, 1987 to demonstrate the departure, but I am reluctant to place too much emphasis on that because as he pointed out, it was an overseas electronic interview. In any event, what he said there was that the equal protection clause applied to groups like blacks and aliens.

Whatever might be said from parsing all his earlier writings on equal protection, I have no doubt whatsoever that the reasonable basis test seems to be at odds with Judge Bork's strong distaste for substantive due process and the open-ended, unstructured inquiries that it invites, indeed requires, of the judiciary. For similar reasons, he has also denounced the ERA as inviting "a dangerous constitutional revolution" and has strongly and persistently criticized "the right to privacy" because it provides no boundaries or guidance to the judges -- it too easily lets their values and preferences come into play and threatens the principle of judicial neutrality. Whatever force this objection has in other contexts clearly applies to Judge Bork's reasonable test because it requires a judge to determine whether a classification bears a reasonable relationship to some legitimate state end.

(c) The Role of Precedent

In yet another effort to minimize the significance of his earlier criticism of many of the cases that constitute the core of the constitutional tradition protecting rights, Judge Bork has emphasized in these hearings his commitment to stare decisis. He was prepared to commit himself to Brandenburg v. Ohio, but was scrupulous in remaining uncommitted in two other cases that have figured prominently in the confirmation proceedings -- Roe v. Wade and Bakke. Even with respect to Brandenburg, we are left with a doubt, perhaps inherent in the very concept of stare decisis, as to whether he is now committed, to return to his distinction, to the result (criminal syndicalism statutes are invalid) and to the principle of that case (the general advocacy of unlawful action is protected).

There was always a place in Judge Bork's thinking for stare decisis, say to avoid the waste inherent in trying to reverse the irreversible; the difference is largely one of emphasis. In trying to justify the new emphasis on precedent, and to tie it to his underlying philosophic commitments, which are not in doubt, Judge Bork said during his testimony: "A justice committed to the theory of original intent needs a strong theory of precedent."[30] I find this assertion to be without foundation. The theory of original intent, as Judge Bork understands it and repeatedly defines it, commits the judge to the values embodied in the Constitution or the values of the framers, not to the values embodied in earlier decisions of the Supreme Court. Earlier he had grasped the point: "Supreme Court justices always can say ... their first obligation is to the Constitution, not to what their colleagues said ten years before."

Of course, a precedent that is roughly contemporaneous with the adoption of the constitutional provision might have more weight, on the (somewhat problematic) assumption that the justice who decided that case had a better sense of what the framers had in mind. But as Judge Bork intimates when he approves the court's decision to overrule *Plessy v. Ferguson* and acknowledges the great changes in modern society, this principle has only the most limited applicability to the line of cases now in question.

Finally, let me say that even the strongest theories of precedent can not fully allay the concerns over this appointment and what Judge Bork's commitment to majoritarianism -- with all its excesses and exceptions -- might mean for the nation. The issue is not simply whether Judge Bork will respect the earlier decisions of the Supreme Court, but how he will face issues not yet resolved and perhaps not even formulated. The real test is *not* whether the nominee will, in 1987, follow *Brown v. Board of Education*, or even more to the point, whether he will follow *Bolling v. Sharp*, but how he might resolve cases of that magnitude and that importance as an initial matter. This has little to do with his attitude toward stare decisis, or with his willingness to accept certain decisions because as he said, they worked out well. Rather, it is more a question of vision, and of courage, and of philosophic commitment.

FOOTNOTES

1) Neutral Principles and Some First Amendment Problems, 47 Indiana L. J. 1 (1971).

2) Interview, Conservative Digest, p.101 (1985).

3) Indiana Law Journal, at 9-10.

4) Id. at 27-28.

5) Id. at 30-33.

6) "Reforming" Foreign Intelligence, Wall Street Journal, March 9, 1978.

7) The Unpersuasive Bakke Decision, Wall Street Journal, July 21, 1978.

8) Catholic University, p.4, March 31, 1982.

9) Speech, Brookings Institute, pp.10-11, September 12, 1985.

10) Speech, Federalist Society, Yale University, p.8-9, April 24, 1982.

11) Specter, Senate Judiciary Committee Hearings Regarding the Nomination to the Supreme Court of Judge Robert H. Bork, 9/17/87 P.M., p.37-1. All references are to the unofficial transcript provided by Federal Information Systems Corporation.

12) Transcript (9/16/87) A.M.) p.34-1.

13) Judge Bork Replies, ABA Journal, v.70, February, 1984.

14) Transcript (9/15/87 P.M.), p.25-1.

15) Transcript (9/16/87 P.M.), p.7-1.

16) Transcript (9/16/87 P.M.), p.6-2.

17) Transcript (9/17/87 A.M.), p.7-2.

18) Transcript (9/15/87 P.M.), pp. 21-1 - 21-2.

19) Transcript (9/15/87 P.M.), p. 26-2.

20) Speech, Catholic University, March 31, 1982, p.3.

21) Hearings on the Human Life Bill before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 97th Congress, 1st Session, pp. 310, 315 (1981).

22) Transcript (9/15/87 P.M.), p.11-2.

23) Transcript (9/15/87 P.M.), pp.9-1 - 9-2.

24) Transcript (9/16/87 A.M.), p. 27-1.

25) Transcript (9/16/87 A.M.), p. 21-1.

26) Brief of the United States, Washington v. Davis, 426 U.S. 229.

27) Transcript (9/15/87 P.M.), p. 14-2.

28) Dronenburg v. Zech 741 F.2d 1388 (D.C. Cir. 1984).

29) 47 Indiana L. J. at 11.

30) Transcript (9/15/87 P.M.) 29-1.

The CHAIRMAN. Thank you very much, Professor. Your entire statement will be reprinted in the record and I will have a few questions about it when we get to the questions.

Professor Grey, this is an awful thing to do with you all, but I have been trying to do it with every panel, but would you try to keep it to the 5-minute rule please.

Mr. GREY. Yes, indeed, Senator, I am planning to.

The CHAIRMAN. I am going to be leaving the room for about 2 minutes and Senator Simpson is going to be here alone—not alone, but—and you are going to have to stop at 5-minutes.

TESTIMONY OF THOMAS GREY

Mr. GREY. Right, especially under Senator Thurmond's stern eye.

I do have a full statement which is submitted, and in addition, I have come here to this panel representing not only myself but the Society of American Law Teachers. This is an individual membership organization of American law professors—the only such organization—and it has taken a position in opposition to this nomination. I submit along with my own statement a letter written by Professor Emma Jordan of the Georgetown University Law School and signed by 123 American law teachers in opposition to the nomination. I believe the Senators have the letter.

Senator SIMPSON. It will be entered into the record without objection.

[Statement follows:]

STATEMENT ON THE NOMINATION OF ROBERT H. BORK TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT

Thomas C. Grey
Stanford Law School
September 23, 1987

My name is Thomas C. Grey. I am Professor of Law at Stanford Law School, where I have studied and taught constitutional law for sixteen years.

I appear before the Committee on behalf of the Society of American Law Teachers. The Society is an organization of law professors who share a commitment to improving legal education, to promoting public service by the legal profession, and to advancing justice and protecting human rights. It is the only general purpose individual membership organization of law teachers in this country.

The Society opposes the Bork nomination, and I appreciate the opportunity the Committee has given me to appear in support of this position. My words and arguments are my own, but I believe that most members of the Society, along with many other American law teachers, would agree with their general thrust.

A law teacher does not lightly oppose Judge Bork. There is a natural reaction of pride when one of our own, a respected former colleague of unquestioned ability, is nominated to the highest court. In my case, there is the additional personal factor that Judge Bork was a teacher of mine, and a very good one.

But at the same time law teachers cannot simply respond to this nomination on the basis of associations and memories. Our work makes us particularly conscious of the place of the Supreme Court in the American scheme of government. The Justices of that court, appointed for life, have the last word on most constitutional questions. And, as Alexis de Tocqueville observed long before "judicial activism" became part of our political vocabulary, a remarkable proportion of important public questions in this country take on constitutional dimensions and come before the Supreme Court for decision.

What is at stake in the Bork nomination is a particular conception of the ideal of equal justice under law -- one that, while it has roots in the ideas of the original framers, and was further reinforced by the anti-slavery movement that shaped the Civil War amendments, has been developed with special force by the Supreme Court over the last half century. This is the idea that the Court should interpret basic constitutional guarantees while always aiming at the ideal of a democratic society that seeks to respect and be open to all its members, especially those at the bottom and on the fringes. Majoritarian institutions are essential to democracy, but left unchecked they have a tendency to exclude from full citizenship those who depart from the majority's image of itself. This tendency has worked in our history to the disadvantage of blacks and other despised racial groups, of immigrants, of women, of minorities in religious practice and sexual preference, of the handicapped, of the aged, and of the poor. These groups have come to look to the courts and to the United States Supreme Court in particular as the branch of our government that will listen to them when prejudice or indifference close the ears of the majority.

Judge Bork, however, has put his formidable talents behind a fundamental challenge to this conception of the role of the Court. In his view, the Court has been too egalitarian and too "permissive" -- which is to say, too much concerned with the personal liberty of those who are different from the majority. The Court has gone astray, Judge Bork thinks, because it has not closely bound itself in constitutional interpretation to the concrete intentions of the framers. It is this confined and fundamentally wrong view of the Constitution that leads me, in company with many fellow law teachers who share my respect for Judge Bork's ability and experience, to oppose his appointment.

In assessing the threat this nomination poses to the role of the Court as the guarantor of equal citizenship, I have taken account of what Robert Bork has said and done in three roles: constitutional theorist and commentator for the last twenty years; federal judge for the last five years; and Supreme Court nominee for the last few weeks. I want especially to address the argument made by Judge Bork's supporters, and to some degree by the nominee himself, that Senators should discount what the Judge has written in his role as legal commentator and theorist in assessing what kind of a Supreme Court Justice he is likely to be. In my view, this argument cannot withstand examination.

It is clear enough why the argument is being made. Judge Bork has written as a constitutional theorist and commentator for nearly twenty years. Since 1971, his position has been one of unrelenting opposition to the main developments in the constitutional law of individual rights over the last two generations.

This opposition is based on a definite constitutional theory. According to Professor Bork, judicially enforced constitutional limitations on government must be confined to those stated in text or originally intended in some fairly concrete way by the framers. He flatly rejects as illegitimate the long-accepted concept of a living constitution, an evolving body of law that develops the meaning of the broad clauses of the fourteenth amendment and the Bill of Rights through the traditional Anglo-American judicial process of case-to-case reasoning. Under Judge Bork's theory, constitutional law legitimately changes only through amendment, and through application of the framers' textually expressed and fixed value choices to new practices not foreseen by them -- railroads, electronic surveillance, and the like.

The outcome of this theory is a thoroughgoing purge of existing constitutional doctrines affecting individual rights. All substantive due process and unenumerated rights, including the whole body of law built up under the constitutional right to privacy, are entirely swept away. The first amendment protects speech that goes beyond the explicitly political only to a limited and unspecified extent, and gives no protection to speech that advocates unlawful conduct. The equal protection clause prohibits only discrimination on the basis of race or ethnicity.

With some considerable strain to his theory, in the face of the strong evidence that the framers of the fourteenth amendment accepted racially segregatory legislation, Judge Bork manages to accommodate Brown v. Board of Education within his constitutional universe. But discrimination on the basis of characteristics other than race -- such as gender, nationality, illegitimacy, class and wealth -- is to be subject only to the minimal requirement of legislative rationality. The body of equal protection doctrine that gives heightened scrutiny to legal distinctions affecting such "fundamental interests" as procreation and political participation is likewise wholly swept away.

This is the most radical departure from existing and accepted constitutional doctrine ever proposed by any Supreme Court nominee. It fully justifies the characterization of Judge Bork as a constitutional extremist. Without very substantial qualification or modification of this position, the nominee certainly could not be confirmed. And in the weeks and months since the nomination there has been a determined campaign to qualify and modify those positions deemed politically unacceptable.

The effort at qualification of Judge Bork's position proceeds along a number of lines. First, Judge Bork's record on the Court of Appeals is cited in support of the proposition that he is a moderate, not an extremist.

Judge Bork's work on the Court of Appeals has been, as a number of recent studies have shown, the performance of a very conservative judge. Within the limits set by existing Supreme Court precedent, Judge Bork has come out on the conservative side of most of the divided-panel decisions in which he has participated. This is as one would expect. As Judge Bork said himself, we all see the world and the law through the lenses of our own world view. In the kind of close case that has some ideological dimension, and where reasonable lawyers disagree about what the law requires, he will see the law and the facts through a lens that tilts to the right. This is not a matter of acting unjudicially, or being "result oriented" in some improper way. No one is immune from what might be called the "lens effect" -- which is one good reason why the Senate must consider the political philosophy of Supreme Court nominees.

At most a fourth of the cases coming to the Court of Appeals are both close and political in the sense I refer to. On the

Supreme Court, by contrast, a much higher proportion of cases fit this description. This fact by itself might reasonably lead a Senator to see the question of Judge Bork's confirmation to the Supreme Court in a quite different light from the question of his confirmation to the Court of Appeals five years ago.

However, this fact does not stand by itself. The truth is that there has been no way for Judge Bork to implement the radical aspects of his constitutional theories on the Court of Appeals. A lower federal judge who thinks the Supreme Court has been misinterpreting the Constitution is still bound to apply the Supreme Court's doctrines. He has some leeway to nudge the law in the direction he thinks right, and Judge Bork has made use of what leeway he has. But that leeway does not include anything even remotely approaching such massive departures from accepted law as the entire abolition of the constitutional right of privacy, or the drastic pruning of first amendment and equal protection doctrine that Judge Bork has advocated. Thus it is no surprise that Judge Bork, while on the Court of Appeals, has not been reversed by the Supreme Court, and has not tried to carry out the revolution in constitutional doctrine he advocated as a commentator. It should also be very little comfort to those who regard that threatened revolution with dismay.

Once a Justice of the Supreme Court, however, Judge Bork would be free, and indeed in a sense obligated, to pursue his own vision of what the Constitution requires. The only check would be his sense of what deference a sitting Justice should pay to those past decisions of the Court that he thought were erroneously decided. The second attempt to qualify Judge Bork's radical position has been to suggest that its implications are much softened when we take into account the effect he is likely to give to the restraints of stare decisis.

But from Judge Bork's pre-nomination statements, we know what -- at least until very recently -- he thought those restraints were. As he put it in a speech to the Federalist Society early this year they are limited indeed: "Certainly at the least I would think an originalist judge would have no problem whatever in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy."

The judge however would not be "absolutely free" to overrule. Some precedents, Judge Bork said, are so embedded in the social fabric that judges could not as a practical matter undo them. The example he gave in that talk was the broad interpretation of the Commerce Clause under which so much of our federal legislation has been enacted. Another along the same lines he has mentioned elsewhere is the decision in Legal Tender Case, which allows the federal government to issue paper money.

These examples illustrate the very weak character of the constraints imposed by precedent on the overruling of "erroneous" constitutional precedent. In both cases, the protected precedents expanded governmental power. In both cases, any attempt to overrule them would involve social upheavals of vast dimensions, and would be completely impractical. Decisions defining and protecting individual constitutional rights rarely if ever are so socially entrenched. It is difficult to think of any individual rights decision or line of decisions that, if overruled, would present the intractable practical difficulties posed by the cases Judge Bork has used as examples. Indeed, I have not found any example in his pre-nomination discussions of the doctrine of precedent of any constitutional decision protecting individual rights that he identifies as even presumptively immune from overruling.

The third attempt to qualify Judge Bork's position rests on the argument that Senators should generally take what he has said in his scholarly writings with a grain of salt. Quite the contrary, in my view, these writings are a much better predictor of his performance as a Supreme Court Justice than are his Court of Appeals decisions. A constitutional scholar, like a Supreme Court justice, is free to state his or her view of proper constitutional doctrine, without the constraint of being subject to review by any higher court.

Here I want to deal with what seem to me some possible misconceptions about the kind of legal scholarship that Judge

Bork's articles and lectures represent. It has been said that these are "theoretical" writings, with the implication that they are intended somehow to be detached from the real world of litigants, judges, and working law. Some scholarly writing about law is indeed "theoretical" in that sense -- especially purely philosophical writing, or work done from the point of view of some scientific or descriptive discipline, like economics or history. But Judge Bork's writings are not like that. They are doctrinal efforts, addressing the decisions in actual past cases and possible future ones, and taking a position on how those cases should be decided.

This kind of scholarship is not external to the working law; it is rather intended to expound that law. It is the kind of work legal scholars do in the practical collaborative effort they carry on with the bench and the bar, an effort aimed at clarifying and restating the existing law. When judicial decisions are criticized in this kind of legal literature, it is not because they fail to correspond with some extra-legal philosophy or theory, but because in the writer's opinion they should have been decided differently given the proper sources of law already in place. Legal scholars take seriously their responsibilities to the working law when they produce this kind of work. They know judges may rely on their work in deciding cases. And they know that when judges do so rely, some losing litigant will be hurt thereby.

Along the same lines, it has been suggested that Judge Bork's writings represent criticism of judicial reasoning, rather than of actual results. Occasionally Judge Bork does limit his criticism in this way, and he knows how to say so. Thus he criticizes the privacy rationale for Pierce v. Society of Sisters, but suggests the result might stand on other grounds, presumably freedom of religion. He criticizes the use of the equal protection clause to attack legislative malapportionment, but suggests that the guarantee of republican government might serve in its stead. On the whole, however, Judge Bork's criticism is directed squarely at the decision itself: for example he tells us that "the Court could not reach its result in Griswold through principle." (47 Indiana Law Journal at 9; emphasis added.)

Finally, his defenders have said that Judge Bork is being criticized for "early" or "youthful" views -- this because these views were most fully set out in an article written 16 years ago. Of course either his general approach to constitutional interpretation or the main results he derives from that approach might have changed substantially since then. They might have, but the published record makes clear they did not -- at least not before his nomination this summer.

The views Judge Bork stated in his 1971 article were those of a mature scholar of 44 years, reached after many years of studying the Constitution. In a 1985 interview, Judge Bork said that the most powerful influence on his judicial philosophy was the seminar he taught with Alexander Bickel at Yale in the years before 1971. "We taught it for seven years," he went on "and I finally worked out a philosophy which is expressed pretty much in that 1971 Indiana Law Journal piece." It is clear he still adheres to that philosophy. In a number of lectures and essays published over the last few years, the most recent appearing in 1986, he has strongly reiterated his insistence that constitutional interpretation must follow original intent in just the sense he spelled out in that article. These very recent pronouncements refute any notion that Judge Bork's experience on the bench gradually led him to change his views on constitutional interpretation.

Nor is it plausible to suppose that while Judge Bork's frequently-reiterated basic philosophy remained the same, the results he would reach in applying that philosophy have drastically changed. The fact is that the most radical of the results do follow pretty straightforwardly from the theory itself. You indeed cannot get the right of marital privacy out of the text of the Constitution or the kind of evidence of concrete framer intent that Judge Bork insists on as the only legitimate premise for a constitutional argument. Nor can you get any substantial constitutional protection against laws based on traditional gender stereotypes. The only example of an announced change in the positions set out in the 1971 article was Judge

Bork's 1984 statement that the first amendment's protection extends beyond explicitly political speech. The theory and most of the results come together as a package, and until the nomination Judge Bork was firm in sticking to the theory.

My main point is that Judge Bork's previously published views must be taken seriously; the attempts made to qualify them are not convincing. Now I want to say some things about the actual modifications in his views Judge Bork has announced since his nomination. In his testimony, Judge Bork stated two important changes. First, he would now apparently give much greater effect to precedent than before in dealing with what he regards as erroneous constitutional decisions. For example, while he still thinks advocacy of illegal speech should in theory not be protected by the first amendment, he is willing to accept the Brandenburg test as settled law.

Second, Judge Bork has dramatically changed the substance of his view of the equal protection clause. Whereas before it imposed substantial limits only upon racially or ethnically discriminatory laws, now all distinctions drawn by law are subject to a single test of "reasonableness." In application, this test supports substantially all of the decisions reached by the Supreme Court in gender discrimination cases under the "intermediate scrutiny" approach.

The trouble with these two positions, adopted under the heated pressures of this dramatic confirmation battle, is that they are altogether inconsistent with Judge Bork's overall approach to constitutional adjudication. It is very unlikely he will be able to live with them and their implications without further, and unpredictable, modifications.

The notion that the equal protection clause substantially protects women is completely inconsistent with the known concrete intentions of the framers of the fourteenth amendment. Those framers were quite aware of feminism and the suffrage movement, which proceeded under premises not very different from those of the modern women's movement. Those premises were scarcely taken seriously, much less accepted, by the framers of 1868.

Further, any notion that the equal protection clause makes all "unreasonable" legal inequalities unconstitutional, leaving it to judges to decide from time to time what is "unreasonable," delegates to courts just the kind of free legislative choice in the guise of constitutional interpretation that has been Judge Bork's main target all along. If the "reasonableness" test is as comprehensive as its initial statement sounds, it would, for example, free him to invalidate economic legislation that he sincerely thinks most unreasonable on the basis of his strong belief in the virtues of the unregulated market. But if, as Judge Bork suggests, the test leaves most economic legislation alone, while invalidating the kind of gender-based stereotyping that the framers of the amendment would have seen as clearly reasonable, it is wildly inconsistent with everything he has said about constitutional interpretation over the last 16 years.

The same problems arise when Judge Bork suggests a broad doctrine validating much established though originally erroneous precedent. Such a doctrine introduces into constitutional law a vast "living" and "unwritten" constitution, made up of the very large proportion of our existing case-law that is not rooted in the text or the intentions of the framers in the way Judge Bork thinks it must be if it is to be legitimate. Furthermore, there are no rules about which originally wrong precedents are to survive and which to be overruled; the decision turns on how the justices strike the balance among a number of vague competing factors, including whether the effect of the precedent is or is not "pernicious." Thus the new doctrine of precedent sets the justices at large to shape the law by nothing more than their policy preferences; and as such it is illegitimate according to Judge Bork's most frequently reiterated criterion.

These innovations in Judge Bork's view of constitutional adjudication and interpretation are, then, too sweeping to be confined to some limited place within his judicial universe. He seems likely to have to retreat from them in practice to something resembling his pre-nomination position, or to move on from them to formulate some new general approach whose contours no one can now predict.

The whole episode confirms the wisdom of the traditional policy against nominees engaging in extensive and detailed discussion of their views of the law. This kind of discussion is likely to take place only when the nominee's views are controversial and hence a source of substantial opposition. In such circumstances, what starts out as discussion and debate quite naturally becomes, with perfect good faith on both sides, a process of unconscious negotiation. Whether the nominee later learns to live with the concessions thus extorted from him or finds that they stick too much in his craw and moves away from them, they have not been reached by the kind of process through which we want our judges and justices to arrive at their views of the constitution and the laws.

This problem is particularly acute with respect to Judge Bork, given his own history. His supporters say that he is criticized, inconsistently, both for being too rigid and too flexible. I think the two points are compatible. Judge Bork's past career shows him to be a man strongly drawn to clearly articulated general theories that generate a wide range of results from a few premises. Thus he was a libertarian judicial activist when he first wrote about constitutional law. When he became dissatisfied with this systematic theory, he moved to an equally sweeping and rigid theory at the other extreme, one that virtually abdicates the traditional judicial responsibility to develop the law of constitutional rights. Now he may be going through another seismic upheaval, triggered by the pressures produced by this confirmation struggle.

In my view, no one can say with any confidence what will emerge in the long run from this process. So far, Judge Bork has stuck to his general approach, and to the wholesale rejection of the right of privacy it involves. This leaves the accepted constitutional liberties of Americans insufficiently protected. What changes the recent modifications in his position may bring along with them cannot be predicted with any confidence. In these circumstances, I would urge this Committee to recommend that the Senate withhold its consent from his nomination as an Associate Justice of the Supreme Court of the United States.

Mr. Grey. Thank you. Now, I just want to address one aspect of the range of issues that I cover in my written statement. This is the issue of how seriously to take Judge Bork's extra-judicial writings and how they bear on the question of whether his nomination should be confirmed.

I want to address five myths and misconceptions that it seems to me have arisen in connection with this question. The first is the misconception that these writings are simply theoretical and academic and as such not very relevant to the question of whether Judge Bork should be confirmed as a Justice of the United States Supreme Court. I was sorry to hear Professor Priest, whose scholarship I admire, further this misconception in his testimony a few minutes ago.

It is certainly true that in legal academic writing at this time there is a good deal of work that is, one might say, to a certain degree external to the law. There is law and economics scholarship. There is history of law. There is philosophical writing about law. There is critical legal studies, which attacks the whole fabric of our standard ways of doing business within the law. In those kinds of work, people take a positions that are in a sense external to the operations of the working legal system itself.

Judge Bork's work does not fit this characterization. It is internal, doctrinal work about the law. It is addressed to judges. It is addressed to his fellow professors as well, but it is addressed to judges and it tells them how they ought to decide cases under the existing law, given the existing sources of the law as he sees them. It is not external.

Judge Bork's work is commentary in the tradition of the commentaries of Blackstone and Kent and Story and Cooley and Wigmore and the rest of the people who wrote the thick law books we all read in law school. It attempts to state what the law is, given the law's legitimate sources. It is an attempt to tell judges how to decide cases.

And I want to urge that I disagree with Professor Priest's characterization of this kind of work. People who do this kind of work within the legal academic community, I think, take very seriously their responsibility to the practical workings of the legal system. They do not regard this as a kind of game or an athletic event—that was his analogy—in which the professor who can commit the figurative art of hyperbole to the highest degree wins.

We are addressing judges. We ask them to listen to what we have to say. We hope they will listen, and we know that if they do listen and if they agree, to use Judge Bork's own words, somebody will be hurt.

That is the first point. The second is that Judge Bork's academic writings address largely reasoning, not results. Now, occasionally, it is quite true that indeed they do, and when they do, he is quite capable of saying so.

If you have read the 1971 article, as I'm sure everybody has, you will remember that he says that *Pierce* v. *the Society of Sisters* was wrongly reasoned but probably could be supported on another ground, the ground of freedom of religion. He also says that *Baker* v. *Carr*, the first reapportionment case, was wrongly decided on equal protection grounds, wrongly reasoned, that is, but probably could be supported on Guarantee Clause grounds or on structural grounds.

Those are the only two examples in that piece of writing that involved criticism of reasoning, not result. All the rest of it is directed squarely and explicitly at the results of the cases, and I simply draw your attention to what he says about the *Griswold* case: "The truth is that the Court could not reach its result in *Griswold* through principle." He then goes on to say that *Griswold's* antecedents were "wrongly decided"—not wrongly reasoned, wrongly decided.

This point runs through the rest of his writings, and that brings me to the next point, the third misconception. The third misconception is that we are dealing with the work of young Professor Bork in 1971. He was 44 years old. I'm 45, and it's nice to think that we're young at that age.

But my point is not one about age but it is one about evolution.

The CHAIRMAN. I'm willing to forgive the mistakes of 44-year-olds myself. [Laughter.]

Mr. GREY. Let me be very brief about this point. The judge's views have not significantly changed since 1971. The question was raised by Senator Specter for the last panel. He has given lots of speeches, published speeches in the last several years in which he reiterates the theories that he laid down in 1971.

He recants exactly one position, and that position is that only explicitly political speech is covered—I'm talking about his pre-confirmation-hearings position. In speeches up through 1986 and early this year he reiterates the Indiana Law Journal position. That remains his position. It is not an old position. It is the position of the Robert Bork of the spring of 1987.

Fourth point, and I will be very brief on this: it is said that his judicial record is such that it undercuts the message of his writings. It is certainly true that in his work on the court of appeals Judge Bork did not carry out the truly radical aspects of his theoretical program—the abolition of the right of privacy, the drastic pruning back of the first amendment and the equal protection clauses.

He couldn't. He was a lower court judge. He simply did not have the authority to do that. He told you Senators in 1982 when he was confirmed that he wouldn't do that, and he didn't; and as a lower court judge he couldn't have.

Now, my last point concerns the biggest misconception, and this is the view that Judge Bork's positions are tentative, speculative "ranging shots." I quote him, of course. He did say those things. He used those words in the 1971 article, in the first paragraph and then in the last paragraph.

I ask you to reread that article. Everything between those two paragraphs is just about as tentative as a marine drill sergeant's orders barked on a parade ground. There is nothing tentative about that article, and to say it is tentative in the first paragraph and to repeat that it is tentative in the last paragraph is like the Marine drill sergeant making a joke and saying I'm going to whisper to you fellows or make a few suggestions to you out there and then giving his orders.

There is nothing tentative about it, and there is nothing tentative about the speeches that repeat the position and reestablish the position in the mid-1980s. What he is about is laying down the law. There is nothing tentative about Judge Bork.

Let me just hammer this home, I think.

The CHAIRMAN. And very quickly because there is going to be nothing tentative about this.

Mr. GREY. This is my conclusion—I see that I am about to be tentatively gaveled.

Here's something Judge Bork said in April of 1987 in a speech in Philadelphia. He was talking about what he calls the second wave of constitutional theorizing, the young Federalists who will sweep away all non-originalists.

Now, non-originalists mean me and everybody else on this panel, but it also means people like Justice Frankfurter, Justice Harlan, Chief Justice Burger who testified the other day who believes in the ninth amendment, and so on.

Here's what Judge Bork said, this tentative, speculative, ranging man. "It may take 10 years, it may take 20 years for the second wave to crest, but crest it will, and it will sweep the elegant, erudite, pretentious and toxic detritis of non-originalism out to sea."

Tentative!

Thank you.

The CHAIRMAN. Professor Resnik.

TESTIMONY OF JUDITH RESNICK

Ms. RESNIK. In some sense, I am here to address what some of the Senators have said has been absent, that we, as academics, have only been addressing Judge Bork in his academic garb rather than in his judicial robes. I'm here to talk about how Judge Bork, as a judge, seems to view the role of the federal judiciary and how—in many fewer of his writings—Judge Bork has spoken about the role of the federal judiciary.

Let me begin first with three aspects of a federal judge's role.

First of all, federal judges must exercise restraint. Article III of the Constitution limits judges to cases and controversies. Judges may speak only when there are real disputes. Federal judges may decide cases only what real disputes require decision.

Second, and here I might borrow a phrase from Senator Specter, Judges must have "courage". They must have courage. Article III gives them the independence to have that courage by life tenure. And, with that life tenure, federal judges must sit, sometimes, in judgment of the government. They must judge the very employer that gives them their jurisdiction to speak.

Third, lawsuits are not simply occasions when judges get to use their able brains to think about interesting legal problems. Lawsuits are about real people, real lives, In the case-by-case method, judges must think about the consequences of legal doctrine on flesh and blood human beings. These three concerns, restraint, independence and courage, and finally compassion, are the concerns that I brought with me when I reviewed Judge Bork's work as a judge in his opinions and his discussions in the area of my expertise, which is procedure, (basically, who can sue whom). I regret to report that Judge Bork fell far short on all three of these aspects.

Let me start first with the people concern, with the question about what relationship the federal judiciary has to the people and to the problems that people of this country face.

First of all, in the 1970s, when he was Solicitor General, Robert Bork gave a speech in which he said: here are my ideas about the role of the federal judiciary. [See 70 F.R.D. 231.] In April of this year, in 1987, Judge Bork delivered a speech at the Brookings Institute where he repeated very similar statements. He said federal courts are too crowded with what he described as "legal trivia." Thus the "intellectual satisfaction" and importance of the job of judging has declined in his view.

There are cases, he said, in the federal docket that persons "far less qualified"—those are his words—"far less qualified" than judges can decide the facts. According to Judge Bork, the federal courts should be closed to these cases and, if anything, federal courts should only be permitted to hear important statutory or constitutional questions that arise.

Now, what are these areas of legal "trivia" for Judge Bork? Cases arising under the Mining and Safety Act, the Federal Employer Liability Act, the Truth in Lending Act, the Consumer Product Safety Act, the Clean Air Act, the Social Security Act, the Water Pollution Act. Judge Bork would keep the people and the facts of all of these cases out of the federal judiciary. And by the way, therefore, a host of claims against the government would not be reviewed by judges who have life tenure, who are equipped with "courage." Rather, judges who are much more vulnerable in their position would be assigned these cases.

There are other examples of how Judge Bork's concern with important theoretical issues seems to take him away from the problems of people in this country. Recall the *Bartlett* case [816 F.2d 695 (DC Cir. 1987); 824-F2d 1240 (D.C.Cir. 1987)] which was discussed earlier by this committee. That was the case where there was a $286 Medicare claim. A woman who was denied the claim said that her first amendment rights had been violated because of the payment scheme. Differential payments were authorized—depending upon the use of a Christian Science facility or not.

Congress has a statute which says when you've got a problem with medicare, first you must go to Health and Human Services, and then, thereafter, if the amount in controversy is over $1,000, you may go to the federal courts. The woman went to Health and Human Services, and they said we're very sorry, we can't talk to you because it's a constitutional claim, and we don't deal with constitutional claims.

So she went to the federal district court and then the court of appeals. The D.C. Circuit said, well, of course, Congress could not have intended, when they had this $1,000 cutoff, to cut off all access to all redress anywhere for constitutional claims. Judge Bork in dissent said no, close the federal courts. And once again what words comes up? The word "trivial". A thousand dollars, "trivial" he says "in dollar terms."

Finally, here, at these hearings, the *Griswold* case, [381 U.S. 479] the contraception case in Connecticut came up. What happens there? Judge Bork once again is not interested in people. He belittles the case. He calls it nutty, a law professor's dream. He ignores that there were real people, women and men in Connecticut too poor to get contraception.

Now, it may be a lot easier to think about hard legal problems if you don't think about the people and the consequences that flow. But law in cases is not an abstraction. Law is about real problems; lives change, and there is where Judge Bork seems to have much less interest.

So, first, the issue of the painful reality of judging. This concern does not seem to be high on Judge Bork's agenda.

Second, let me turn to the "courage" point. Judge Bork's opinions say over and over again that the judiciary should abdicate its article III responsibilities, that judges should not stand in judgment of the other branches of this government. Let me briefly give you one example. *Nathan* v. *Attorney General William French Smith* [737 F.2d 1069 (D.C. Cir. 1984)] involved the Greensboro incident, in which individuals were killed in a lawful parade. There was some concern that the FBI had some involvement and knowledge about the possibility of violence. The plaintiffs sued to try to get the Attorney General to begin a preliminary investigation, under a statute calling for the appointment for the appointment of an independent prosecutor.

Two judges on the D.C. Circuit said sorry, you (the plaintiffs) haven't shown enough facts here. What does Judge Bork say? He says never. No one can ever challenge the President in decisions on enforcement of the law. "The execution of the laws is lodged by the Constitution in the President. * * * It all belongs to the Executive." [737 F.2d at 1079]. Imagine that the Department of Justice tomorrow stopped all anti-discrimination work, all civil rights enforcement. Under Judge Bork's vision, the judiciary would be silenced to hear such challenges because the power to decide about the execution of the laws "all belongs to the President."

A third of the federal docket in the trial court involves the United States as a party, plaintiff or defendant. Judges must have the ability to function as checks and balances and must not abdicate their role.

My final problem with Judge Bork is one of restraint. Judge Bork has said, "A judge's authority derives entirely from the fact that he's applying the law and not his personal values." Judge Bork has come here as an apostle of judicial restraint. But time and time again, in opinions, Judge Bork has not been tempered, has not been restrained. And here let me point out that I have a flat disagreement with Professor Priest. I have read all of Judge Bork's opinions in my area of expertise, and I have been struck time and again by the stridency of the tone, the harshness which has evoked in his colleagues on the bench responses that essentially say: "Hey, wait a second, you're misquoting me."

Judge Edwards (quoted to you earlier) stated in the *Tel-Oren* opinion, [726 F.2d 774 (D.C. Cir. 1984)] "Judge Bork seriously distorts my basic premises"—this is a quote—"Judge Bork ignores my express reservations. I believe that my opinion belies my colleague's mischaracterizations." Judge Edwards is responding to Judge Bork's strident tone, not his allegedly temperate or restrained decisionmaking.

And let me point out that that stridency came across in his exchange here with Senator Byrd about the *Barnes* v. *Kline* [759 F.2d 21 (D.C. Cir. 1985), recorded as moot, congressional standing case. Judge Bork argued not only that members of Congress had no standing in *Barnes*, to challenge the pocket veto, Judge Bork denounced outright the entire doctrine of congressional standing. Imagine, once again, a hypothetical: that the President walks into this room and stops the deliberations. If there is no congressional standing, none of you can bring a lawsuit to permit you to deliberate. Judge Bork's approach, this lack of judicial restraint isn't just a matter of style. It's a matter of substance because he therefore develops a closed mind. He prematurely decides questions that are not before him.

Thus, my conclusion: You've heard about people who have criticized Professor Bork, as making overstatements, as strident. You've heard people who've criticized the speechmaker Bork. He has provided provocative bright lines, but, we've been told, that's speeches, that's good after dinner conversation.

I'm telling you that Judge Bork, the judge, is that same person. He's distrustful of the judiciary, he's disdainful of judging, he's hostile to adjudication, and he's impatient with the case-by-case method of adjudication. He came here and, in response to questions, said why he wanted to be an Associate Justice. He said it would be an "intellectual feast". Lawsuits are more than grits for a very powerful mind. Lawsuits are about real people and real pain. Judge Bork as judge, Judge Bork as law professor, Judge Bork as academic, I think together the record is disqualifying.

Thank you.

[Statement of Professor Resnik follows:]

Statement of Judith Resnik,

Professor of Law,

University of Southern California Law Center

Before the Committee on the Judiciary, United States Senate
On the Question of the Confirmation
of Robert H. Bork to become
an Associate Justice
of the United States Supreme Court

Mr. Chairman and Members of the Committee.

My name is Judith Resnik, and I am a Professor of Law at the University of Southern California Law Center. Thank you for the invitation to testify.

The question before this Committee is whether the Senate should confirm the nomination of Robert H. Bork to be an Associate Justice on the United States Supreme Court. Before I address this question, I want to provide the Committee with the perspective from which I speak. My scholarship has been devoted to considering the purposes of adjudication <1>, the functions of the federal courts <2>, and the role of judges <3>. I value adjudication, I care deeply about the office of judge, and I view the question of who should sit on the United States Supreme Court as one of highest importance to all of us in this country.

A. The Qualities Demanded of Judges

There is a vast body of legal literature that struggles with the question of what qualifies a person to be a judge. As that literature reflects, it is often easier to describe what disqualifies a person from judging in a specific case than it is to explain what qualifies a person to hold the office of judge <4>. To determine who may be a judge, we must, by necessity, speak in general terms. We seek judges who will be impartial and restrained, who will be sufficiently disengaged from the fray so as to hear both sides and to judge fairly, and who will judge each case on its merits. Because human beings are our judges, we understand that values and interpretation must always affect the decisions made. We want judges who will be aware of the value choices they make.

Two aspects of the judicial role are particularly important when assessing an individual's qualifications to hold the office of judge. First, judges hold awesome powers in this society. Their judgments change lives, transfer assets, imprison individuals and even determine life and death. Because we give such power to judges, we expect them to exercise that power with restraint. We constrain judicial power by requiring judges to provide reasons for their judgments and to explain the bases for their decisions. Most importantly, adjudication itself restricts judicial power. Judging is an instance of specification. A judge is required to decide the merits of the case at hand. While some level of generalization may be necessary, judges are not supposed to reach beyond the facts, the specific events, and the necessary legal principles; judges are not supposed to use cases to enshrine their philosophy as law. We seek judges who will have the wisdom and humility to use their power sparingly.

Second, a judge is an employee of the government, which is often a party to a case or has an interest in the issues to be decided. But a judge is not an ordinary government employee, for the judge has extraordinary powers. A judge must sometimes rule against her or his employer -- must contradict the very government that empowers the judge to speak, that gives the judge her or his grant of jurisdiction. The intrinsic tension in the judicial role poses a constant threat to impartiality. Hence, we require not only judicial impartiality and disengagement but also judicial independence.

The requirements we demand of judges -- independence, impartiality, disengagement, fairness, and restraint -- find expression in the Constitution itself, which addresses the special problems of judicial independence and restraint. First, Article III vests the judicial power of the United States in judges who are protected by life tenure with no diminution of salary while in office. These protections liberate judges from the obligation to please their employer, here, the United States government. Freed from the fear of losing their salaries or their jobs, federal judges will, we hope, be true in their commitment to the rule of law; federal judges will, we hope, have the strength to disagree (if need be) with the Executive and with Congress.

Second, Article III imposes a powerful constraint upon judges, for the judicial power extends only to actual "cases" and "controversies". Judges are empowered to decide cases only if litigants can demonstrate that real disputes divide them. Article III of our Constitution expresses important values for our polity; the constitutional guarantees are a structural commitment to judicial independence, to impartiality, and to restraint.

B. The Standard for Appointment to the United States Supreme Court

The question before this Committee is not simply whether an individual may become one of the 575 federal trial court judges or 168 appellate court judges <5>. The issue is whether Robert Bork has demonstrated the qualifications required to sit as an Associate Justice on the United States Supreme Court. Given the unique power of that position, the Committee is entitled to impose the most stringent of standards. The Committee must examine Judge Bork's unusually ample record to determine whether he possesses a temperament suitable for those who sit as one of nine justices on our highest and most powerful court. In assessing his qualifications, the Committee has before it not only Judge Bork's commentary as a law professor and legal theorist, but also the many opinions written during his five years as a judge on the Court of Appeals for the District of Columbia. The Committee must apply the general, but profoundly important, standards of judging to this nomination. The issue is whether Robert Bork has demonstrated unwavering commitment to the values of judicial independence, impartiality, restraint, fairness, and disengagement.

C. Judge Bork's Record

After reading the opinions that Judge Bork has authored in the areas of my expertise, I conclude, with concern, that his work as a judge has not consistently displayed the qualities necessary for those who seek to hold the office of an Associate Justice of the United States Supreme Court. First, although Judge Bork has presented himself as an apostle of judicial restraint, he has not always been restrained in his efforts to turn his own philosophy into law. Second, Judge Bork is so deeply committed to a view of a limited judiciary and to deference to the government that he seems unable to approach legal challenges to government action with a sufficiently open mind.

Before providing examples, I should explain the bases for my views. I have reviewed the opinions in my field that Judge Bork has written while on the Court of Appeals and that have been cited by both proponents and critics. I have looked at opinions in which the question is whether the court may hear the claim. These cases raise issues of justiciability -- of jurisdiction, causes of action, standing, statutes of limitations, and defenses such as sovereign immunity. Further, I have looked particularly (but not exclusively) at instances in which Judge Bork is writing for himself, either in a concurrence or a dissent, because those are the instances in which his own voice can be heard most clearly. While I will draw examples from Judge Bork's opinions, I must also stress that I am not claiming that any one decision proves or disproves Judge Bork's qualifications to sit on the Supreme Court. A given outcome or an approach can often be explained or distinguished, and I have not based my conclusions upon a ruling in any one case. Rather, it is Judge Bork's work in the aggregate that demonstrates his failings.

Prior to becoming a judge, Robert Bork developed a philosophical commitment to a limited role for the judicial branch of government and to strong presumptions in favor of executive and legislative decisionmaking <6>. Unfortunately, since becoming a judge, Robert Bork has been unrestrained in attempting to write this political theory into law. Judge Bork has used several of his opinions as a platform from which to advocate his particular political philosophy. Although Judge Bork told this Committee that the "judge's authority derives entirely from the fact that he is applying the law and not his personal values" <7>, Judge Bork's work on the bench has demonstrated his efforts to enshrine his "personal values" in the law. Unwilling in his work as a judge to be constrained by the limitations of that role, Robert Bork has not shown consistently that he brings qualities of disengagement, disinterest, and impartiality to every case.

1. An Insistence on the Categorical: A Pattern of Reaching Out to Decide Issues Not Presented

Several of Judge Bork's opinions display his desire to decide not only the case before him but also general legal questions. Apparently unable to shed the mantle of his ideology, of his oft-expressed views on the role of courts, many of Judge Bork's opinions urge his colleagues to expand the scope of a decision to write his own views into law. His penchant for the categorical statement that would dispose of an entire arena of legal issues is profoundly at odds with the very process of adjudication. The most fundamental and important restraint on judicial power is that it be dispensed only when necessary: to decide a live case, a real controversy. The greatest threat to judicial legitimacy is a judge who does not take seriously the boundaries of the case at bar.

Illustrative of Judge Bork's repeated failures to accept the constraints of judging is his concurrence in Williams v. Barry, 708 F. 2d 789 (D.C. Cir. 1983). The plaintiffs in Williams -- homeless men -- claimed that the District of Columbia was constitutionally obligated to provide them an opportunity to be heard before the District decided to close a shelter for the homeless. Judge Harry T. Edwards, for the court, concluded that all the procedural protections required had been afforded and that the second issue, the "proper scope of judicial review of a procedurally correct decision to terminate emergency shelter services, was not ripe for decision ...." 708 F. 2d at 792.

Judge Bork wrote a separate concurrence because, apparently, he wanted to address two issues that were not before the court -- whether any legally cognizable right was at stake and what the scope of judicial review of the District's decisions might be in the future. The trial judge had found that the homeless were protected by the Due Process Clause of the Fifth Amendment. See Williams v. Barry, 490 F. Supp. 941 (D.D.C. 1980). The defendant, the Mayor of the District of Columbia, had not cross appealed to challenge that ruling. Nonetheless, Judge Bork offered an advisory opinion: "Had there been a cross appeal, I think it highly likely that no process would have been found due." 708 F. 2d at 793. Further, while the majority understood that there was no need to decide the scope of judicial review over actions that had not yet been taken, Judge Bork reached out to address that question. Judge Bork characterized the majority's refusal to reach the issue of judicial review as a "suggestion" that judicial review might be available. Rather than simply disagreeing, Judge Bork used the occasion to debate the general issue of the relationship between the executive and judicial branches of government. In his words: "Given our legal tradition, the suggestion that there may be judicial imposition of procedures on, and review of, plainly political decisions is revolutionary." 708 F. 2d at 793.

Judge Bork may well have believed that the District had no legal obligation to permit the homeless to participate in the decisionmaking and that judicial review was therefore unavailable. In addition to being an inaccurate description of the law, which in fact permits "judicial imposition of procedures" when individual entitlements are at stake <8>, Judge Bork's statements evidence a lack of restraint. None of Judge Bork's commentary on the relationship between executive and judicial decisionmaking was necessary to decide the case before him or to explain the principle that governed his conclusion. Williams v. Barry is not a "big" case, although the outcome profoundly affected the litigants involved. But Judge Bork was unwilling to deal with the case on its own terms; instead he used the case as a means to comment, generally, on the allocation of power between courts and the executive branch of government. Reaching out to decide issues not before a court is the hallmark of the very judicial style Judge Bork purports to disdain. Judicial power is expanded when judges move beyond the confines of a case, and judicial power is used illegitimately as judges make legal decisions not demanded by the task of adjudication.

Before turning to other examples of Judge Bork's unrestrained decisionmaking, Judge Bork's rhetoric in Williams v. Barry must be contrasted with the words he used in Silverman v. Barry, 727 F. 2d 1121 (D.C. Cir. 1984). In Silverman, Judge Bork voted to uphold (rather than to deny) the power of courts to hear lawsuits challenging actions taken by the executive branch of government. In Silverman, as in Williams, plaintiffs claimed that the District of Columbia had violated their constitutional rights. In Silverman, a limited partnership of housing developers alleged that inaction by the District's Department of Housing and Community Development and actions by the District's Council on condominium conversions violated the Fifth Amendment. Judge Bork, here writing for a panel that included Judges Mikva and Wright, upheld federal court jurisdiction over the lawsuit. Instead of branding as "revolutionary" the challenge to the actions of the District for violating individual constitutional rights, Judge Bork concluded that the federal courts could hear the developers' claims alleging that the District had engaged in an "arbitrary delay and refusal to grant conversion permits ...." 727 F. 2d at 1125.

Had Judge Bork not chosen, in his concurrence in Williams v. Barry, to speak about the inviolate nature of decisions of the political branch, the comparison between the Williams and Silverman opinions would not have much potency. As I have noted, any two cases can be distinguished. While both these cases raised issues of due process, lawyers -- including myself -- can point to differences in the nature of the rights sought to be enforced. But what cannot be "distinguished away" in the two cases is the fact that both cases involve challenges to executive decisionmaking. When the homeless brought their claim, Judge Bork insisted that the very process of judicial review of decisionmaking by the executive branch of government was illegitimate. When developers came to court, Judge Bork supported judicial review of the decisions of the District of Columbia as an appropriate exercise of a court's jurisdiction. *Williams v. Barry*, by itself, is an example of Judge Bork's tendency to attempt to rule on more than is necessary. When *Williams v. Barry* is read in conjunction with *Silverman v. Barry*, questions of Judge Bork's even-handedness are raised.

A second example of Judge Bork's insistence on writing at the greatest possible level of generality, rather than addressing the particulars of a case, comes from the substantial number of cases in which Judge Bork has written about standing. As this Committee well knows, the question of standing turns on whether a given plaintiff has alleged a specific injury fairly attributable to the activities of the defendant named <9>. Judge Bork has addressed the standing issue in a variety of contexts. In *Barnes v. Kline*, 759 F. 2d 21 (D.C. Cir. 1985), vacated as moot sub nom *Burke v. Barnes*, 107 S.Ct. 734 (1987), Judge McGowan wrote a majority opinion which held that 33 members of Congress, the Senate, the Speaker, and bipartisian leadership of the House could challenge the President's exercise of a pocket veto of a bill presented to the President the day that the Ninety-eighth Congress adjourned its first session. 759 F. 2d at 24. Judge Bork, in dissent, did not simply object to the decision in the case before him. Judge Bork was not content to argue that members of Congress had failed to show the requisite "injury in fact" when claiming harm from the President's exercise of a pocket veto. Unwilling to leave open the ultimate question of whether any member of Congress could ever show standing to challenge any action of the Executive, Judge Bork wrote: "We ought to renounce outright the whole notion of congressional standing." 759 F. 2d at 41. Thereafter, Judge Bork criticized the majority's view as "absurd" (759 F. 2d at 55), and he insisted that his was the only "conclusion ... possible" from the silence of the Constitution on the point at issue. 759 F. 2d at 56.

This case is not simply an example of inflammatory rhetoric, of intellectual arrogance, and of name-calling. Barnes v. Kline demonstrates once more that Judge Bork is not always willing to submit to the constraints of judicial decisionmaking. Reverting to his professorial mode, Robert Bork insisted upon attempting to sketch the contours of an entire legal doctrine. Judge Bork used Barnes as a platform from which to announce his reading of Article III: that no member of Congress -- in that case or any other -- could ever show the kind of injury required to have claims heard by the federal courts. Indeed, according to the majority opinion, Judge Bork's "wide-ranging dissent" goes further and would "bar any governmental official or body from pursuing in federal court any claim, the gravamen of which is that another governmental official or body has unlawfully infringed the official powers or prerogatives of the first." 759 F. 2d at 26 (emphasis in the original).

One can easily spin out hypotheticals to challenge Robert Bork's theory. For example, imagine that the President ordered the halls of Congress shut to prevent the legislature from deliberating. Could a member of Congress sue? But my point is not that Bork's theory is controversial or vulnerable; my point is that he has misunderstood his role. Were he still a law professor, he would be free to articulate a theory of an absolute bar to congressional standing. But, as a judge, he was obliged to decide Barnes v. Kline. As a judge, he had every right -- indeed a duty -- to announce and to apply the principles he believed should govern. As a consequence, he may well write, as he did, that the court had no jurisdiction to decide that case. But as a judge, Bork should not have tried to use his power to make law unnecessary to the outcome of the case at hand. His dissent in Barnes is addressed to the entire "doctrine of congressional standing" (759 F. 2d at 47), rather than to the issue of congressional standing to challenge the pocket veto

<10>. The result of such an approach is to create inflexible, unduly broad principles of law that impede fair consideration of future cases <11>.

A third example of Judge Bork's overreaching comes from his opinion in Tel-Oren v. Libyan Arab Republic, 726 F. 2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985). Plaintiffs, survivors and representatives of survivors of persons "murdered in an armed attack on a civilian bus in Israel in March 1978," filed a lawsuit under 28 U.S.C. section 1350 and sought damages. 726 F. 2d at 775. Section 1350 dates from the First Judiciary Act of 1789 and provides jurisdiction over actions by an alien alleging a tort committed in violation "of the law of nations or a treaty of the United States." The question was whether the statute both conferred jurisdiction on the federal courts and provided a cause of action to plaintiffs, or whether the statute was only jurisdictional and plaintiffs had to find a cause of action from another source <12>.

A per curiam opinion stated the court's view that the action was properly dismissed. Judges Bork, Edwards, and Robb each filed separate opinions. Once again, Judge Bork strove to provide a definitive account of a legal issue, to decide not only whether the plaintiffs before him could be heard but also to identify what kind of claims fell within the statute. Although he acknowledged that "[h]istorical research has not as yet disclosed what section 1350 was intended to accomplish" (726 F. 2d at 812), Judge Bork argued that the statute's reference to the "law of nations" should not be read in terms of "modern assumptions" -- but rather as its "framers" might have intended. 726 F. 2d at 813. Claiming that "in 1789 there was no concept of international human rights" <13>, Judge Bork inferred that the statute might have been addressed to a list he quoted from Blackstone of the "principal offences against the law of nations ... 1. Violations of safe-conducts; 2. Infringement of the rights of embassadors; and 3. Piracy." 726 F. 2d at 813 (citation omitted). In Judge Edwards's words, Judge Bork proposed such a restrictive interpretation of the statute that his construction "would deny jurisdiction to any plaintiff ... who could not allege a specific right to sue apart from the language of section 1350 itself." 726 F. 2d at 777. Once again, my use of a particular case is not to show that Judge Bork was "right" or "wrong" about the merits of the issue before the court. My objection is based upon process. Judge Bork's decisionmaking -- in a variety of cases <14> -- is not narrow, focused, or restrained.

How does this repeated insistence upon making categorical statements, extending far beyond the parameters of the case at hand, relate to whether Judge Bork is qualified to sit as an Associate Justice on the United States Supreme Court? Fair judgment depends upon a careful consideration of the facts in a given case. Embedded within the case-by-case approach is a quintessentially conservative process that limits the reach of a decision so as to enable fair judgment of the next set of facts, of the next question of law. What is conserved is judicial power, which is to be deployed only when necessary. What is preserved is judicial impartiality, for a judge does not commit him or herself prematurely to decisions of future, unspecified cases. Judge Bork's consistent interest in reaching out to make general rules of law and his unwillingness to join opinions that provide more narrow statements suggest that he is uncomfortable with the judicial role. Instead, he seeks to impose his world view by using a particular case as a vehicle for exposition of his general theories.

Let me be clear about my criticism. I am not claiming that no judge has ever gone outside the boundaries of a case nor waxed eloquent on whatever concern he or she happens to cherish. Moreover, by definition, intermediate appellate judges must operate at some degree of generality, for they have a lawmaking function. But there are limits. Judge Bork has, in several instances, attempted to exploit his lawmaking powers. Judge Bork seems unable to function at the level of the particular, a level some may describe as "mundane". Rather, Judge Bork reaches for the generality, and in the process discards his judicial robes. Indeed, in this respect, Judge Bork fails his own test of judging. To use his words: A judge's "abstinence from giving his own desires free play, that continuing and self-conscious renunciation of power, that is the morality of the jurist" <15>.

General theories are for legislatures, and perhaps for law professors, but are not for judges. Adjudication addresses the problems of particular people in the context of events in their lives. Judge Bork's record as a judge suggests that he is uncomfortable with and ill-suited for the task of adjudicating.

2. A Failure of Independence: A Commitment to Deference that Results in a Reluctance to Judge the Government

While a law professor, Robert Bork developed a theory of government that has strong preferences for legislative and executive decisionmaking and deep suspicions about the legitimacy of judicial decisionmaking. Since becoming a judge, this philosophical agenda has led Judge Bork to expand doctrines that insulate the government from legal challenges. Judge Bork has couched his decisions under a variety, and sometimes a melange, of legal headings, including executive privilege, jurisdiction, sovereign immunity, standing, and causes of action. Judge Bork's interpretive choices produce a continual theme of deference: He believes that governmental decisionmaking should not be challenged by citizens who claim they have been harmed and that courts should not sit in judgment of the decisions made by the other branches of government <16>.

Nathan v. Smith, 737 F. 2d 1069 (D.C. Cir. 1984), illustrates Judge Bork's commitment to judicial deference. The case arose out of the "Greensboro incident", in which members of the Ku Klux Klan and the American Nazi Party made "an armed attack" upon individuals participating in a parade. 737 F. 2d at 1070. Survivors and the relatives and representatives of those killed sought appointment of a special prosecutor because they believed that members of the federal government had been involved with the attackers and that therefore the Department of Justice had a conflict of interest. When their requests for a special prosecutor were denied, plaintiffs sought mandamus against the Attorney General to commence a preliminary investigation, as described by 28 U.S.C. section 592. On a cross appeal, the court held, per curiam, that the district court erred in its partial grant of summary judgment for plaintiffs. All of the judges on the panel filed separate statements.

Judge Bork wrote to set forth his view that the court had no jurisdiction over the case. In his view, "the Ethics in Government Act creates no private right of action to compel the Attorney General to conduct a preliminary investigation." 737 F. 2d at 1077. Although Judge Bork acknowledged that the process of determining the existence of an implied right of action is to look to Congressional intent, his discussion went considerably beyond that inquiry to the general question of separation of powers. Judge Bork used Nathan v. Smith to propound his theory that the Executive branch must be unfettered in its exercise of decisions to initiate enforcement actions. He claimed that the "principle of Executive control extends to all phases of the prosecutorial process." 737 F. 2d at 1079. Further, Judge Bork seemed to address executive prerogatives in areas other than the initiation of criminal prosecutions.

> If the execution of the laws is lodged by the Constitution in the President, that execution may not be divided up into segments, some of which courts may control and some of which the President's delegate may control. It is all the law enforcement power and it all belongs to the Executive.

737 F. 2d at 1079.

Such an analysis is not only sweeping in its search for a bright line; the analysis also concludes that no person could challenge any Executive decision not to enforce any law. Imagine that the Department of Justice ceased to enforce anti-discrimination statutes. Under Judge Bork's view, the courts would have to be silent, would have to close their doors to claims of executive malfeasance. Or, rather than imagining, turn to a real case, Dunlop v. Bachowski, 421 U.S. 560 (1975), a Supreme Court case curiously not mentioned in Judge Bork's analysis. In Bachowski, the plaintiff sought enforcement of the Department of Labor's obligation, under the Labor Management

Reporting and Disclosure Act, 29 U.S.C. section 482, to commence a lawsuit against a labor union to have election results set aside because of illegal efforts to win votes. The Supreme Court held that judicial review was available and that the Secretary of Labor was required to provide reasons for declining to file suit. While a subsequent Supreme Court decision, Heckler v. Chaney, 470 U.S. 821 (1985), held that judicial review of an agency's enforcement decision is limited to those instances when standards govern an agency's exercise of discretion, Judge Bork's position in Nathan reaches much farther. Judge Bork's prior commitment to judicial deference to executive decisionmaking led him to a remarkably broad formulation that leaves him unable to entertain challenges of any genre. In a sense, Judge Bork is unable to "hear the other side" <17>, even to consider the possibility that an executive decision could be subject to judicial review.

A second example of Judge Bork's "jurisprudence of insulation" is Bartlett v. Bowen, 816 F. 2d 695 (D.C. Cir. 1987), order for rehearing en banc vacated and panel opinion reinstated, 824 F. 2d 1240 (D.C. Cir. 1987). Josephine Neuman, a member of the Christian Science faith, entered a Christian Science facility and received care until she died. Medicare refused to pay the $286 for the post-hospital care. Ms. Neuman's sister, Mary Bartlett, filed a lawsuit in which she claimed that the refusal to provide benefits violated First Amendment rights of the free exercise of religion. The Medicare Act, 42 U.S.C. section 405(h) and 1395ff (b)(2), permits "judicial review" of a "final decision" of the Secretary of the Department of Health and Human Services only if the amount in controversy is $1000 or more. The issue in Bartlett was whether that statute was a bar to a federal court hearing the First Amendment claim.

Judge Edwards, writing for the court, held that the federal court had jurisdiction to hear the constitutional claim. Judge Bork, in dissent, introduced what the majority termed "an absolutely unprecedented use of sovereign immunity". 816 F. 2d at 707. While noting that his conclusions rested upon Supreme Court cases "not free of ambiguity", Judge Bork argued that the federal courts should not hear the claim. 816 F. 2d at 711. In

Judge Bork's view, the amount in controversy provision of the statute constituted a limited waiver of sovereign immunity for suit; because Congress had not waived its immunity for claims of less than $1000, the constitutional claim was barred. Judge Bork thought that a purpose of the limited waiver was to avoid "overloading the courts with 'trivial matters'" in "dollar terms." 816 F. 2d at 713 (citation omitted).

While it should be noted that Judge Bork deployed the doctrine of sovereign immunity in an innovative and unusual manner, this is not the place to explore his unique formulation deployed to protect the government from constitutional challenges. Rather, Bartlett is another example of Judge Bork's efforts to insulate the government from having to respond to its citizens' allegations of illegal behavior. Time and again, Judge Bork concludes that the courthouse door must be shut and that federal courts may not decide the merits of claims of illegal and unconstitutional action by governing bodies <18>.

This pattern of protecting the federal government from suit is particularly disturbing in light of the docket in the federal courts. Between June 30th of 1985 and June 30th of 1986, 254,828 civil cases were filed in the United States district courts <19>. Of those 254,828 civil cases that were commenced, the United States was a plaintiff in 60,779 and a defendant in an additional 31,051 cases <20>. In short, the United States was a party to more than one third of the civil lawsuits and (by definition) to 100% of the 41,490 criminal cases filed in the federal trial courts <21>. Given the substantial number of cases in which the United States is involved, it is critical that a federal judge have an open mind when litigants challenge government action as unlawful. The federal docket is not the place for presumptions that the United States stands as a litigant whose actions should not be reviewable by the judicial branch <22>.

D. Conclusion: Judge Bork's Discomfort with the Judicial Role

A review of Judge Bork's work as a judge during the last five years demonstrates his discomfort with the restraints of the judicial role and his rebellion against it. In the cases that I have studied, Judge Bork has refused to work within the narrow confines of the case before him. Rather, he seeks out the broadest formulation of the issues to decide. Recently, when asked why he wanted to be an Associate Justice, Judge Bork answered that the work was an "intellectual feast" <23>. Lawsuits unquestionably raise interesting intellectual issues, but lawsuits are not just about ideas. Lawsuits are the sagas of individuals, whose cries of anguish are real. But the plight of individuals does not appear to hold as much interest for Judge Bork as does political philosophy <24>. Thus cases become platforms for the exposition of legal theory rather than moments when government-empowered individuals -- judges -- attend to individual claims of wrongdoing.

Of course, the Supreme Court does not simply respond to individual claims; the Court must address broad legal questions, and Supreme Court justices are freer of constraints than are judges of the lower courts. But even the Supreme Court is confined to the context of the case in which an issue arises. The Court does not simply offer its views about jurisdiction, standing or sovereign immunity in the abstract. The Court, when functioning as it should, does not operate at an unrestrained level of generality nor does the Court offer advisory opinions. To be a justice of the United States Supreme Court, one must not only be intellectually adept, but must also be wise, restrained, and compassionate.

While sitting on a court with more structural restraints than the Supreme Court, Judge Bork has displayed his eagerness to reach for the most global formulation of an issue; Judge Bork has shown his discomfort with the confines of the adjudicatory method. His approach counsels against his promotion to the Court. Further, Judge Bork has demonstrated his commitment of deference to the other branches of government, even when such deference leaves individuals without an opportunity to challenge allegedly unconstitutional acts of government. While Judge Bork marshals a variety of arguments, the refrain is consistent: courts are not the place where claims of wrongdoing may be heard.

The cumulative impression formed from these written opinions is that he is hostile to the very act of adjudication, that he simultaneously disdains and distrusts judging itself.

Footnotes

1. Resnik, The Public Dimension, in Conference on Procedural Due Process: Liberty and Justice, 39 University of Florida Law Review (forthcoming, 1987); Failing Faith: Adjudicatory Procedure in Decline, 53 Chicago Law Review 494 (1986); Precluding Appeals, 70 Cornell Law Review 603 (1985); Tiers, 57 Southern California Law Review 837 (1984); and Robert M. Cover, Owen Fiss, and Judith Resnik, Procedure (forthcoming, Foundation Press 1988).

2. Resnik, The Mythic Meaning of Article III, 56 Colorado Law Review 581 (1985).

3. Dennis E. Curtis and Judith Resnik, Images of Justice, 96 Yale Law Journal 1727 (1987); Judging Consent, 2 University of Chicago Legal Forum (forthcoming, 1987); Managerial Judges, 96 Harvard Law Review 374 (1982), also published by the Institute of Civil Justice of the Rand Corporation.

4. Those who judge must not stand to win or lose -- directly or indirectly -- from a decision. See, e.g., Ward v. Village of Monroeville, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927). Those who judge must not be too close to or too embroiled in an event, for we fear clouded judgment and bias. See, e.g., Mayberry v. Pennsylvania, 400 U.S. 455 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); In re Murchison, 349 U.S. 133 (1955). Statutory disqualification standards are set forth

in 28 U.S.C. section 144 and section 455.

5. 1986 Annual Report of the Director of the Administrative Office of the United States Courts (hereinafter, 1986 Administrative Office Report) at pages 2 and 8. The numbers do not include senior judges.

6. Bork, Neutral Principles and Some First Amendment Problems, 47 Indiana Law Journal. 1 (1971); see also Bork, The Constitution, Original Intent, and Economic Rights, 23 San Diego Law Review 823 (1984).

7. See "Bork Statement: 'Philosophy of Role of Judge'", New York Times, page 16, col. 1 (September 16, 1987).

8. The Due Process Clause protects individuals who have "statutory entitlements"; the courts determine whether such entitlements exist and the procedural protections that must be afforded. See Mathews v. Eldridge, 424 U.S. 319 (1976); Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).

9. See, e.g., Meese v. Keene, 107 S.Ct. 1862 (1987); Arkansas Writers' Project, Inc. v. Ragland, 107 S. Ct. 1722 (1987); Clark v. Securities Industry Association, 107 S. Ct. 750 (1987). See generally Monaghan, Constitutional Adjudication: The Who and When, 82 Yale Law Journal 1363 (1973).

10. Ironically, in the course of his dissent, Judge Bork stated that "[t]he courts are enabled to think about real interests and claims, not words. Constitutional adjudication should operate upon the basis of realities, not general propositions." 759 F. 2d at 55.

11. For additional discussion of the legal issue, see Daniel Polsby, Analysis of Judge Bork's Opinions on Standing, Statement submitted to the Judiciary Committee, (September, 1987); Dessem, Congressional Standing to Sue: Whose Vote Is This, Anyway?, 62 Notre Dame Law Review 1 (1986); Note, The Justiciability of Congressional-Plaintiff Suits, 82 Columbia Law Review 526 (1982).

12. Other statutes which combine a statement of jurisdiction and a cause of action are 28 U.S.C. section 2241, 2254, and 2255, which authorize federal courts to entertain claims by prisoners that they are confined in violation of the Constitution.

13. My colleagues who are legal historians tell me that, as a matter of history, such an absolutist assertion is questionable. See William M. Wiecek, The Sources of Antislavery Constitutionalism in America, 1760 - 1848 Chapter 1 (1977) (discussing Somerset v. Stewart, a 1772 case which some read as a "declaration that slavery was incompatible with natural law"). Id. at 20. See also Robert M. Cover, Justice Accused at 16 -19 (1975); and Soifer, Status, Contract, and Promises Unkept, 96 Yale Law Journal 1916 (1987).

14. See also Telecommunications Research and Action Center v. Allnet Communications Services, Inc., 806 F. 2d 1093, 1097 (D.C.Cir. 1986) (Judge Bork argued for a "per se" rule against associations having standing to bring damage claims on behalf of their members); Haitian Refugee Center v. Gracey, 809 F. 2d 794 (D.C. Cir.1987) (Judge Bork sought broader rule on associational standing); Nathan v. Smith, 737 F. 2d 1069 (D.C. Cir. 1984) (Judge Bork urged a broad rule of Executive freedom from judicial review of decisions to enforce laws).

15. Tradition and Morality in Constitutional Law, Francis Boyer Lecture (American Enterprise Institute) at 11 (1985) (as quoted by the Department of Justice's Response to Judge Bork's critics, at p. 4 (September 13, 1987)).

16. Once again, I am not suggesting that Judge Bork never finds that an individual or group has standing to challenge governmental action. In fact, Silverman v. Barry, 727 F. 2d 1121 (D.C. Cir. 1984), discussed in the preceeding section, is an example of Judge Bork recognizing a claim, by developers, against the District of Columbia. See also Norfolk and Western Railway Co. v. United States, 768 F. 2d 373 (D.C. Cir. 1985), cert.

denied sub nom Aluminum Ash v. Norfolk and Western Railway Co., 107 S.Ct. 270 (1986) (railways' petition for review of Interstate Commerce Commission not barred by res judicata or by statutory time limits; no reduction of rates required); Emory v. Secretary of Navy, 819 F. 2d 291 (D.C. Cir. 1987) (per curiam opinion holding that the district court had jurisdiction to hear a challenge to the Navy's promotion policies, claimed to be racially discriminatory); Ososky v. Wick, 704 F.2d 1264 (D.C.Cir. 1983) (Judge Bork was a member of a panel that held that a claimant under the Equal Pay Act was not required to exhaust administrative remedies prior to obtaining judicial review of alleged discrimination); Howes Leather Co., Inc. v. Carmen, 680 F. 2d 818 (D.C. Cir. 1982) (per curiam opinion that disappointed bidder had standing to challenge government rejection of a bid).

Of course, as Professor Stewart explained, a "judge may join a colleague's result for a variety of reasons falling well short of full agreement ...." Richard Stewart, The Judicial Performance of Robert Bork in Administrative and Regulatory Law, Statement submitted to the Judiciary Committee at p. 3 (September, 1987). As a consequence, I have selected for full discussion in the text only those cases in which Judge Bork himself wrote an opinion. Further, my approach throughout has not been to quantify who wins and who loses but rather to offer a qualitative analysis of some of the opinions that both proponents and opponents have used as exemplary of Judge Bork's work.

17. "Odi l'altra parte!" (Hear the other side!). This inscription can be found on pictures of the Virgin Mary dating from the early Renaissance and appearing in Italian municipal buildings. See S. Edgerton Pictures and Punishment: Art and Criminal Prosecution during the Florentine Renaissance 22- 23, 52, n. 38 (1985). See also Maimonides's explanation of the phrase in Leviticus: "In righteousness shalt thou judge thy neighbor." "What is meant by righteous judgment? It is a judgment marked by perfect impartiality to both litigants ... not to show courtesy to one,

speaking softly to him, and frown upon the other, addressing him harshly...". Code of Maimonides (Mishneh Torah) bk. XIV, Book of Judges, Laws of Sanhedrin, c. xxi, paras. 1 and 2 (Hershman trans. Yale Judaism series).

18. See also Persinger v. Islamic Republic of Iran, 729 F. 2d 835 (D.C.Cir. 1984), cert. denied, 469 U.S. 881 (1984) (Judge Bork found that the statutory waiver of sovereign immunity did not apply and therefore claim of former hostage and his parents was barred) ; Gott v. Walters, 756 F. 2d 902 (D.C. Cir. 1985), rehearing en banc granted, and then, upon joint motion of the parties, panel opinion vacated and dismissed on joint motion, 791 F. 2d 172 (D.C. Cir. 1975) (Judge Bork joined a majority concluding that no judicial review was available of the Veterans Administration's decisions on compensation for injuries stemming from radiation exposure); Jayvee Brand, Inc. v. United States, 721 F. 2d 385 (D.C. Cir. 1983) (Judge Bork wrote the opinion for the majority concluding that the Federal Torts Claims Act could not provide a basis for the suit); Citizens Coordinating Committee on Friendship Heights, Inc. v. Washington MTA, 765 F. 2d 1169 (D.C. Cir. 1985) (corporation cannot assert injury to aesthetic interest to establish standing); Brown v. United States, 742 F. 2d 1498 (D.C. Cir. 1984), cert. denied sub nom District of Columbia v. Brown, 471 U.S. 1073 (1985) (Judge Bork argued that a District of Columbia six month notice of claim should bar constitutional damage actions); California Association of the Physically Handicapped, Inc. v. Federal Communications Commission, 778 F. 2d 823 (D.C. Cir. 1985) (Judge Bork joined a majority holding that the Association had no standing to challenge the FCC's approval of a stock transfer).

19. 1986 Adminstrative Office Report, supra note 5, at p. 169, Table C (U.S. District Courts, Civil Cases Commenced, Terminated and Pending).

20. Id. at p. 175, Table C2.

21. Id. at p. 232, Table D-1.

22. Some of Judge Bork's proponents have simultaneously belittled statistical analyses of his record that have suggested a strong pro-government bias while they have cited the statistic that his opinions have never been reversed by the Supreme Court. See the Response to Judge Bork's critics, supra note 15, at p. 29 ("That the Supreme Court has never reviewed a majority opinion that he has written means that those decisions do not merit review by the Supreme Court, and the Court was content to let them represent the binding authority in the Circuit") (emphasis in the original omitted). The conclusion drawn is that the absence of a reversal somehow proves that Judge Bork has performed acceptably as an appellate judge and that his views on a variety of legal issues fall within the mainstream of legal thought. However, the statistic cited cannot make the case for Judge Bork. In 1985, the Courts of Appeal disposed of 31,387 cases; the Court of Appeals for the District of Columbia disposed of 1346 appeals. 1986 Administrative Office Report, supra note 5, at 137, Table B. During the same year, the United States Supreme Court disposed -- by full or by per curiam opinion -- of 171 cases. Id. at p. 135, Table A-1. That Judge Bork's cases have not happened to be among those chosen for review does not prove that he was correct or incorrect. Indeed, no one mentions the number of cases in which review was requested or that the Supreme Court has steadfastly insisted that one can draw no conclusions from a denial of certiorari.

23. As quoted by the Los Angeles Times, Bork Finishes Record Five Days of Testimony at p. 1, col. 3, continued at p. 30, col. 3 (September 20, 1987).

24. Let me provide two examples of this approach. First, while Solicitor General, Judge Bork urged that many lawsuits involving ordinary people's problems be shifted away (at least initially) from Article III courts. Included were cases arising under the Social Security, Food Stamp, Federal Employers' Liability, Consumer Products, and Clean Air Acts, as well as those involving prisoners. See Robert Bork, Dealing with the Overload in Article III Courts, 70 F.R.D. 231 at 238-239 (1976) ("[S]omeone far less

qualified than a judge" can assess such cases).

Second, in the course of his testimony, Judge Bork dismissed Griswold v. Connecticut, 381 U.S. 479 (1967) as an intellectual exercise, a "nutty" case, conceived by law professors to challenge a law never enforced. The lawyers who were involved have contradicted Judge Bork; apparently, clinics were unwilling to provide birth control devices because they feared prosecution under the law. See Lewin, Bork is Assailed over Remarks on Contraceptive Ruling, New York Times, at p. 9, col. 2 (September 19, 1987). Compare the concern that Justice Harlan expressed for the poor, when he recognized a right of access to courts for indigents who sought divorces. Boddie v. Connecticut, 401 U.S. 372 (1971).

My thanks to Deborah Cantrell and Rosario Herrera for their assistance in the preparation of this statement.

The CHAIRMAN. Thank you very much. Professor Gewirtz.

TESTIMONY OF PAUL GEWIRTZ

Mr. GEWIRTZ. Mr. Chairman and members of the committee, it's an honor to be invited to appear before you.

I must tell you at the outset that as a teacher of constitutional law, I have found these hearings a truly extraordinary event, and not simply because they've helped to get my first year law students excited about their constitutional law course, although I certainly appreciate that.

What I think is extraordinary about these hearings is that they represent a reaffirmation of the democratic character of the Supreme Court's role in our society, a role that's often been challenged.

What you, the elected representatives of the people on both sides of the aisle, and probably on both sides of this issue, what you've been affirming again and again through your questions and concerns is that our democratic system isn't simply one that promotes the prerogatives of the majority, but is one that also insists on protecting individuals against the majority, even when those rights are sometimes unpopular. And you've been reaffirming again and again the indispensible role that the Supreme Court plays in enforcing these constitutional rights. You've been affirming all of this in the context of a particular legislative debate with real things at stake, not simply in a Fourth of July speech. And I think no one should underestimate how important that is for our public life and for the life of our Constitution.

I have a lengthy written statement concerning Judge Bork with two appendices, but I'll be brief here.

The CHAIRMAN. The entire statements of all of you who have testified will be inserted in the record.

Mr. GEWIRTZ. As witness after witness has testified, Judge Bork has largely built his career criticizing an extraordinary range of landmark Supreme Court decisions protecting individual rights. It's these long-standing and forcefully espoused views critical of so much of constitutional law that leads me to conclude that this nomination poses a serious risk to settled and fundamental constitutional values.

The question for you, as I see it, is whether we should take those risks and whether these hearings really have allayed those concerns. I think not.

Judge Bork's record of criticism suggests to me that there are three sorts of concerns about how he would behave as a Supreme Court Justice. And I want to say something briefly about each of the three.

The first concern is overruling, whether Judge Bork will overrule cases that he has long criticized.

The second concerns how he will apply precedent, precedent that he said he is willing to accept but still thinks was wrongly decided.

And the third is how will he handle new kinds of claims.

With respect to overruling, no one disputes that a Supreme Court Justice has powers that a court of appeals judge simply does not have. Judge Bork's comments over the years have suggested a standard for overruling that's strongly receptive to overruling constitutional cases believed to be wrongly decided. But the real concern here, I think, is not that Judge Bork has a standard for overruling that's somehow outside the mainstream, but rather that he considers so many Supreme Court decisions to be wrongly decided that his standard, I think, would lead to a large number of important cases actually being overruled. It's important to remember here that Judge Bork does not simply view many landmark cases as being wrong. He's called them such things as pernicious, lawless, unprincipled and unconstitutional, which is a degree of wrongness that under his own standard suggests that he will be more likely to overrule them.

Now, at these hearings last week Judge Bork did affirm that he has no intention of voting to overrule cases like *Brandenburg* v. *Ohio,* and I don't at all question his sincerity in saying that. But he certainly made no broad commitment to accept Supreme Court precedent. And I should remind you that he conspicuously avoided making any affirmation about the long line of liberty and privacy cases going back to *Meyer* v. *Nebraska.* So, in my view, the risk of overruling is clear and clearly substantial.

The second concern that I mentioned is about how Judge Bork would apply precedent which he still thinks was wrongly decided but doesn't overrule. The critical thing here, I think, is that most lawyers recognize that precedents are generally capable of being given either a broad or restrictive reading, particularly by a judge on a court with no higher court to review its decisions. Given the leeway that judges inevitably have, inevitably have in reading precedent, I think it's reasonable to conclude that Judge Bork will read decisions he disagrees with restrictively. And that means, of course, that in the closely contested cases, which are the sort of cases that come to the Supreme Court, it is likely that Judge Bork would decide that earlier decisions he believes were wrongly decided simply don't control the matter in question.

Now, there is nothing necessarily improper about that. Some leeway is inevitable. But what I want to emphasize is that a Judge can "accept" a precedent—a word that Judge Bork has used—and yet still read it very narrowly. When someone disagrees with a precedent as strongly as Judge Bork often does, that seems pretty likely. In doing so, Judge Bork would not be disgraced in history—to use his phrase. He would only be doing what the committee should have predictably concluded he would do, given what it most plausibly means in this context to say that precedent has been "accepted".

The third and final area of concern is how Judge Bork is likely to approach the really novel issues of liberty and equality that will emerge in the years ahead, issues where a Justice has leeway not closely channeled by precedent. Now, it is true that it is hard to predict how a Justice will react, the more novel the issue is, but Judge Bork's track record does reflect certain fundamental convictions, methods and patterns that make prediction more plausible. The concern here arises from his general judicial philosophy and his general style of constitutional interpretation, but also arises simply from the cumulative effect of reviewing all of his strong criticisms of particular court decisions protecting individual rights.

What is especially troubling today about Judge Bork's positions about such landmark racial equality cases such as *Shelley* v.

Kraemer or his views opposing historic federal civil rights legislation in 1964—what is the subject of concern there I think—is that Judge Bork stood against all of those legal developments when it counted, and no latter day recantation or acceptance of prior precedent can really erase that. When it comes to women's equality issues, we can debate and debate how his new reasonable basis test that was unveiled last week will work out, and my written testimony tries to evaluate it. But the gender equality panel this afternoon made, I think, a more fundamental point, which is that until last week, during the last 15 to 20 years when it really counted in the development of the law, Judge Bork had repeatedly objected to any 14th amendment coverage of sex equality matters.

The CHAIRMAN. Please conclude, Professor.

Mr. GEWIRTZ. Last sentence—or two.

As one imagines the kinds of great new issues that might come before the Court in the years ahead—issues raised, for example, by biomedical advances—there is surely reason to fear that on these great issues Judge Bork will once again not be there when it counts.

So I return to the basic question I think is before you: Should we take the risk with so much at stake? I think not.

[The statement of Professor Gewirtz follows:]

Testimony of Professor Paul Gewirtz
Yale Law School
on the Nomination of Judge Robert H. Bork
to the Supreme Court of the United States

Before the Committee on the Judiciary
United States Senate

September 25, 1987

I am a Professor of Law at Yale Law School, where I have taught for eleven years. Prior to that, I practiced law in Washington, D.C. for four years and I was a law clerk to Justice Thurgood Marshall at the Supreme Court of the United States. My primary fields of teaching and writing are Constitutional Law and Federal Courts. I have also participated in appellate litigation in these fields, including cases in the Supreme Court of the United States.

I testify today in opposition to the nomination of Robert Bork to be an Associate Justice of the Supreme Court. I do so for one overriding reason: I believe that Judge Bork's long-standing views about the meaning of our Constitution and the role of the Supreme Court are outside an appropriate range, and that our country's constitutional values and best interests would not be served if those views were to shape the law of the land.

Judge Bork's views are primarily reflected in his general judicial philosophy and his long-standing criticisms of a broad spectrum of constitutional decisions protecting liberty and equality. Indeed, it is not unfair to say that Robert Bork has largely built his career denouncing an extraordinary range of landmark Supreme Court decisions protecting individual rights. Others, including Judge Bork himself in his testimony, have spelled out his criticisms of dozens of Court decisions in great detail, and it is not necessary to repeat those details yet another time. Suffice it to say that over a period of 25 years, Judge Bork has criticized major decisions protecting privacy; barring racially restrictive covenants; upholding landmark Congressional civil rights legislation; guaranteeing equal treatment of men and women; protecting artistic and literary speech; protecting political speech where there is no clear and imminent danger of harm; allowing the press to publish the Pentagon Papers; and many many others. In addition, he has repeatedly opposed as unconstitutional the assertion of Congressional prerogatives with respect to the Executive branch, whether it be the War Powers Act, Special Prosecutor legislation, or Congressional standing to challenge executive branch intrusion on Congressional powers.[1]

I. The Proper Focus of the Senate's Inquiry: Judge Bork's Long-Expressed Constitutional Views

My theme here is a simple one: The views that Judge Bork has long expressed about the meaning of the Constitution and the role of the Supreme Court should be central to the Senate's judgment about this nomination. Judge Bork's long-standing views establish that his nomination poses grave risks to settled and fundamental constitutional values. These risks, in my judgment, have not been sufficiently reduced by the current hearings or by other information that we have. And various arguments seeking to shift attention away from Judge Bork's long-standing constitutional views should be resisted.

Shortly after this nomination was made, we heard the first of such arguments: some suggested the Senate's "advice and consent" role did not properly include any assessment of a judicial nominee's legal philosophy and views about the meaning of the Constitution, but should be limited to such matters as intellect, experience, integrity and temperament. From their questioning, it appears that most members of this Committee now believe otherwise, and apparently have concluded that Judge Bork's legal views are indeed an appropriate factor in the confirmation process. This consideration of a judicial nominee's legal views is supported by the original intent of the Constitution's framers, by Senate tradition, by the President's own consideration of this factor in making the nomination, and by the fact that a nominee's legal views are clearly relevant to how he will perform the job in question.[2]

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[1] A memorandum discussing Judge Bork's views on Congressional prerogatives and Executive power, an issue that has thus far not been fully addressed in these hearings, is set forth as Appendix A to this testimony.

With Judge Bork's legal views put in issue, some sought to characterize those views as moderate ones by pointing out that respected moderate Justices frequently dissented in decisions that Judge Bork criticized. But this argument misses the point. The problem with Judge Bork is not his criticism of any handful of Supreme Court decisions in isolation, but his criticism of so many important decisions across so broad a range. It is true that Justice John Marshall Harlan, for example, shared Judge Bork's criticisms of the poll tax case (Harper v. Virginia State Bd. of Elections) and of the "one-person, one vote" cases (Reynolds v. Sims and its progeny). But Justice Harlan was also the most eloquent exponent of the privacy doctrine developed in Griswold v. Connecticut, a doctrine strongly denounced by Judge Bork; he was the author of the Supreme Court's much-praised First Amendment decision in Cohen v. California, which Judge Bork has repeatedly criticized; and in Katzenbach v. McClung he supported the constitutionality of the 1964 Civil Rights Act, legislation which Judge Bork viewed as unconstitutional. Similarly, while it is true that Justice Hugo Black shared Judge Bork's criticisms of the Griswold case and the poll tax case, Justice Black was one of the Court's most powerful defenders of freedom of speech (including Brandenburg v. Ohio and legal doctrines protecting artistic speech, both of which Judge Bork has long criticized); freedom of the press (including the Pentagon Papers case, which Judge Bork criticized in a 1979 University of Michigan Speech); racial equality, as reflected in such cases as Shelley v. Kraemer, Katzenbach v. McClung, and Katzenbach v. Morgan, all of which Judge Bork has criticized; and Congressional prerogatives in the foreign affairs area, see Youngstown Sheet & Tube Co. v. Sawyer [The Steel Seizure Case], 343 U.S. 579, 588 (1952), prerogatives which Judge Bork rejects. Considering their views as a whole, Justices Harlan and Black kept the basic balance between individual rights and majority rights in our constitutional order; but the sweep of Judge Bork's criticisms of individual rights decisions shows an extraordinary tilt in the direction of majority prerogatives and against individual rights.

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[2] See Gewirtz, "Senate Should Play Activist Role in Assessing Judicial Nominee's Views", Legal Times, Aug. 10, 1987. (A copy of this article is attached to this testimony as Appendix B.)

More recently we have heard suggestions that Judge Bork's articles and speeches should be of little relevance as compared to his opinions as a Court of Appeals judge. In my view, that is wrong. A Court of Appeals judge is obliged by his position in the judicial hierarchy to carry out Supreme Court precedent, and knows that if that obligation is ignored there is a higher court to reverse him. A Supreme Court Justice has much greater power because of the importance of the cases that come to the Court and because a Justice has the leeway to overrule prior Court decisions. In exercising the more extensive leeway that typically exists in cases before the Supreme Court, a Justice is likely to draw more extensively upon his or her deep-seated convictions about what the Constitution means and what a Justice's role is -- convictions which, in Judge Bork's case, have been and continue to be expressed in articles, speeches, and interviews.

Some have said that Judge Bork's academic writing should be ignored because academic writing is simply provocative speculation. But virtually all academics write to express what they believe to be the truth. We may try out ideas that we later conclude are wrong, but, while lawyers respond to client's demands, law professors try to say what they really believe. Thus, what we write is always revealing. And when the writing over the years is as consistent and deeply felt as Judge Bork's has generally been since 1971, we cannot dismiss it as simply passing experimental thoughts. To do so is insulting to academics, and trivializes their search for the truth. It also understates the power that an academic has. Academics not only have (and aspire to have) influence over their students, but they also typically try to influence judges, the legal profession, and the broader public. This seems to have been particularly true of Robert Bork, who more than most legal academics did a large part of his legal writing for more popular journals such as *The New Republic*, *The Wall Street Journal* and *Fortune* magazine, rather than law reviews. To his credit, Judge Bork was an academic who wished to be influential, who wrote what he did to try to persuade the world (as Holmes put it) to "mov[e] to the measure of his thought" -- who was not content simply to roam, undisturbed and undisturbing, in some remote academic field.[3]

There is a more particular reason that Robert Bork's academic writing -- along with his extrajudicial speeches and articles -- are highly relevant: he has been writing about what Supreme Court Justices should do. Had his writing simply been excursions in personal political philosophy, one could say that it tells us little about what he would do as a Supreme Court Justice, since Justices are constrained by distinctive role norms. In this case, however, the writing and speaking is almost always about what *Justices* should do. And added to that, Judge Bork himself has said that "[t]eaching is very much like being a judge and you approach the Constitution in the same way." Interview with WQED, November 19, 1986. As William T. Coleman, Jr., wrote the other day in *The New York Times*, "It simply defies common sense to think that Justice Bork would not effectively do what he has built his career saying should be done."

Finally, some have argued that recent shifts stated in Judge Bork's views, coupled with his announced willingness to accept as binding precedent certain decisions with which he still disagrees, should reassure us that as a Justice he would move within the mainstream. As elaborated more fully below, I think these shifts have been neither so large nor so firmly rooted as to allay the concerns and the risks arising from his earlier writings and statements.

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[3] Any notion that an inquiry like the one before this Committee will have an unfortunate "chilling effect" on academic writing seems false. Of course, we want academics to take chances, and penalizing an academic for uttering a few aberrational ideas would be unfair. But academics who reveal again and again that they hold views outside the mainstream must reasonably expect that others will be concerned about giving them the power to implement those ideas. It is not unfair or disturbingly "chilling" to expect that those people -- academics and nonacademics alike -- who aspire to wield governmental power over others should, in the overall body of their work and actions, display qualities that give others confidence in yielding power to them. That is the issue being explored in the present confirmation process.

II. The Reasons For Concern: Overruling, Application of Precedent, and Deciding New Kinds of Claims

Robert Bork's record creates three somewhat distinct concerns about how he would act as a Supreme Court Justice.

-- First, there remains a strong likelihood that he will overrule many if not most cases he disagrees with.

-- Second, even where Judge Bork would not overrule decisions that he considers wrong, he is likely to be relatively unreceptive to claims involving their application.

-- Third, even if he does not overrule prior decisions, he is likely to oppose the new kinds of claims of individual liberty and equality that will surely emerge in the years ahead.

A. Overruling. Prior to these hearings, Judge Bork spoke often about the appropriateness of overruling the cases that he had criticized so strongly:

> "Certainly at the least, I would think an originalist judge would have no problem whatever in overruling a non-originalist precedent, because that precedent by the very basis of his judicial philosophy, has no legitimacy. It comes from nothing that the framers intended."
> Transcript, Speech to the Federalist Society, January 31, 1987.

> "Supreme Court justice[s] always can say... their first obligation is to the Constitution, not to what their colleagues said 10 years before."
> Justice Robert H. Bork: Judicial Restraint Personified, California Lawyer, May 1985.

> "[I]f a Court became convinced that it had made a terrible mistake about a constitutional ruling in the past, I think ultimately the real meaning of the Constitution ought to prevail over a prior mistake by the Court."
> Confirmation of Federal Judges: Hearings Before the Senate Committee on the Judiciary, 97th Cong., 2d Sess. 1, 13.

> "Q: Can you identify any Supreme Court doctrines that you regard as particularly worthy of reconsideration in the 1980's?
> "A: [Bork:] Yes I can, but I won't."
> A Talk With Robert Bork, District Lawyer, Vol. 9, no. 5. p. 32, May/June 1985.

At times, Judge Bork qualified these sweeping statements by noting one factor that would count as a limitation on overruling wrong decisions and by noting an example of a line of cases that may have been wrongly decided but that he believes should not be overruled:

> "There are some constitutional decisions around which so many other institutions and people have built that they have become part of the structure of the nation. They ought not to be overturned, even if they are thought to be wrong. The example I usually give, because I think it's noncontroversial, is the broad interpretation of the commerce power by the courts. So many statutes, regulations, governmental institutions, private expectations, and so forth have been built up around that broad interpretation of the commerce clause that it would be too late, even if a justice or judge became certain that that broad interpretation is wrong as a matter of original intent, to tear it up and overturn it."
> A Talk with Robert H. Bork, District Lawyer, vol. 9, no. 5, p. 32, May/June 1985.

At these confirmation hearings, for the first time, Judge Bork seemed to expand the factors that might counsel against overruling. And he affirmed that he had no intention of voting to overrule several precedents which he had criticized, most clearly Brandenburg v. Ohio. It is clear, however, that Judge Bork avoided making such an affirmation about the line of "liberty"/"privacy" cases going back to Meyer v. Nebraska. In light of his many repeated statements about the appropriateness of overruling wrongly decided cases, one must anticipate that, as a Justice, Robert Bork would be receptive to a significant amount of overruling in this area and others. One cannot, of course, be sure. But the risk is clear, and clearly substantial.

The concern, I should add, is not that Judge Bork's standards for overruling constitutional decisions are themselves outside the mainstream; they are not. The source of concern is that because he considers so many Supreme Court decisions wrongly decided -- indeed, considers so many "pernicious", "lawless", "unprincipled", "unconstitutional", "improper", or "utterly specious" -- he will vote to overrule a very broad range of landmark decisions.

B. Application of Precedent. Even where Judge Bork would not overrule decisions that he considers wrong, a separate concern is raised about how he would apply precedent which he believes to be wrong but does not overrule. Lawyers recognize that precedents are generally capable of being given either a broad or a restrictive reading. On this, it is useful to recall Karl Llewellyn's famous discussion of the doctrine of precedent.

> "What I wish to sink deep into your minds about the doctrine of precedent, therefore, is that it is two-headed. It is Janus-faced. That it is not one doctrine, nor one line of doctrine, but two, and two which, applied at the same time to the same precedent, are contradictory of each other. That there is one doctrine for getting rid of precedents deemed troublesome and one doctrine for making use of precedents that seem helpful. That these two doctrines exist side by side. That the same lawyer in the same brief, the same judge in the same opinion, may be using the one doctrine, the technically strict one, to cut down half the older cases that he deals with, and using the other doctrine, the loose one, for building with the other half. Until you realize this you do not see how it is possible for law to change and to develop, and yet to stand on the past....
>
> Nor, until you see this double aspect of the doctrine-in-action, do you appreciate how little, in detail, you can predict out of the rules alone; how much you must turn, for purposes of prediction, to the reactions of the judges to the facts and to the life around them...
>
> People -- and they are curiously many -- who think that precedent produces or ever did produce a certainty that did not involve matters of judgment and of persuasion, or who think that what I have described involves improper equivocation by the courts or departure from the court-ways of some golden age -- such people simply do not know our system of precedent in which they live."
>
> The Bramble Bush 68-69 (emphasis omitted)

Given the leeway judges inevitably have in giving precedent either a relatively broad or restrictive reading, it is reasonable to be concerned that Judge Bork will read decisions he disagrees with restrictively, either out of design or simply because he is not sympathetic with its purposes. (It is undoubtedly possible to apply broadly precedents with which one disagrees, but when someone disagrees with a precedent as strongly as Judge Bork often does, this seems less likely.) This means that Judge Bork might well resolve the most contested matters -- which are the matters that come to the Supreme Court -- by deciding that earlier decisions which he believes were wrongly decided do not control the matter in question.

Take, for example, the Brandenburg case. Brandenburg involved an Ohio statute that was construed by the Ohio state Courts as punishing certain advocacy without requiring any form of clear and imminent danger. Brandenburg is usually said to hold that advocacy may be punished only if it involved "incitement to imminent lawless action." But the Supreme Court concluded that the Ohio statute was unconstitutional on its face: read narrowly, Brandenburg's "holding" could be limited to that, and not read as a rule about what particular degree or kind of proximate danger is constitutionally required. Furthermore, as Professor Burke Marshall in testimony here suggested the other day, if Judge Bork does not accept the "intellectual and historic and traditional underpinning" of the clear-and-present-danger requirement -- if he does not genuinely accept the premises for protecting extreme speech -- then he may end up applying clear-and-present-danger standards in a more restrictive way than others would. He might, for example, "accept" Brandenburg in the sense of requiring more than mere advocacy to sustain a conviction, but nevertheless uphold a conviction based on jury instructions that require a somewhat lesser degree of imminence of harm than other readings of Brandenburg might suggest. This, of course, is only an example of the more general point: a judge who "accepts" a precedent with which he disagrees may well read that precedent narrowly.

C. New Types of Claims. Judge Bork's record is also a source of concern because of what it reveals about how he is likely to approach novel issues of liberty and equality that will emerge in the years ahead, issues where a Justice has a leeway that is not closely channelled by precedent. It is true of course that the more novel the issues the harder it can be to predict how a Justice will react -- even one with a long track record. But Judge Bork's track record reflects certain basic patterns and certain fundamental convictions and methods that make prediction more plausible.

One concern arises simply from the cumulative effect of reviewing his many strong criticisms of prior Court decisions protecting individual and minority rights. What remains especially troubling today about Judge Bork's positions opposing great racial equality cases like Shelley v. Kraemer or opposing historic federal civil rights legislation in 1964 and 1965 is not really a concern that he would today uproot these landmarks from the American legal landscape if he had the chance. What is troubling is that Judge Bork stood against all of these legal developments when it counted -- and no latter-day recantation or acceptance of prior precedent can really erase that. As one imagines the kinds of new great issues that might come before the Court in the years ahead -- issues raised, for example, by biomedical advances -- one might well fear that on these future issues Judge Bork will once again not be there "when it counts."

The concern about how Judge Bork will handle future cases also arises, perhaps more fundamentally, from the basic judicial and constitutional philosophy revealed by his criticisms of prior cases -- a general orientation and approach that is likely to continue to be reflected in his analysis of new issues. One of the great themes in our constitutional order is the balance between individual rights and majority prerogatives. Judge Bork tilts that balance overwhelmingly in the direction of majoritarianism, both because of the kinds of goals he would allow the majority to pursue, the deference he would show to majority judgments of needs, and his theory of constitutional interpretation which yields a contracted scope for constitutional rights.

Judge Bork calls himself an "interpretivist" -- someone who believes that judges should interpret the Constitution, not make up new rights and call them law. In a 1982 article Judge Bork commented: "By my count, there were in recent years perhaps five interpretivists on the faculties of the ten best-known law schools. And now the President has put four of them on courts of appeals."[4] In fact, though, virtually all constitutional law scholars are interpretivists; what divides scholars is their differing versions of interpretivism. Judge Bork's comment quoted above simply reflects how far from the mainstream his version of interpretivism is.

In briefest summary, Judge Bork's version of "interpretivism" leads to a shrunken role for the Court in protecting individual rights because Judge Bork believes that if the "original intent" is not clear, the Court should not protect the right in question. Thus, in the great sections of the Constitution where individual rights are guaranteed in broad and general terms -- particularly in the Due Process Clause and the Equal Protection Clause -- Judge Bork finds insufficient specificity to warrant much judicial protection. Most other scholars, however, accept that our Constitution is a broad charter of freedom, that there is typically uncertainty about what the original intent was, and that to give real world meaning and specificity to constitutional ideals only generally described in the constitutional text itself, a judge must inevitably make constrained choices and judgments. It is in large part because Judge Bork rejects this basic judicial role and this basic conception of constitutional interpretation that there are concerns about how he will respond to new and unforseen constitutional issues.

III. Evaluating the Recent Shifts: The Example of Equal Protection and Women

The reasons for continuing concern about how Judge Bork would act on the Supreme Court, even in areas where there has been a stated shift in his position, is illustrated by examining one substantive area of constitutional law in particular: Judge Bork's views on sex equality under Equal Protection Clause.

Over many years, and as recently as several months ago, Judge Bork has taken the view that the Equal Protection Clause does not address matters other than racial equality. To extend the Clause to women, Judge Bork has argued, departs from the original intent behind the 14th Amendment, produces unprincipled and subjective judicial decisionmaking, and would get courts involved in "enormously sensitive" and "highly political" matters. Thus, in his 1971 Indiana Law Review article, Judge Bork wrote:

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[4] Bork, "The Struggle Over the Court", National Review, Sept. 17, 1982, p. 1137.

> "The Supreme Court has no principled way of saying which non-racial inequalities are impermissible."

He reiterated that position more than ten years later, in a March 31, 1982 speech at Catholic University:

> "We know that, historically, the Fourteenth Amendment was meant to protect former slaves. It has been applied to other racial and ethnic groups and to religious groups. So far, it is possible for a judge to minimize subjectivity.
>
> "But when we abandon history and a very tight analogy to race, as we have, the possibility of principled judging ceases."

Later that year, he repeated this objection to departures from what he saw as the original intent of the Fourteenth Amendment, complaining again about the "extension of the Equal Protection Clause to groups... that were historically not intended to be protected by that clause." Federalism and Gentrification, Yale Federalist Society, April 24, 1982, at 9.

In 1986, in a discussion of his 1976 opposition to the Equal Rights Amendment, Judge Bork expressed an additional concern about courts deciding issues of gender equality, a concern that is as applicable to sex equality claims under the Equal Protection Clause as to claims under proposed Equal Rights Amendment:

> "Now the role that... men and women should play in society is a highly complex business, and it changes as our culture changes. What I was saying was that it was a shift in constitutional methods of government to have judges deciding all of these enormously sensitive, highly political, highly cultural issues. If they are to be decided by government, the usual course would be to have them decided by a democratic process in which those questions are argued out."
> Judicial Notice Interview, June 1986.

And finally, as recently as June 1987, Judge Bork said:

> "I do think the Equal Protection Clause probably should have been kept to things like race and ethnicity.

> "When the Supreme Court decided that having different drinking ages for young men and young women violated the equal protection clause [in Craig v. Boren, 429 U.S. 190 (1976)], I thought that was a very -- that was to trivialize the Constitution and to spread it to areas it did not address."
> Worldnet Interview, June 10, 1987.

It is because of this sustained, well-developed, and thoroughly consistent critique of applying the Equal Protection Clause to women that Judge Bork's recent testimony on this subject was so startling. At these hearings, for the first time, Judge Bork said that "Everybody is covered -- men, women, everybody." And he described a new approach that he said should be used in equal protection cases, including sex equality cases. Under this approach, government classifications (including gender classifications) are measured by asking whether they have a "reasonable basis." At no point prior to these hearings had Judge Bork publicly indicated that these were his views. At no point prior to these hearings had Judge Bork qualified his argument that the Equal Protection Clause should not be applied beyond racial and perhaps religious inequalities. At no point prior to these hearings had Judge Bork suggested that there should be "reasonable basis" protection for women.

Should we nevertheless feel reassured that Judge Bork now views the Constitution in a way that protects women appropriately? In my judgment, we should not. I say this not to challenge Judge Bork's sincerity at these hearings, but because I do not believe that this new position can allay the serious and thoroughly justified concerns that his prior record has raised. I conclude this for several reasons:

1. Most importantly, Judge Bork's standard does not seem sufficiently strong to provide appropriate protection for women. "Reasonable basis" tests have a history: the standard that gender classifications will be allowed if they have a "rational basis" was the very standard that for many years led to the validation of a broad range of sex classifications. It was experience with this standard that demonstrated to both the Court and the country that a stronger standard was needed. A

"reasonableness" standard leaves equality rights altogether vulnerable to a judge's unguided assessment of "reasonableness." And since legislatures usually do have reasons for what they do, it will be difficult for a court to conclude that a legislature does not have a minimally "reasonable basis" for its actions. Predictably, the "reasonable basis" test will significantly dilute current protections under the Equal Protection Clause.

2. Even though Judge Bork did suggest that he would use a "reasonable basis" test in a tougher way than the traditional "rational basis" test, his own examples suggest how weak his standard actually is. The gender case that Judge Bork has probably discussed most frequently is Craig v. Boren. That decision case struck down an Oklahoma statute which provided different drinking ages for men and women. Judge Bork has said that the decision "trivialize[d] the Constitution." Worldnet Interview. But even more importantly, during his testimony before this Committee Judge Bork explained why he thought that the classification in Craig would be upheld using a reasonable basis test: the gender classification there was reasonable "because they have statistics.... [T]hey had evidence that there was a problem with young men drinking more than there was with young women drinking." Transcript of Proceedings, Afternoon Session, September 17, 1987, p. 135. In other words, the sex-based treatment was allowable because it rested on a generalization supported by statistics -- even though many individual men had no drinking problems and many individual women did.

This example of the "reasonable basis" test in action demonstrates one reason why this test seems so inadequate. The test focusses on the accuracy of a statistical generalization about men and women, not whether the generalization is true for individual men and women. If gender classifications are permissible whenever they involve a sex distinction that is accurate as a generalization, then many sex classifications -- and for that matter many racial classifications -- will be "reasonable." The contribution of cases requiring a "higher" level of scrutiny is that the higher standard rejects the sufficiency of having simply a reasonable generalization, because even though a classification may be accurate on the average, it can be altogether *in*accurate and unfair for individuals. "Reasonable basis", as Judge Bork seems to understand it, allows a sex classification based on group averages, and ignores the unfairness to individual women who don't fit the generalization but who are lumped together with others of their sex. Judge Bork's standard is not sensitive to the essence of discrimination -- making distinctions between people based on group generalizations that are not accurate as applied to them individually.

3. Nor is it accurate to say that Judge Bork's view is the same as Justice Stevens'. Most obviously, in the *Craig v. Boren* case itself -- one of the few specific sex discrimination cases Judge Bork discusses -- Justice Stevens came out the other way. Furthermore, while Justice Stevens does use the phrase "rational basis" from time to time in discussing equal protection, that hardly means that Judge Bork's approach is the same. Justice Stevens has described what he means by "rational basis" in this context in this way:

> "The term 'rational'... includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate purpose that transcends the harm to the members of the disadvantaged class. Thus, the word 'rational' -- for me at least -- includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially." *City of Cleburne v. Cleburne Living Center*, 105 S.Ct. 3249, 3261 (1985) (Stevens, J., concurring).

This notion of "rational basis" as a kind of balance between government purpose and degree of harm is obviously very different from simply asking whether the government has the "statistics" to justify the accuracy of a generalization.[5]

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[5] Indeed, Justice Stevens builds into his standard an even more demanding requirement: He asks not simply whether an "impartial lawmaker" would view the law as rational, but also whether "a member of [the] class of persons" treated differently would view the law as rational.

4. Another reason for concern about the firmness with which Judge Bork will adhere to and apply his new reasonableness test is that it seems altogether unmoored from his basic method. Most obviously, Judge Bork has not rooted this test of protection of women in the "original intent" of those who adopted the 14th Amendment. Indeed, he has insisted that the only way to understand the 14th Amendment in a principled, "intentionalist" way is that the Amendment protects a principle of racial equality. So where, in his method, does the protection of women and the reasonable basis standard come from? How can an "originalist" who believes that the 14th Amendment was not intended to embody a principle concerning sex equality find a warrant to displace a legislature's use of sex classifications? It should be noted that Judge Bork cannot explain using a reasonable basis test for women on the ground that he will adhere to settled precedent even though he disagrees with it. As virtually all have acknowledged, Judge Bork's new test for sex-based classifications is not the test mandated by settled precedent.

In addition, a "reasonable basis" test also seems at odds with Judge Bork's usual insistence that constitutional law standards not be so vague that they easily permit the judge's subjective preferences to dominate. It is hard to imagine a more vague and unpredictable standard than asking whether there is a "reasonable basis" for a law. Such a standard makes the equal protection rights of women dependent upon a judge's ad hoc and subjective sense of what is "reasonable." The Supreme Court's current doctrinal standards do not eliminate all possibility of subjectivity, of course; but they structure the analysis more firmly and give the law (and those who try to obey it) a much more predictable basis for action.

5. All of these factors point to a more general conclusion: A phrase as vague and open-ended as "reasonable basis", publicly articulated for the first time at these hearings, cannot allay the concerns arising from Judge Bork's long-standing views about the scope and application of equal

protection. It is conceivable, of course, that we are hearing a novel approach that will end up being used in a way that adequately protects sexual equality. But the earlier writing and speeches are so emphatic, and the new test so vague and seemingly so weak, that it is fair to ask: should we take the risk?

Conclusion

Given the constitutional views that Robert Bork has so long and so forcefully espoused, there is not, in my judgment, sufficient counterveiling evidence that would justify the Senate in taking the large risk of confirming him to sit on the Supreme Court. Judge Bork's testimony confirmed the basic outlines of the concerns that arise out of his writings. And in some respects the testimony opened additional concerns.

The testimony revealed a powerful intellect, but also someone who intuitively thinks of legal issues in terms of abstractions, who sees constitutional law primarily as an intellectual activity rather than an enterprise that both embodies great ideals and serves ordinary people. One recalls an exchange like the following:

> "Senator Simon... One point, at a speech at Berkeley in 1985, you say -- and I would be interested in any comments you have here -- 'What a court adds to one person's constitutional rights it subtracts from the rights of others.' Do you believe that is always true?
>
> "Judge Bork. Yes, Senator. I think it's a matter of plain arithmetic."
> Testimony, September 16, 1987, pp. 260-61.

And one remembers the passage in Robert Bork's Indiana Law Review article where he equated the claim by married couples to a right to use contraceptives with the claim of an electric utility to a right to produce smoke pollution: "The cases are identical." 47 Ind. L.J. 1, 9.

Constitutional law, however, is not a matter of arithmetic. Nor are all claims of liberty equivalent. To implement our Constitution as a charter of freedom, Supreme Court Justices must make distinctions and judgments, and must do so without the certainties of a mathematical proof. And they should be men and women who integrate into their thinking an understanding of how legal issues affect people.

When asked by Senator Simpson why he wanted to be a Justice on the Supreme Court, Judge Bork responded:

> "Senator, I guess the answer to that is that I have spent my life in intellectual pursuits in the law and since I have been a judge, I particularly like the courtroom. I liked the courtroom as an advocate and I like the courtroom as a judge and I enjoy the give and take and the intellectual effort involved.
>
> "It is just a life -- and that is, of course, the court that has the most interesting cases and issues, and I think it would be an intellectual feast just to be there and to read the briefs and discuss things with counsel and discuss things with my colleagues. That is the first answer.
>
> "The second answer is, I would like to leave a reputation as a judge who [understood] constitutional governance and contributed his bit to maintaining it in the ways I have described before this Committee. Our constitutional structure is the most important thing this nation has and I would like to help maintain it and to be remembered for that."
> Testimony, Saturday, Sept. 19, 1987, p. 99.

Absent from this answer was any sense that Judge Bork seeks to resolve important human grievances, to strengthen individual liberty, to assure equal justice under law. By itself, such an omission in an off-the-cuff answer would not be particularly noteworthy. But taken alongside the substance and tone of the rest of his writings and testimony, it reinforced a basic concern: Judge Bork will not be sufficiently receptive to claims that embody our people's aspirations -- our Constitution's aspirations -- for fuller liberty and equality.

APPENDIX A

Robert Bork's Views on Congressional and Executive Power

One of the areas in which Robert Bork's constitutional views are most likely to concern Senators involves Congress' powers with respect to the Executive Branch. In general, Judge Bork's views are broadly resistant to Congressional prerogatives and extremely receptive to sweeping claims of inherent Presidential power. He repeatedly rejects a Congressional partnership role with the President. Judge Bork does not simply argue that it is preferable to keep Congress out of certain areas as a policy matter; rather, he argues that the Constitution prohibits Congress from acting in these areas. The reason for concern is not so much because of any one of Judge Bork's positions in isolation, but because of the cumulative picture -- the pattern they reveal.

Specifically, Judge Bork has argued that:

- The War Powers Act is unconstitutional.
- It is unconstitutional for Congress to restrict the President from invading a country with which we are not at war.
- It is unconstitutional for Congress to adopt a charter for the CIA.
- It is unconstitutional for Congress to require a judicial warrant before the executive branch undertakes electronic surveillance of American citizens to investigate foreign security matters.
- It is unconstitutional for Congress to adopt a "Special Prosecutor" law to provide for the independent investigation of allegations of criminal actions within the executive branch.
- It is unconstitutional for Congress to adopt legislation implementing 14th Amendment rights through the methods it deems most appropriate, even though Section 5 of the 14th Amendment explicitly provides that "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."
- It is unconstitutional for Congress to authorize Congressional standing to initiate Court challenges to unlawful Presidential interference with Congressional prerogatives.

It is worth noting at the outset that these views of truncated Congressional powers and sweeping Presidential ones bear little relationship to the "original intent" of the Framers of our Constitution, and in fact Judge Bork has never really attempted to link his views to the Framer's own understandings. The drafters of the Constitution were especially distrustful of broad Presidential powers, and were careful to confine the President to a relatively small number of functions while giving Congress a broad range of national powers in Article I (including various powers involving foreign relations). It may well be that fundamental changes in international relations and international dangers since the Constitution's adoption point to a need for considerably greater Presidential powers than the Framers' contemplated. But Judge Bork's constitutional methodology of strictly adhering to "original intent" does not allow such an evolutionary perspective in support of constitutional arguments. The conclusions Judge Bork reaches about constitutional restrictions on Congressional powers raises questions about his actual commitment to this constitutional methodology when it yields results with which he disagrees.

A. Restrictions on Congress' Foreign Affairs Role

With respect to foreign affairs powers, Judge Bork believes not only that Article II of the Constitution gives the President broad inherent powers (in his words) "to be the officer of government primarily responsible for foreign affairs",[1] but also that the Constitution generally bars Congress from exercising overlapping responsibility in these areas.

One aspect of his position is uncontroversial: the President, whose authority as Commander-in-Chief is explicitly enumerated in Article II, has the power to make tactical decisions during warfare. Bork expanded upon this view in the course of justifying the United States invasion of Cambodia during the Vietnam conflict:

> "I think there is no reason to doubt that President Nixon had ample Constitutional authority to order the attack upon the sanctuaries in Cambodia seized by North Vietnamese and Viet Cong forces. ... The real question in this situation is whether Congress has the Constitutional authority to limit the President's discretion with respect to this attack. Any detailed intervention by Congress in the conduct of the Vietnamese conflict constitutes a trespass upon powers the Constitution reposes exclusively in the President....
>
> "These inherent powers of the President are themselves sufficient to support his order to attack the Cambodian sanctuaries seized by the enemy. It is completely clear that the President has complete and exclusive power to order tactical moves in an existing conflict, and it seems to me equally clear that the Cambodian incursion was a tactical maneuver and nothing more....

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[1] Statement of Robert H. Bork to the House of Judiciary Subcommittee on Courts and Civil Liberties, p. 134. See Abourezk v. Reagan, 785 F.2d 1043, 1062 (D.C. Cir. 1986) (Bork, J., dissenting) (foreign affairs power is "fundamentally executive in nature").

> "The Constitutional division of the war power between the President and the Congress creates a spectrum in which those decisions that approach the tactical and managerial are for the President while the major questions of war and peace are, in the last analysis, confined to the Congress. .... [A] decision to bomb Chinese depots... is at one extreme of the spectrum, since it would involve the decision to initiate a major war, while the actual case before us, attacks made with the full approval of the Cambodian Government upon bases being used by the enemy in an existing conflict, is at the opposite end of the spectrum....
>
> "I arrive, therefore, at the conclusion that President Nixon had full Constitutional power to order the Cambodian incursion, and that Congress cannot, with Constitutional propriety, undertake to control the details of that incursion. This conclusion in no way detracts from Congress's war powers, for that body retains control of the issue of war or peace. It can end our armed involvement in Southeast Asia and it can forbid entry into new wars to defend governments there."

R. Bork, "Comments on the Legality of U.S. action in Cambodia," 65 Am. J. Int'l. Law 79-81 (1971).

Few if any constitutional scholars would dispute that the President has the power to make tactical decisions such as sending in additional troops during a particular battle. There is clearly greater disagreement, however, where the "tactical" decision during a war involves the invasion of a country with whom we are not in conflict. And as Judge Bork acknowledges, the "real question" is "whether Congress has the authority to limit the President's discretion with respect to this attack."

Far more importantly, though, Bork broadly extends the President's armed forces powers far beyond "tactical moves in an existing conflict" by embracing a much broader notion of what counts as "tactical" -- and, even more significantly, he also holds that in this broadened area Congress is constitutionally forbidden to act. Under Judge Bork's view,

> "Congress clearly has the constitutional power to declare war or to refuse to declare war. It also has the power to appropriate funds for armed conflict or refuse to do so. Congress has, in fact, the raw constitutional power to disband the Armed Forces altogether and leave the President as a Commander in Chief in name only, without a single platoon to maneuver.
>
> "Yet -- and this is the crucial point -- Congress does not lawfully obtain tactical control of the Armed Forces because of its enormous legislative powers, including the power to say whether or not there shall be any Armed Forces."

Hearing before the Senate Select Committee on Intelligence, June 21, 1978, page 455.

> "Congress' constitutional role [concerning foreign affairs] is largely confined to the major issues, issues such as whether or not to declare war and how large the armed forces shall be. Congress makes the large decisions; it may not dictate the President's tactics in an area where he legitimately leads."

Statement of Robert H. Bork to the House Judiciary Subcommittee on Courts and Civil Liberties (hereafter "House Testimony (1978)"), p. 134 (1978).

> "The President is to lead in areas requiring managerial decisions and secrecy. The Congress leads in areas requiring collective deliberation and openness."

American Bar Association, Law, Intelligence, and National Security Workshop," p. 62 (1979).

This obviously gives the President a much broader power than simply making tactical decisions during warfare. And it ousts Congress as a partner in that wide area of foreign affairs decisionmaking that is in-between the one extreme of deciding the ultimate question of war or peace and the other extreme of directing merely tactical maneuvers during warfare. Judge Bork affirms broad Presidential foreign affairs powers not only where Congress has concurred in the action taken or where Congress is silent; he also asserts that the President may exercise those sweeping powers even where Congress has explicitly sought to prohibit the action in question.

Thus, Judge Bork argues that the War Powers Act is "unconstitutional." "Law, Intelligence and National Security Workshop", p. 63 American Bar Association, December 11-12, 1979 (hereafter "ABA Workshop"). As its language states, the War Powers Act reflects Congress' attempt "to insure ... the collective judgment of both the Congress and the President" concerning the introduction of U.S. forces into hostilities. 87 Stat. 555, Public Law 93-148, Sec. 2 ("Purpose and Policy") (emphasis added). For Judge Bork, though, the War Powers Act appears to be part of a broader "trend, we have seen, for Congress to usurp executive functions." ABA Workshop, page 64. It is not only unconstitutional, but "would do irreparable harm to our security, and yet would provide a major political embarrassment to any president who tried to reassert his constitutional authority." Id. at 63.

Presumably the Boland Amendment would also be unconstitutional. So too would be Congressional legislation prohibiting deployment of U.S. forces into the Persian Gulf, since that appears to fit into Judge Bork's broad conception of "tactical" Presidential decisions short of a major war and thus beyond Congress' power to restrict. The same seems true of legislation requiring some form of Congressional committee approval of certain covert actions. (Judge Bork has called Congressional involvement in decisions on covert action "a corruption of the Congressional function." ABA Workshop, p. 64.) In addition, the legislation under which Congress vetoes certain arms sales to foreign governments might well be unconstitutional in Bork's view.

B. Restrictions on Congress' Regulation of Intelligence-Gathering Practices

Judge Bork has taken a similar approach to the regulation of intelligence-gathering activities. His speeches and articles on this subject were generally written in the context of the Congressional legislation ultimately enacted as the Foreign Intelligence Surveillance Act.

First and most generally, Bork challenged the constitutionality of the basic effort to enact a statutory charter for the CIA as a way of curbing various abuses:

> "The detailed control of intelligence activities seems to me both unwise and in all probability unconstitutional in that it invades Presidential powers under article II of the Constitution....
>
> "The conduct of intelligence activities is basically a function of the executive branch of our Government and comes within the constitutional powers of the President. It draws upon both the President's role as Commander-in-Chief and upon his role as leader in the conduct of foreign affairs. This is not to say that the Constitution excludes Congress from these areas. It has a role to play, not only in intelligence operations but in the declaration and conduct of wars and in the conduct of foreign policy. I do mean to say that the constitutional roles of the Congress and the President are very different and that that difference flows from their differing constitutional capabilities.

> "Congress was intentionally designed by the framers of the Constitution as a deliberative assembly. Its very numbers and necessary methods of proceeding render it incapable of swift, decisive, and unanticipated response to the emergencies the Nation must face.... The President was to lead in those areas that required managerial rather than legislative decisions.
>
> "[T]he conduct of intelligence in the modern age, given the close interdependence of nations and a technology that can bring war to any nation within a matter of minutes, presents many of the same requirements as the conduct of war: the need for central direction, rapid action, flexibility of judgement, secrecy, and the control of individual decisions according to a general strategic response to a hostile environment. But [the proposed CIA Charter] plunges into tactical decisions about intelligence, decisions that are, moreover, made in advance without knowledge of the circumstances, and in times, I believe, the bill trenches impermissibly upon the role of the President."

Hearing Before the Senate Select Committee on Intelligence, June 21, 1978, pages 457, 459-460. Judge Bork cited as an example of unconstitutional intrusions into constitutional authority section 132 of the bill, which forbade the use of certain individuals for intelligence activities, and section 135, which forbade certain types of covert operations. (Id. at pages 454, 458).

Paralleling his views about the armed forces, Bork reaffirmed in 1979 that, although Congress could abolish the CIA, Congress could not ordinarily regulate the activities of the CIA:

> "A substantive [CIA] charter that says what will be prohibited and what will be allowed... would seem to be a congressional attempt to control the president's power in this respect. It verges upon unconstitutionality, and may well be unconstitutional, because the president has broad powers, as commander-in-chief and as the executive who conducts our foreign relations in this area. A congressional charter that told him what he could or could not do in detail would be an attempt to control his constitutional powers at the tactical level....
>
> "The legislature should confine itself to general oversight and to writing the criminal laws. The tactical day-to-day running of intelligence ought to be almost entirely an executive branch duty....
>
> "Usually, we leave to Congress those decisions about the large issues -- Should we have a CIA? -- and leave the managerial decisions, the day-to-day and tactical decisions, to the executive branch."

Foreign Intelligence: Legal and Democratic Controls, pp. 8, 36-37 (American Enterprise Institution, 1979).

He makes "an analogy to the differing roles of the President and the Congress with respect to war":

> "[Congress] has no power to provide in advance what tactics should be followed, whether the Doolittle raid should occur, whether people situated as they were at Bastogne in the Battle of the Bulge should surrender. Congress is simply excluded from decisions of that type, and I think that is precisely the kind of decision that the [CIA] charter legislation we've been looking at contemplates."

ABA Workshop, page 63. It is not clear, though, why Congressional legislation providing general rules to govern CIA operations is equated with some hypothetical Congressional command about how to handle a particular battlefield situation.

Again in 1979, he argued that a CIA charter is

> "not merely unworkable, I think such a code is indeed unconstitutional. The conduct of intelligence activities is part of the conduct of foreign relations and of the command of our military forces. It falls, therefore, under Article II of the Constitution within the President's constitutional powers. I do not mean to say that Congress is excluded from those areas. It certainly is not. But the role Congress may play is necessarily limited by its institutional capacities and limitations. And those institutional capacities and limitations are themselves created by the Constitution and constitutional values. The President is to lead in areas requiring managerial decisions and secrecy. The Congress leads in areas requiring collective deliberation and openness."

American Bar Association, Law, Intelligence, and National Security Workshop, pp. 62 (1979).

Bork also mounted a more specific attack on the provision of the legislation that required that a judicial warrant be sought in advance of electronic surveillance in the United States against Americans and others who are suspected of engaging in foreign intelligence (disagreeing with his own Attorney General, Edward Levi, on this). Such a warrant procedure parallels that routinely used before electronic surveillance commences in other law enforcement matters, including internal security matters. Judge Bork concluded that this warrant requirement violated both Article II and Article III of the Constitution, and he accused Congress of "a certain lightheadedness about the danger the reform will do to indispensible Constitutional institutions." "'Reforming' Foreign Intelligence", Wall St. Journal, March 9, 1978.

According to Bork, the warrant requirement violated Article II because, as with the other provisions of the law, it invaded the President's inherent power to conduct intelligence. Given Bork's rigid compartmentalizations of the foreign affairs powers, if the President has surveillance powers under Article II, Congress has no authority to regulate that process --short of abolishing the CIA altogether. As he has often done in discussing other legal issues, Bork supplemented his legal argument with a claim that a Congressionally-mandated warrant requirement would be "unworkable." Actual experience with the law after it was adopted belies that claim.

Bork's Article III argument is even more unusual:

> "Article III, the judiciary article of the Constitution, is violated because in the application for a foreign intelligence warrant there is no "case" or "controversy" to give the federal court jurisdiction. The government attorney appears in a secret session before a special judge. There is nobody present to oppose the issuance of the warrant. Warrants obtained for purposes of criminal prosecution do not have this defect because they are expected to become known and the subject of litigation. The criminal law standard inserted in this bill does not meet the "case" or "controversy" requirement -- not if we really intend to conduct foreign intelligence -- because it is a subterfuge. Foreign intelligence must often be done in cases where, whether or not, there is a violation of the federal criminal code, no prosecution is intended and there will never be litigation over the warrant's validity."

Testimony Before House Judiciary Subcommittee on Courts and Civil Liberties (1978), p. 134.

This position ignores the fact that issuing warrants _ex parte_ has long been a traditional judicial function. This point was elaborated by Congressman Ertel in his questions to then-Professor Bork at the House hearing:

> "Mr. Ertel: Are we not already doing that with the court system, not necessarily a judge, a magistrate may issue a warrant when they apply for a search warrant?
>
> "Mr. Bork: Well, I think not, because at least there you have -- you are going to have, litigation. He issues the warrant and a search is made, and then you have a challenge.
>
> "Mr. Ertel: You may not have litigation, nothing may be found.
>
> "Mr. Bork: That is true, but you know, if it is the kind of search which the person being searched is aware of, I suppose -- well, I guess I probably would have trouble with a damage action at that point.

> "Mr. Ertel: I think -- I was a prosecutor -- and I would say two-thirds of the cases we never could have litigated on the warrant."

Id. at 172.

Judge Bork reiterated his Article III objections in the Wall Street Journal, March 9, 1978:

> "[T]he attempt to give the Supreme Court an essentially administrative role in intelligence gathering may run afoul of Article III of the Constitution. It is somewhat as if Judge Webster was empowered to run the FBI while remaining on the bench. The job is managerial, not judicial, and the two should not be mixed."

One might question whether it is appropriate to equate the sharply limited and altogether traditional judicial function of issuing warrants with "run[ning] the FBI."

At the close of the initial portion of Bork's House testimony on the Intelligence bill, Chairman Kastenmeier said:

> "Mr. Kastenmeier: Thank you, Mr. Bork. I think as far as witnesses before this committee, you stand alone in your views. I think you did once before.
>
> "Mr. Bork: It has happened before, Mr. Chairman."

Id. at page 139.

C. Restrictions on Congressional Authorization of Special Prosecutors

Robert Bork's narrow views about Congressional power is also reflected in his consistent position that it is unconstitutional for Congress to authorize the appointment of a "Special Prosecutor" who is not controlled by the executive branch to investigate allegations of criminal law violations within the executive. Robert Bork's firing of Special Prosecutor Archibald Cox during the Watergate investigation has been assessed from a number of different perspectives. But it is important to realize its link to a constitutional position that Judge Bork could implement as a Supreme Court Justice and that would undermine Congress' careful legislative efforts regarding Special Prosecutors since the Cox firing.

According to Judge Bork, the Special Prosecutor legislation is unconstitutional because "the Constitution of the United

States makes prosecution of criminal offenses an executive branch function." See Hearings Before the Senate Judiciary Committee, 93rd Cong. 1st Sess., 1973, page 451; see also Hearings Before the Subcommittee on Criminal Justice of the House Judiciary Committee, 93rd Cong, 1st Sess., 1973, page 251. In fact, the Constitution nowhere states that prosecution of criminal law violations must be the province of the executive branch or that appointment of prosecutors is an executive function. Indeed, the Constitution is quite explicit on Congress' power to direct how government officials may be appointed, including the appointment of officials to prosecute violations of criminal laws:

> "[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." (Art. II, Sec. 2)

Congress' decision to provide for the appointment of Special Prosecutors by a "Court of Law" in carefully circumscribed situations of demonstrated need clearly fits within this explicit Constitutional authorization of Congressional power. Moreover, practical flexibility in handling the appointment of United States Attorneys is an established part of our tradition, pursuant to the longstanding practice of having courts appoint U.S. Attorneys on a temporary basis when vacancies occur.

What stands out in Robert Bork's testimony about the Special Prosecutor legislation is the adherence to a rigidly abstract version of "separation of powers", without any regard for the practical accommodations which are the true genius of our system of checks and balances. It would be one thing if the rare appointment of a Special Prosecutor/Independent Counsel threatened something vital in the American system; but the truth is exactly the opposite. At rare times, the appearance of possible corruption within the upper reaches of the executive branch profoundly threatens public confidence in its government, and impartial investigation by regular officials of the executive branch itself seems to the public impossible. Following a grave national trauma, Congress faced up that problem, examined it, and devised a balanced legislative solution that has significantly helped to restore public confidence. Judge Bork's deployment of constitutional arguments against this Congressional action seems consistent with his repeated willingness in other contexts to restrict Congressional power, and to enhance and protect the executive.

D. Restrictions on Congressional Standing

Judge Bork has sought to restrict Congressional access to the courts, flatly rejecting prior decisions of his own Court of Appeals permitting "congressional standing." His views are stated in his lengthy dissent in Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985). The case was a suit brought by a bipartisan group of United States Congressmen and the United States Senate (which authorized suit in a resolution jointly sponsored by then-Senate Majority Leader Howard Baker and then-Minority Leader Robert Byrd) to challenge what President Reagan had claimed was a pocket veto of Congressional legislation. The issue raised was whether the President had the power to kill this legislation without returning it to the Hill while Congress was in a temporary recess. Thus, both the "standing" issue and the "merits" issue involved Congressional prerogatives. The Court of Appeals majority, in an opinion by Judge Carl McGowan held that the plaintiffs satisfied Article III's standing requirements and that there could not be a pocket veto unless Congress had adjourned (which it had not done here).

Judge McGowan noted that: "The dissent contends that previous decisions of this court do not bind this panel because they are the result of the court's failure to give proper regard to the underpinnings of Article III's standing requirement" (id. at 26) -- an indication perhaps of the approach Judge Bork would take to overruling prior Supreme Court decisions if he is confirmed. In reaffirming Congressional standing, the majority relied upon an opinion by Justice Powell stating that "a dispute between Congress and the President is ready for judicial review when 'each branch has taken action asserting its constitutional authority' -- when, in short, 'the political branches reach a constitutional impasse.'" Judge McGowan continued:

> "The court is not being asked to provide relief to legislators who failed to gain their ends in the legislative arena. Rather, the legislators' dispute is solely with the Executive Branch.... Congress has raised a claim that is founded on specific and concrete harm to its powers under Article I, section 7... That such injury is judicially cognizable has been clear since the Supreme Court [decided] Coleman v. Miller, 307 U.S. 433....
>
> "The dissent believes, however, that the separation of powers would be better served in this case by remitting the questions involved to a political solution, rather than a judicial one. The dissent understandably leaves unspecified the precise course of events contemplated: a "political solution" would at best entail repeated, time-consuming attempts to reintroduce and repass legislation, and at worst involve retaliation by Congress in the form of refusal to approve presidential nominations, budget proposals, and the like. That sort of political cure seems to us considerably worse than the disease, entailing, as it would, far graver consequences for our constitutional system than does a properly limited judicial power to decide what the Constitution means in a given case... To quote again from Justice Powell's opinion in Goldwater:
>
>> ...The specter of the Federal Government brought to a halt because of the mutual intransigence of the President and the Congress would require this Court to provide a resolution pursuant to our duty "'to say what the law is.'" United States v. Nixon, 418 U.S. 683, 703, 94 S.Ct. 3090, 3105 (1974), quoting Marbury v. Madison, 1 Cranch 137, 177 (1803)...."

E. Restrictions on Congress' Power to Enforce the 14th Amendment

Among the Supreme Court decisions that Robert Bork has criticized are a series of major cases in which the Court has upheld Congress' exercise of power to enforce civil rights under Section 5 of the Fourteenth Amendment, which provides that: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." In Katzenbach v. Morgan, 384 U.S. 641 (1966), the Court upheld the constitutionality of Section 4(e) of the 1965 Voting Rights Act, which prohibited the state from requiring prospective voters to be able to read or write in English if they attended school in the United States or Puerto Rico which was taught in a language other than English.

The legislative history made clear that the purpose of the law was to help enfranchise several hundred thousand Puerto Rican Americans who were literate in Spanish rather than English. The Supreme Court held that, regardless of whether a court might not hold the English language literary requirement unconstitutional, Congress could prohibit the test pursuant to its powers under Section 5 of the 14th Amendment.

Judge Bork has repeatedly criticized the decision in Katzenbach v. Morgan and Congress' claim that it had the power to adopt the legislation involved there. In a 1972 pamphlet he wrote:

> "The Morgan decision embodies revolutionary constitutional doctrine, for it overturns the relationship between Congress and the Court. Under American constitutional theory, it is for the Court to say what constitutional commands mean and to what situations they apply. Congress may implement the Court's interpretation, as it is specifically empowered to do by Section 5 of the Fourteenth Amendment. But Section 5 was intended as a power to deal with implementations only. Morgan would also overturn the relationship between federal and state governments. Once Congress is conceded the power to determine what degree of equality is required by the equal protection clause, it can strike down any state law on the ground that its classifications deny the requisite degree of equality. Morgan thus improperly converts Section 5, which is a power to deal with remedies, into a general police power for the nation."

R. Bork, Constitutionality of the President's Busing Proposals, p. 10 (1972). In testimony given the same year, Judge Bork reiterated his disagreement with "the broad, revolutionary sweep of the opinion." Hearings on the Equal Educational Opportunity Act before the Subcommittee on Education of the Senate Committee on Labor and Public Welfare, 92nd Cong., 2d Sess., p. 1509 (1972). Most recently, Judge Bork asserted in 1981, "I agree entirely with the dissent ... in Katzenbach v. Morgan." According to Bork:

> "[I]n Katzenbach v. Morgan, 384 U.S. 641 (1966), the Court held that Congress could eliminate literacy in English as a condition for voting by exercising the power granted in Section 5 of the Fourteenth Amendment. In Oregon v. Mitchell, 400 U.S. 112 (1970), a unanimous Court upheld Congress' elimination of all literacy tests. There are other decisions that declare a congressional power to define substantive rights guaranteed by the thirteenth, fourteenth, and fifteenth amendments by employing the granted power to "enforce"

> the provisions of those amendments.... [It is] my conviction that each of these decisions represents very bad, indeed pernicious, constitutional law."

Hearings on the Human Life Bill before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 97th Cong., 1st Sess., p. 310, 313-14.

The decisions which Judge Bork considers "very bad, indeed pernicious, constitutional law" involve situations where Congress has recognized that the courts necessarily have limited powers to give actual real world effect to our constitutional values, and Congress has therefore taken steps in that direction going beyond what the courts have ordered. Judge Bork would restrict Congress' powers under Section 5 of the 14th Amendment by treating Congress as if it were just another court applying Section 1. But given distinctive limitations on judicial power -- limitations which Judge Bork elsewhere insists upon -- Congress has broader powers than courts to devise creative remedies for rights violations, to correct situations that are only arguably unlawful, to require prophylactic measures to prevent future law violations, and to create some breathing room for constitutional rights. The Congressional action under Section 5 attacked by Judge Bork fits this description, as a broad range of constitutional law scholars have recognized. Moreover, the consequences of Judge Bork's position, if it became the law of the land, is that a number of other important Congressional statutes might well be vulnerable, including: the "discriminatory effect" standard applied under the Voting Rights Act (upheld, relying on Katzenbach v. Morgan, in City of Rome v. United States, 446 U.S. 156 (1980)), and the 1866 Civil Rights Act, which prohibits a wide variety of discriminatory action by private individuals even though such conduct is not state action and would not be independent violations of either the Thirteenth or Fourteenth Amendments.

Conclusion

Judge Bork's views about Congressional power in these five areas -- foreign affairs, intelligence-gathering, special prosecutor legislation, Congressional standing, and Congressional power to enforce the 14th Amendment -- reveal a consistent pattern. It is a pattern of striking hostility to Congressional prerogatives, coupled with broad solicitude for Presidential power. These views are sharply at odds not only with much settled constitutional law, but also with a broad range of Congressional legislation and powers that play a major role in our system of "checks and balances."

ANALYSIS

(From Legal Times, August 10, 1987)

APPENDIX B

Senators Should Use Activist Approach In Judging Nominees

The issue of the role of 'ideology' in the Bork confirmation process masks the deeper question: What is it that justices actually do when they decide constitutional cases?

BY PAUL GEWIRTZ

Should a Supreme Court nominee's views about the meaning of the Constitution and the role of the Supreme Court be relevant to the Senate's decision whether to confirm the nominee? Before senators can reach a responsible judgment about the recent nomination of Robert Bork, they must first decide this threshold question about appropriate criteria.

The question is sometimes put as whether "ideology" is relevant—but the word *ideology* obscures what is actually being talked about here: the nominee's legal views and legal philosophy.

In the context of Bork's nomination, the question involves the relevance not only of his general views about the role of the Supreme Court, but also of his views on such specific constitutional issues as privacy, abortion, race and sex equality, congressional vs. presidential power, free speech, government involvement with religion—and whether specific Supreme Court decisions in these areas are seen as binding precedent.

Since these are the very matters that a justice of the Supreme Court will be called upon to address in the years ahead, it is striking that some senators have been reluctant to treat the nominee's views on these issues as relevant in the confirmation process. Why is that?

Lesson From History

Neither Senate tradition nor constitutional text counsels Senate passivity or explains it. Professors Henry Abraham (in *Justices and Presidents*) and Laurence Tribe (in *God Save This Honorable Court*) have thoroughly documented that over our country's history the Senate has rejected presidential nominees to the Supreme Court about 20 percent of the time, and that it has often done so because of the nominee's views. Examples span nominations made by presidents from George Washington through Richard Nixon.

It is frequently said that President Reagan should be given the same leeway that President Franklin Roosevelt had to shape the court in his own image. But while President Roosevelt did indeed seek to shift the Court's direction in economic regulation cases, the Senate at the time *shared* the President's view of what the Constitution meant and what direction the Court should take. The Roosevelt example demonstrates only that when the Senate and the President both favor the appointment of people with certain legal views, qualified people holding those views will be confirmed if nominated.

The Constitution itself nowhere suggests that it is the president's unilateral prerogative to shape the viewpoint of the Supreme Court. Rather, the Constitution requires that the Senate give "advice and consent" to Supreme Court nominations, making the Senate a full partner in the process.

Records kept during the Constitutional Convention in 1787 confirm that the specific original intent of the framers was that the Senate play a central role in appointing judges. Indeed, until the very last few days of the convention, the proposed constitutional text gave the Senate the *sole* power to make judicial appointments. The provision ultimately adopted—which gives the president the power to nominate, subject to the "advice and consent" of the Senate—was a last-minute concession to those who wanted some role for the president. That provision was clearly intended to preserve a central role for the Senate.

This active Senate role makes great sense. When a justice is nominated, after all, the president is not proposing the appointment of someone to a post within the executive branch but to a branch of government outside his own, for a lifetime appointment that extends beyond his own term.

Neither the Constitution nor the various presidential and congressional elections since 1980 gave the president a mandate to reshape the Court unilaterally in his image, any more than they gave the president a mandate to reshape unilaterally our country's legislation in his image. The appropriate metaphor for staffing the third branch is "partnership" between president and Senate, each democratically elected.

As an aspect of that partnership, it seems self-evident that if a nominee's views are taken into account by the president (and the current president has left no doubt that they are), the nominee's views should also be taken into account by the Senate.

The Senate's role and the president's role are not identical, of course; the president alone nominates. But nothing about this difference entitles the president to consider a factor that is then deemed off-limits for the Senate. The president alone negotiates treaties and submits them to the Senate for advice and consent, but no one suggests that the president's power of initiation bars the Senate from considering any factor relevant to whether the treaty is a good one.

While a stubborn president whose first nominee is rejected can always come back with a carbon-copy replacement nominee, such a course would only invite repetition of the rejection. Therefore, a broadly acceptable "compromise" nomination—not

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stalemate—is the far more plausible consequence of having the Senate assess whatever factors the president does.

But the point here is not just that the Senate should consider a nominee's views because the president already has. The Senate should consider those views because they are highly relevant to how the nominee will perform the job.

A Supreme Court justice has significant leeway in interpreting the law and deciding whether to overrule prior cases. And within these areas of leeway, a justice's legal views and philosophy will heavily shape his or her actions. (This helps to explain why the Senate's earlier confirmation of the nominee for a lower court judgeship does not control confirmation to the Supreme Court: a lower judge is obliged to follow Supreme Court precedent and has far less leeway and power than a Supreme Court justice. It also helps explain why a judge's decisions on a lower court may not be a good indicator of how closely he will follow prior Supreme Court cases after becoming a Supreme Court justice.)

It makes no more sense for the Senate to ignore a Supreme Court nominee's legal views than it would for an engineering company to ignore the technical skills of a job applicant: in each situation, the information bears on how well the person will perform the job in question. It is all but meaningless in this context to call a Supreme Court nominee one of the "best" or "most qualified" if one has not assessed a key element in how the nominee will do the job—the person's views.

It follows that the Senate should be particularly concerned about a prospective justice's views when the Court is evenly divided on many issues, as it is now, so that the nominee's views will become not simply another voice on the Court but the decisive voice—the voice that becomes the law of the land.

The point is not that any change in the pre-existing "balance" on the Court would be improper, as some in the current debate have tried to suggest. The point is a more substantive one: that any new justice will have the power to move the Court in what may be the wrong direction, a direction that embodies an inappropriate understanding of what the Constitution means.

Politics the Explanation

The reluctance of the Senate to assess a nominee's views openly cannot, therefore, be explained by either Senate tradition or constitutional requirements. A more credible, if partial, explanation is "politics," albeit a rather complicated politics. First and most obviously, conflict over the criteria for confirmation inevitably reflects political maneuvering designed to affect the nominee's prospects.

Given Bork's intelligence and experience, any case against him must be based on concerns about integrity (was his firing of Special Prosecutor Archibald Cox lawful and honorable?), temperament (is he truly open-minded or does he have rigid views about the issues?), or the substance of his views.

To deem a nominee's views irrelevant removes one obstacle to confirmation—in this case a significant obstacle, since Judge Bork has spent much of his career strongly criticizing a broad range of landmark Supreme Court decisions protecting individual rights.

A second political factor may be that senators from the party not controlling the White House question whether it is really in their party's long-term interest to embrace a principle that gives the Senate such broad powers in the confirmation process, since in the future such a principle could constrain a president elected from their own party.

It is doubtful, though, that Democrats today really believe that being active now will have a large impact on future Democratic administrations, since in recent decades Republicans have already often objected to nominees whose views they have disapproved of (e.g., Thurgood Marshall, Fortas). Even with the Senate assessing nominees' views, the president's nominees will generally be confirmed when a majority of the Senate does not widely diverge from the president's constitutional outlook; that is typical.

It is true that an active Senate role will tend to produce nominees whose outlook is broadly acceptable, rather than occupying one extreme or the other. But that generally seems like a good, not a bad, development.

A third political factor is probably the most significant. Senators may be reluctant to get involved in assessing a nominee's constitutional views because they believe this will thrust them into some of the most controversial issues in American society. Many senators are uncomfortable voting on controversial constitutional issues when they come up in the context of proposed legislation or constitutional amendments, and there is no reason to think they are eager to be seen as casting a vote on these issues as part of the confirmation process.

While controversy seems inescapable whichever way a senator votes in the current nomination fight, explicitly assessing a nominee's views does open up distinctively controversial matters. To some extent, this seems an inevitable aspect of senators' performing their constitutional duty. The goal of the confirmation process must be to ensure that the Supreme Court will continue to carry out its proper role in our system of government. No aspect of that role is more fundamental than the protection of our individual rights and civil liberties. These rights are typically ones we enjoy whether or not the "majority" agrees with us, and that is one reason why Supreme Court decisions are occasionally controversial and at times unpopular.

Senators' constitutional duty to "preserve and protect" the Constitution in the appointments process requires them to support this potentially "unpopular" Supreme Court role and to resist seeing the appointments process as simply a majoritarian referendum on particular constitutional issues—and that may open senators to some controversy themselves.

But it is important to remember that the assessment of a nominee's views envisioned here requires a senator only to make an overall appraisal of a nominee, not to cast a vote on all the specific constitutional issues about which the nominee may have spoken. The basic judgments a senator must make are *general* ones—for example, whether Judge Bork's views about the role of the Supreme Court adequately reflect the constitutional balance between individual rights and majority rights, or between congressional prerogatives and presidential power. In answering those general questions, a senator will undoubtedly have to examine Judge Bork's views on specific issues as well as his more general statements, for often one can best understand what a person's general ideas actually mean only by seeing how they play out in concrete situations.

But assessing the nominee's basic approach will be the touchstone. Examining specific issues will be for the purpose of discerning a pattern and uncovering general themes, not for the purpose of applying a litmus test about any one or two cases in isolation. Indeed, a senator might well agree with Judge Bork's criticism of a Supreme Court case in some instances, and yet still vote against his confirmation if the senator concludes that the overall pattern of Judge Bork's views is too extreme. It is significant that even though many Americans do occasionally disagree with a particular Supreme Court decision, they want the Court to continue playing its general constitutional role of carefully safeguarding our individual rights and liberties.

Beyond politics, there is a deeper reason for some senators' uneasiness in asserting that a nominee's views and philosophy are relevant to the confirmation process. To assert they are relevant is to assert that personal views are relevant to judicial decision-making itself, and that remains an uncomfortable assertion for many in our society.

Indeed, to open up the question of the extent to which a judge's individual values and philosophy enter into judicial decision-making takes a senator right into the middle of one of the major intellectual questions in modern legal thought.

At one time, judicial decision-making was portrayed as if it simply involved logical deduction from clear and certain legal premises. If this were all that the work of judging involved, a judge's predispositions, legal philosophy, and values would play no significant role.

The movement in American legal theory called "legal realism," which mushroomed in the 1920s and 1930s, sought, among other things, to show that such a view of judicial decision-making was inaccurate. The realists argued that for law to serve real people in a real world, judges must think functionally about law—must view the law as embodying a set of policy objectives, not simply as a system of abstract rules requiring only logic for their application.

The realists demonstrated, moreover, that judges in fact have considerable leeway in interpreting the law, since there are inconsistencies, gaps, and ambiguities in the legal texts and rules they are supposed to apply. From this perspective, then, a judge's personality, individual beliefs, and philosophy all matter, and it is naive to think otherwise.

While legal realism had the liberating force of truth, it also created a crisis from which American legal thought has not yet fully recovered. By demonstrating that legal rules do not fully determine outcomes, that there is leeway, that a judge's background understandings help to shape decisions, the realists left us with a dilemma.

We can no longer pretend—if we ever believed it at all—that judicial decision-making is simply logical deduction: That is both untrue and inherently impossible. On the other hand, if judicial decision-making ends up as reflecting only the personal policy preferences of individual judges, little is left of "the rule of law" and the legitimacy of unelected judges wielding power over us.

Those post-legal realist thinkers who are not nihilists have generally sought to find a middle ground, viewing judicial decision-making—particularly constitutional decision-making on the Supreme Court—as a mixture of law, policy, moral principle, and personal judgment. We acknowledge that judges have leeway and that their individual viewpoints can make a significant difference; but we also insist that the legal culture and legal craft powerfully constrain them.

This constraint comes from such things as the text of the law; professional norms about proper methods of interpretation; the general duty to follow precedent; the rules of procedural regularity; the judge's duty to write reasoned opinions; and the aspiration (implicit in the judicial role) to be impartial, to articulate our ideals, and to be principled.

But for all the academic discussion, it is still safe to say that describing the actual components of constitutional decision-making is difficult. And it is also safe to say that most people still find it easier to describe how judicial decision-making differs from other kinds of governmental action than to acknowledge the ways in which it, too, is influenced by individual viewpoints, practical policy assessments, and philosophic orientations.

This brief bit of intellectual history helps to explain, I think, some of the current hesitation and confusion about criteria to be used in the appointment of Supreme Court justices.

Opening New Issues

First, to focus on the relevance of a nominee's individual views unleashes difficult and even unsettling intellectual questions that require a senator to talk about the meaning of the Constitution and the complex nature of making constitutional law decisions.

The senator must acknowledge that intellect, integrity, experience, and temperament are not the only factors relevant to the kind of job a justice does, and that a judge's pre-existing views of the law—indeed, a judge's broader philosophy and values—will make a difference. To open up this subject, which has daunted law professors for decades, can be a forbidding task for a senator.

Second, since many people still articulate a concept of judicial decision-making that treats the judge's individual views as irrelevant, entering the thicket of a nominee's views opens a senator to the charge of "playing politics"—a potentially damaging charge when judges are concerned.

Senators will have to explain to the public that expressing concern about a nominee's legal views and philosophy is not playing politics—or, if it is, that it is the highest form of politics: a concern about the proper meaning of our Constitution.

Assessing a nominee's legal views and philosophy implies that a justice's decisions are not simply the result of logical application of the law, that there are real choices to be made, and that the person choosing makes a difference. But there is nothing wrong with this assumption.

President Reagan has at times accused those judges he disagrees with of reading their individual views into the Constitution, as if his own conception of constitutional law was some "true meaning," impersonally derived from the Constitution in a way wholly unconnected to his own fundamental convictions. But the truth is that the broad provisions in our Constitution cannot be given meaning in one direction or the other without relying to some extent on values independent of the constitutional provision itself.

A judge's views are properly treated as a factor in the appointments process.

A judge's views are an inevitable and proper part of judging—and are therefore properly treated as a factor in the appointments process. To dismiss this recognition as playing politics either is unfair or reflects a naive view of what the complex enterprise of judging unavoidably consists of.

Some senators may nevertheless be concerned about the difficulty of conveying these complexities to the broader public. The concern may involve not only potential political damage to themselves, but damage to the body politic. Understandably, senators may worry that any acknowledgment that a judge's individual views play some role in law may lead the public to think that judging is *only* personal preferences—a view that would undercut the public's faith in "the rule of law" and the very legitimacy of judicial power.

But the solution cannot be to place a smoke screen over the judicial process, denying that a nominee's views have any relevance. That would not only involve lying to the American public about a truth we actually can live with, but would also distort the entire appointments process.

The price of publicly disclaiming such relevance is that other issues inevitably get blown out of proportion. Senators who are concerned that focusing on a nominee's views might make the appointments process pervasively ideological and damage the image of the Court should realize that in the long run the willingness of the Senate to object on the merits may, by discouraging ideologically provocative nominations, reduce the role of ideology in the appointments process.

The challenge of judging, and of the confirmation process that authorizes it, is to take account of the importance of individual judges' views without thoroughly politicizing or personalizing law. The way for the Senate to meet its challenge is not to evade reality but to speak candidly about the substance of judicial decision-making, to accept the relevance of a nominee's views about the meaning of our Constitution, and to face the difficult but all-important questions: Are the nominee's views appropriate, and, if they become the law of the land, will that be good for the country?

To answer these questions, senators will have to define for themselves what they believe the Constitution means and what the proper role of the Supreme Court is; they must decide which views and which background understandings and beliefs are appropriate to help shape the interpretation of our laws. They must then study the nominee's record, decide what kinds of questions are appropriate to ask at confirmation hearings, and then reach an overall judgment about the nominee.

The question for each senator cannot be whether he or she would have made the particular nomination in the first place, but whether the nominee is "acceptable." As with legislation, some compromise with the president's point of view will be necessary. But each senator has the responsibility to "preserve and protect" the Constitution and not confirm someone who would misconstrue it.

In the weeks and months ahead, senators and others will be examining the particulars of Judge Bork's record. But the threshold task is to establish the appropriate criteria for examining those particulars. I have suggested that it is the honorable and responsible course for senators to evaluate a Supreme Court nominee's legal views and philosophy. Since nothing less than the real world meaning of our Constitution is at stake, such a role is a senator's highest calling. □

The CHAIRMAN. Thank you very much, Professor.
Dean Bennett?

TESTIMONY OF ROBERT BENNETT

Mr. BENNETT. Thank you, Mr. Chairman.

My written statement focuses on my concerns about Judge Bork's articulated philosophy of constitutional decision making, particularly as that philosophy bears on the appropriate use of precedent. I can perhaps best use the time allotted me here to relate my concerns to Judge Bork's recent testimony before this committee.

In his testimony, Judge Bork continued to insist—as he has for over 25 years now—that the route to constitutional meaning through original intention is the sole authoritative route, that that is his route, and that that is what makes what he would do as a judge constitutional interpretation, while what others do is "making law."

That is a false dichotomy. The concept of original intention is so fraught with ambiguity and its use so subject to manipulation that in this day and age it is little more than a rhetorical prop used to justify conclusions reached on other grounds—particularly when applied to the sweeping generalities of the 14th amendment.

Judge Bork is as adept as the next judge at manipulating that original intention. He picks and chooses from among pieces of the historical record. He varies the level of abstraction at which he characterizes the relevant intention. He employs so-called structural arguments as a way to elaborate intent. And in these hearings Judge Bork added selective respect for precedent to the tools available to him in manipulating the respect he would pay to this original intention.

I have provided some examples of Judge Bork's use of the concept in my written remarks, but I found his use of the constitutional requirement of rationality in these hearings particularly revealing. He invoked the requirement of rationality or reasonableness of legislation on at least three occasions—as a basis on which *Skinner* v. *Oklahoma* might have been decided, as a possible basis for *Griswold,* and as an available rationale for matters of sex discrimination, all via the 14th amendment.

There are two striking things about the rationality requirement in this regard. First, I know of no discussion of a requirement of legislative rationality in the history of the 14th amendment. And second, the requirement is itself notoriously manipulable. It has been roundly criticized by a variety of commentators for just that reason.

On either of those grounds, and certainly on both combined, that basis for decision should have been unavailable to Judge Bork based on what he has said over the years and repeated in these hearings. It is thus apparent that Judge Bork, like other judges, will reach out for decisional bases at odds with his articulated philosophy.

What troubles me about Judge Bork's approach to constitutional decisionmaking, then, is not so much that he has a rigid approach, but that he seems to be so insistent that he does. And in particular, his articulated philosophy provides for him the illusion of a kind of pipeline to constitutional truth that must blind him to the appropriate, the vital, role of precedent in constitutional law.

In his testimony, Judge Bork made substantial nods to the role of precedent. Viewed in isolation, I would find much to commend in his remarks about precedent. But in context, they seem quite forced, especially because they are at odds with so much of what he has said previously.

Constitutional decisionmaking is an institutional enterprise of nine justices at the Supreme Court level, and of many courts over time. If each participant has his own pipeline to constitutional truth and pursues it single-mindedly, the enterprise will not work.

Judge Bork's previous statements about precedent, giving it grudging sway at best at the Supreme Court level, are or a piece with his insistence that he knows how constitutional law is done and that others do not. His present embrace of precedents that he continues to insist are wrong suggests the inadequacy of his constitutional philosophy, and also casts into doubt whether he could sustain a respectful attitude toward precedent over time.

A moment's reflection will show that it will not do to say that a case was wrong but I will not vote to overrule it. What are lawyers and litigants to do with that case when the next one arises that is a little bit different? Are they to appeal to what the Judge says is constitutionally right or to the precedent he says he will tolerate, even though it is wrong?

To be sure, all judges suffer from this dilemma to a degree, but few insist that they know the route to constitutional truth with the vehemence that Judge Bork does. For that reason, I remain baffled and concerned about Judge Bork's likely approach to the use of precedent, despite the assurances he offered.

Among contemporary justices, Justice Powell seemed particularly sensitive to the importance of precedent. That sensitivity will be sorely missed in any event, but in my view we should be wary of having Justice Powell replaced by a justice for whom the importance of precedent still seems to be so problematic.

Thank you.

[The statement of Professor Bennett follows:]

Statement of Robert W. Bennett
Submitted to
The Committee on the Judiciary
of the
United States Senate
September, 1987

My name is Robert Bennett. I am a Professor of Law and Dean of the Northwestern University School of Law. I submit this statement with regard to the nomination of Judge Robert Bork to be an Associate Justice of the United States Supreme Court. The statement is, of course, submitted on my own behalf and not on behalf of Northwestern University or its law school.

The principal focus of my scholarly interest for almost ten years now has been constitutional law and constitutional theory. I have in particular written a number of articles dealing with the role of the judge in constitutional decisionmaking. In that writing I have been critical of two extremes in the scholarly writing about the role of judges in constitutional law. One extreme, associated with the political left, depicts the law, and constitutional law in particular, as infinitely manipulable, the product solely of what individual judges of the moment choose to do with it. The other extreme, associated with the political right, depicts constitutional law as legitimately referable solely to some favored basis for decision providing a kind of pipeline to constitutional truth. The most commonly asserted route to such authoritative constitutional answers is the use of original intention. Robert Bork has been a major proponent of the view that constitutional decisionmaking is simply a matter of discovering and applying original intention. One thing that both these positions share is a disdain for the role of precedent in constitutional law, a disdain that Judge Bork in particular has manifested in his speeches and published articles. My own view is that respect for precedent is essential for the stability and integrity of constitutional law. It is a concern about the way that Judge Bork would deal with precedent that leads me to submit this statement.

I should say at the outset that the impression conveyed by Judge Bork's own testimony before the Judiciary Committee is very different from the impression that comes through from his speeches and scholarly writing over the last twenty-five years. If I were judging solely on the basis of the testimony he presented, I would find much with which to quarrel--particularly with regard to the role that he insists can and must be played by original intention--but I would view those differences as relatively minor. In particular in his presentation before the committee Judge Bork expressed a view of the role of precedent that I would find exemplary if it were viewed in isolation. I do not think that he yet appreciates the extent to which his insistence on the original intention route to constitutional truth is inconsistent with his acceptance of a substantial role for precedent, but his testimony does display a refreshing sensitivity to the vital role that precedent must play in any system entitled to be called "law." But I cannot judge solely on the basis of his testimony, because that testimony is sharply at variance with so much that he has said so consistently over the years. I do think that the hearings on Judge Bork's nomination will make him a better judge, whether he is confirmed in his nomination to the Supreme Court or not. But they have not removed the substantial doubt in my mind--formed on the basis of his scholarly writings and speeches--about whether he should be confirmed. While I will refer on occasion in what follows to Judge Bork's testimony in these hearings, my observations are grounded basically in those earlier pronouncements.

Judge Bork's position is not simply that what was in the minds of the constitutional framers (or ratifiers) is one important influence on constitutional decisions. He recurrently contrasts his position with the view that the value system of judges is legitimately made relevant in constitutional decisions, and dismisses that view. The clear implication is that values of constitutional framers are all a judge need work with in constitutional law. This position, however, is historically insupportable, theoretically unsound, and notoriously manipulable--as can be seen from Judge Bork's own use of it.

Many of the most difficult and controversial questions of constitutional interpretation arise under the very general language of the fourteenth amendment, in particular of the due process and equal protection clauses. Both the theoretical and historical difficulties with Judge Bork's position can be illustrated by reference to the case of Yick Wo v. Hopkins, an 1886 decision under the equal protection clause, that is by now a settled and decidedly uncontroversial part of constitutional law. Yick Wo involved the question, among others, of whether non-citizens are entitled to the protection of the clause. The language of the equal protection clause extends its protection to "any person," but that language is not dispositive, or even particularly influential for Judge Bork, because it leaves so much to judicial choice. But the evidence of original fourteenth amendment intention with regard to aliens is very sparse, so that Yick Wo cannot be solved by reference to original intention either. It can only be answered by reference to some value system that allows one to ask whether aliens are relevantly similar or analogous to the newly freed slaves who were the focused object of the fourteenth amendment framers' concern. Some material to inform that value system might be gleaned from the relevant history, but ascribing the judgment about aliens to the fourteenth amendment framers must largely be a fictional cover for a value judgment that in reality is the interpreter's. And if original intention could not solve Yick Wo all by itself, as Judge Bork seems (before the hearings and at some points even during the hearings) to insist it must to be acceptable, it cannot solve hundreds of other, more controversial, fourteenth amendment decisions long accepted as good law.

The point can be generalized. Almost all constitutional cases in the real world will involve problems that to one degree or another were not the focused object of concern of the draftsmen. Even Judge Bork recognizes that the sweeping phrases of the fourteenth amendment, and of other constitutional provisions, must be applied in unforeseen circumstances. Judge Bork, however, repeatedly asserts that this can be done by the application of "principles" associated with the language and that that process of application need not draw on the value systems of judges. But neither the application of principles nor the drawing of analogies can proceed without a framework of values to inform the process. And those values will seldom if ever be discoverable by historical research into original intention alone. That would be so even if constitutions were the product of one person alone, but in the real world of our constitution where hundreds of people acting in many different bodies are responsible for enacting a provision, the historical search that Judge Bork suggests is essential can provide no unequivocal route to decision at all.

There is another difficulty in applying general principles associated with some constitutional provision, the absence of any definitive criteria for choosing the general principles. In the fourteenth amendment examples that cause so many of the difficulties, there are statements of general principle that have authoritative sanction--the language of the provisions. But these statements are unacceptable to Judge Bork, because they leave so much to judicial choice. He thus insists on some more specific statement of general principle, but any more specific statement will be rightly suspect. It will be subject to the objection that if the draftsmen had meant that they could have said it. The more specific statement thus comes with no particular warrant in original intention, and hence does not avoid the necessity of using the judge's value system.

This is not to say that original intention is irrelevant. It can reveal some clear cases of what initially is permitted and forbidden, providing anchors for the process of analogizing and important suggestions of relevant values. But the decider's values must flesh out the decisional process in any real world of constitutional decisionmaking. And over time the process that original intention sets in motion in this way may even come back to reject a result originally contemplated. This is precisely what happened in Brown v. Board of Education.

These considerations suggest how easily manipulable is the notion of original intention. This manipulability can be illustrated with Judge Bork's own use of the concept. Here, for instance is Judge Bork's discussion in May of 1987 of the basis in original intention for Brown v. Board of Education.

> I would suppose that the framers, the ratifiers of the 14th Amendment and its equal protection clause, probably meant something pretty close to what Plessy v. Ferguson (1896) meant, that is separate but equal--the races should have separate facilities, but they should be equal . . . . For purposes of this discussion, it's probably pretty close to accurate that that was their original intent.
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> By the time you get to the thirties and forties in this country and the fifties, to 1954 when Brown v. Board was decided, it has become perfectly apparent that as a matter of fact separate is never going to be equal. The physical facilities aren't even going to be equal, much less psychology or anything else. So I think it was apparent, or it should have been apparent to the Supreme Court at the time of Brown, that they had to sacrifice one aspect or another of the framers' original intent.
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> They could be true to the idea of separation, or they could be true to the idea of equality, but not both. I think it is proper in those circumstances to drop the idea of separation, stick to the idea of equality, because that was the thrust of the equal protection clause.

A second, even more extreme, example of Judge Bork's manipulation of original intention, comes in the following discussion of the first amendment from a speech a decade earlier:

> It is now clear, thanks to the excellent historical researches of Leonard Levy and Walter Berns, that the Framers of the First Amendment had not thought through what they meant by freedom of speech and of the press. Neither the text nor the legislative history of the amendment tells us much of value today.
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> The framers were not libertarian. We have had, of necessity, to invent a rather more liberal First Amendment than the one they intended. The reason is clear. The Constitution provides for a republican form of government, which is meaningless unless citizens are free to discuss and to write about political men and issues. Freedom of political speech follows directly from the structure and functions of the government the

> Framers created. This is the form of constitutional construction employed by Chief Justice Marshall in McCulloch v. Maryland, used by James Madison in arguing against the Sedition Law on First Amendment grounds, and made fully articulate by my colleague, Charles Black. We should have had to arrive at the judicial protection of political speech even if there were no First Amendment.

I do not invoke these examples because I disagree with the substance of the discussions in them. Rather they show how easy it is to manipulate the concept of original intent if one can choose pieces of it, or recur to "structural" arguments when evidence of specifics runs out or is contrary to some desired result. The work of many judges uses original intention in such latitudinarian ways. The arguments of the majority in Griswold v. Connecticut, for instance, are close kin to the structural argument that I have quoted from Judge Bork. But no judge of whom I am aware--other than Judge Bork--uses the notion in such a loose way one day and then lambasts opinions of others that make similar moves, with or without the rhetorical prop of original intention, on the next. That is just what Judge Bork has done in his repeated criticisms of Griswold.

The manipulability of original intention rhetoric leads to what is for me the most distressing aspect of its use. As long as judges differ about the appropriate nature and extent of reliance upon it, the use of original intention by one who believes it provides a pipleline to constitutional truth will be in constant tension with judicial reliance upon precedent, reliance which in my view holds far more promise of acting to constrain judicial choice under general constitutional language than does the original intention emphasis itself.

One peculiar feature of the judicial process makes it easy to overlook the important role that precedent plays. Precisely because of the importance of precedent, cases that reach appellate courts are likely to be ones where the pull of precedent is substantial on both sides. But it would be a mistake--a very destructive mistake--to conclude from the cases that come to court that precedent does not or need not matter. For it is the system of precedent that helps resolve most disputes before they come to court and indeed prevents endless disputes from ever arising in the first place.

Before his testimony in these hearings, Judge Bork sometimes seemed to recognize the presence of these interests served by precedent, but he also seemed seriously and regularly to undervalue them. Thus in a 1986 speech he acknowledged that overruling decisions on the reach of the Congress' commerce power "would create chaos, politically, economically, and socially." But he contrasted such decisions with those under the Bill of Rights, the "theoretically easiest to reform." For those decisions he thought "some degree of reexamination is desirable," and urged that for such decisions "the concept of original intent provides guidance to the courts and also a powerful rhetoric to persuade the public that the end to imperialism is required." For me the grudging and limited nature of this concession to the pull of precedent is probably the most disquieting aspect of the public record of Judge Bork's own constitutional jurisprudence.

The stability and predictability fostered by respect for precedent are, of course, not the only interests of importance in constitutional law. Important issues must remain open to periodic reexamination. But a large measure of stability is an essential precondition to a framework in which orderly change is possible, and that stability is put in jeopardy when judges fail to appreciate how important respect for precedent is. The importance extends beyond lower court obedience to Supreme Court decisions, where it has always been accepted even by Judge Bork, to Supreme Court respect for the decisions of prior courts, where Judge Bork has only come around to a stance of appreciation in these hearings. Judges must appreciate that theirs is an institutional role, that they must feel a responsibility to the pronouncements of the institution they serve, the decisions of the Court as a whole. Among modern judges, Justices Harlan and Frankfurter come to mind as particularly attentive to this institutional responsibility.

Among the most recent Justices, Justice Powell was especially mindful of the importance of respect for precedent. I fear, however, that the Court as a whole has not in recent years been as mindful as it must be of these institutional values. The default here cuts across the ideological divisions so often used to characterize individual Justices. Chief Justice Rehnquist on the right and Justices Brennan and Marshall on the left too often seem disdainful of responsibility to prior decisions with which they may have disagreed.

The mischief to which disdain for precedent can lead is exemplified by a series of cases dealing with whether the federal commerce power reaches state and local governments in their relations to their employees, an example which perhaps has the virtue of carrying less emotional baggage than many other contemporary issues. The Supreme Court upheld the assertion of federal power in 1968 in Maryland v. Wirtz. Barely eight years later the Court reversed itself in National League of Cities v. Usery. And only nine years after that the Court reversed itself again in Garcia v. San Antonio Metropolitan Transit Authority. In my view this has been an unseemly episode, and we may not have seen the end of it, for Justices Rehnquist and O'Connor warned in their dissents in Garcia that they were ready to reverse course once again as soon as the votes were available. If this kind of constant reversal becomes more commonplace, the stability born of respect for precedent that is so essential to orderly progress in a society under law will be in serious jeopardy. Basically I am here today because of a concern that Judge Bork may exacerbate rather than ease the inclination of the present Court to change course without sufficient attention to the very real costs that such an inclination brings.

In closing let me say that judicial restraint is not what is at stake here. The elusiveness of meaning of original intention and Judge Bork's manipulation of the concept show that his rhetoric of original intention provides no guarantee that his decisions will be less activist than the next judge's, whatever meaning one gives to judicial activism. If we had a different constitution, one drawn exclusively in very specific and precise language, we would have a constitutional system in which less judicial choice was necessary, and the dilemma of judicial activism and judicial restraint would be less serious. But that is not our constitution. Ours is one in which sensitive questions of application constantly arise that cannot be solved by any easy reference to constitutional language, to original intention or to any other simple key to constitutional meaning. They must be solved with the historical evidence as the starting point, and with heavy reliance on the good sense and restraint of the judicial branch, guided in the time honored fashion of the common law by the accumulated wisdom of a system of precedent. That change need not go in one direction only toward further extension of the reach of general language, but the decision of the pace and direction of change is inevitably in the hands of the judicial branch, unless we abandon judicial review altogether. For better or for worse that is our constitutional system, and it is one that, for all its faults, in my view has over the years served us well.

The CHAIRMAN. Professor, I cannot thank you enough. You were within your 5 minutes, I think, or just about. And that is—I think you get the award for the hearings, the entire X number of days we have had. I do not mean to in anyway belittle what you have had to say. It was very, very worthwhile.

What is that old expression of someone? I would have written you a shorter letter had I had time.

Let me, before I yield, put in the record a letter dated September 22, 1987 addressed to me: "Enclosed please find a list of 123 law professors who endorsed the view expressed in my letter of August 28th, 1987 in opposition of the confirmation of Judge Robert A. Bork submitted on behalf of the Society of American Law Teachers. I submit this list to underscore my earlier remarks and to convey the level of opposition this nomination has engendered within the legal academic community across the country."

"As you know, Professor Thomas Grey of Stanford Law School will testify in person in the next few days in behalf of the Society of American Law Teachers. We continue to be available to assist the committee in any way it may be required. Emma Coleman Jordan, Professor of Law."

I submit that for the record.

[Letter follows:]

Society of American Law Teachers
c/o Emma Coleman Jordan
Georgetown University Law Center
600 New Jersey Ave. N.W.
Washington, D.C. 20001

PRESIDENT
EMMA COLEMAN JORDAN

PRESIDENT-ELECT
CHARLES R. LAWRENCE III

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ELIZABETH WARREN
PATRICIA WILLIAMS

SECRETARY
WINNIE F. TAYLOR

TREASURER
STUART J. FILLER

September 22, 1987

The Honorable Joseph Biden
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Biden:

Enclosed please find a list of 123 law professors who endorse the views expressed in my letter of August 28, 1987 in opposition to the confirmation of Judge Robert H. Bork, submitted on behalf of the Society of American Law Teachers.

I submit this list to underscore my earlier remarks and the convey the level of opposition this nomination has engendered within the legal academic community across the country.

As you know, Professor Thomas Grey of Stanford Law School will testify in person in the next few days on behalf of the Society of American Law Teachers. We continue to be available to assist the committee in any way you may require.

Sincerely,

Emma C. Jordan

Emma Coleman Jordan
Professor of Law

ECJ:mad

Society of American Law Teachers

c/o Emma Coleman Jordan
Georgetown University Law Center
600 New Jersey Ave. N.W.
Washington, D.C. 20001

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AVIAM SOIFER
ELIZABETH SPAHN
MARK SPIEGEL
ELIZABETH WARREN
PATRICIA WILLIAMS

SECRETARY
WINNIE F. TAYLOR

TREASURER
STUART J. FILLER

Law Professors Who Subscribe to the Society of American Law Teachers' Letter of Opposition to the Nomination of Judge Robert H. Bork to the United States Supreme Court

	NAME	SCHOOL
1.	Calleros, Charles	Arizona State
2.	Brodin, Mark	Boston College
3.	Donovan, Peter	Boston College
4.	Goldfarb, Phyllis	Boston College
5.	Howe, Ruth	Boston College
6.	Lichtenstein, Cynthia	Boston College
7.	Upham, Frank	Boston College
8.	Abrams, Kathryn	Boston University School of Law
9.	Beermann, Jack	Boston University School of Law
10.	Cohen, Jane	Boston University School of Law
11.	Kaplan, Wendy	Boston University School of Law
12.	Knight, Lois	Boston University School of Law
13.	Koppelman, Stanley	Boston University School of Law
14.	Lupu, Ira	Boston University School of Law
15.	Miller, Frances	Boston University School of Law
16.	Nilsen, Eva	Boston University School of Law
17.	Seidman, Robert	Boston University School of Law
18.	Seipp, David	Boston University School of Law
19.	Singer, Joseph	Boston University School of Law
20.	Soifer, Aviam	Boston University School of Law

24. Kotkin, Minna	Brooklyn Law School
25. Kuklin, Bailey	Brooklyn Law School
26. Schneider, Elizabeth	Brooklyn Law School
27. Stempel, Jeffrey	Brooklyn Law School
28. Blaustone, Beryl	City University of New York
29. Burns, Hayward	City University of New York
30. James, Ellen	City University of New York
31. Johnson, Conrad	City University of New York
32. Lesnick, Howard	City University of New York
33. O'Neil, Paul	City University of New York
34. Williams, Pat	City University of New York
35. Areen, Judith	Georgetown University Law Center
36. Bauman, Jeff	Georgetown University Law Center
37. Chused, Richard	Georgetown University Law Center
38. Drinan, Robert F., S.J.	Georgetown University Law Center
39. Eskridge, William	Georgetown University Law Center
40. Jordan, Emma	Georgetown University Law Center
41. Malmo, Jane	Georgetown University Law Center
42. Murphy, Jane	Georgetown University Law Center
43. Patterson, Elizabeth	Georgetown University Law Center
44. Seidman, Louis Michael	Georgetown University Law Center
45. Tague, Peter	Georgetown University Law Center
46. Thompson, Rebecca	Georgetown University Law Center
47. Tushnet, Mark	Georgetown University Law Center
48. Wales, Heathcote	Georgetown University Law Center
49. Williams, Wendy	Georgetown University Law Center
50. Bartholet, Elizabeth	Harvard Law School

51.	Bell, Derrick	Harvard Law School
52.	Greenberg, Judith	New England School of Law
53.	Spahn, Elizabeth	New England School of Law
54.	Angelos, Claudia	New York University
55.	Davis, Peggy	New York University
56.	Dorsen, Norman	New York University
57.	Farrior, Stephanie	New York University
58.	Franck, Thomas	New York University
59.	Frank, Beatrice	New York University
60.	Galowitz, Paula	New York University
61.	Kornhauser, Lewis	New York University
62.	Pinto, Arthur	New York University
63.	Redlich, Norman	New York University
64.	Sexton, John	New York University
65.	Strossen, Nadine	New York University
66.	Zimmerman, Diane	New York University
67.	Brown, Judith	Northeastern University Law School
68.	Klare, Karl	Northeastern University Law School
69.	Monks, John	Northeastern University Law School
70.	Rodriguez-Orellana, Manuel--	Northeastern University Law School
71.	Holoch, Alan	Ohio State University
72.	Jost, Timothy	Ohio State University
73.	Kindred, Michael	Ohio State University
74.	Williams, David	Ohio State University
75.	Wilson, Charles	Ohio State University
76.	Babcock, Barbara	Stanford Law School
77.	Grey, Thomas	Stanford Law School

78.	Lawrence, Charles R.	Stanford Law School
79.	Blumenson, Eric	Suffolk University
80.	Clark, Gerard	Suffolk University
81.	Dodd, Victoria	Suffolk University
82.	Dowd, Nancy	Suffolk University
83.	Haddon, Phoebe	Temple University School of Law
84.	McClellan, Frank	Temple University School of Law
85.	Abramson, Harold	Touro Law
86.	Kaufman, Eileen	Touro Law
87.	Klein, Richard	Touro Law
88.	Swartz, Barbara	Touro Law
89.	Zablotsky, Peter	Touro Law
90.	Abel, Richard	UCLA
91.	Blumberg, Grace	UCLA
92.	Garcia, Robert	UCLA
93.	Goldberg-Ambrose, Carol	UCLA
94.	Goldstein, Robert	UCLA
95.	Gunning, Isabelle	UCLA
96.	Handler, Joel	UCLA
97.	Letwin, Leon	UCLA
98.	Menkel-Meadow, Carrie	UCLA
99.	White, Lucy	UCLA
100.	Filler, Stuart	University of Bridgeport
101.	Shultz, Marjorie	University of California-Berkeley
102.	Moulton, Beatrice	University of California-Hastings
103.	Denvir, John	University of San Francisco
104.	Donovan, Dolores	University of San Francisco

105.	Grillo, Trina	University of San Francisco
106.	Honigsberg, Peter	University of San Francisco
107.	Mounts, Suzanne	University of San Francisco
108.	Wildman, Stephanie	University of San Francisco
109.	Cain, Pat	University of Southern California
110.	Levine, Martin	University of Southern California
111.	Moore, Michael	University of Southern California
112.	Resnik, Judith	University of Southern California
113.	Slawson, David	University of Southern California
114.	Mersky, Roy	University of Texas
115.	Brower, Todd	Western State University
116.	Buckman, Miriam	Yale Law School
117.	Dalton, Harlon	Yale Law School
118.	Days, Drew	Yale Law School
119.	Emerson, Thomas	Yale Law School
120.	Solomon, Robert	Yale Law School
121.	Zanger, Sally	Yale Law School
122.	Colbert, Douglas	Hofstra
123.	Goldstein, Anne	Springfield, Massachusetts

The CHAIRMAN. Now, I yield to my colleague and ranking member, Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

A witness who testified today—have you all been here all day? We are glad to have you here—Mr. Forest McDonald, I want to read the first two paragraphs of his testimony: "I quote the senior Senator from Massachusetts. This man may be keen of intellect, but his record impeaches him on far higher grounds than those of intellectual ability. And the Detroit Free Press: Of all the appointments in recent years, he is perhaps the least fit for the calm, cold, dispassionate work of the Supreme Court of the United States. And the New York Times: The Supreme Court protects the people against the errors of their legislative servants. To place on the Supreme bench judges who hold a different view of the function of the Court to supplant moderation by radicalism would be to undo the work of John Marshall and strip the Constitution of its defenses."

"The subject of these observations was not Judge Robert Bork, but Mr. Louis Brandeis on the occasion of his nomination by President Wilson in 1916. It was repeatedly charged during the bitter 4 months of hearing on his nomination that Brandeis lacked the proper judicial temperament, and six former Presidents and the then current President of the American Bar Association pronounced him not a fit person to be a member of the Supreme Court. And yet it is the verdict of history that Brandeis proved to be one of the greatest justices of all times."

Your testimony reminds me of that.

Mr. GREY. Could I take a crack at that, Senator? I think it was quite appropriate for people to suppose that Justice Brandeis would be different from the justices who preceded him. He had been an active person in political life. He had been a legal activist. He was perhaps the Ralph Nader of his day. It was not at all surprising that people of conservative views, protectors of private property and freedom of contract, thought that he might threaten the constitutional doctrines they held dear. And indeed he did threaten them. And within 20 years after his ascension to the bench, most of those doctrines were swept away.

Now, I think that was an entirely appropriate constitutional development. But I also think it was equally appropriate for the Senate to look into Justice Brandeis' substantive views vigorously and fully, and make an independent judgment about whether the kind of change that his nomination portended was a change that would be good for the country.

Senator THURMOND. I do not know whether you were here a couple of days ago when Chief Justice Burger testified; did you hear his testimony?

Mr. GREY. Yes, sir, some of it anyway.

Senator THURMOND. Chief Justice Burger has worked here with this man. He knows him well. Judge Bork has written 150 decisions on the circuit court of appeals. He has participated in 400 decisions. And from the testimony here it seems that none of those decisions have been overruled by the Supreme Court.

And he did not stray off to himself. He was not a loner. He was in line with the Court. And Chief Justice Burger said—and some people call Judge Bork an extremist—he said, if he is an extremist, I am an extremist.

Mr. GEWIRTZ. Senator?

Senator THURMOND. Just a minute. I have not got much time. You have had a chance to present and I want to say what I am going to say now.

Mr. GEWIRTZ. I am sorry, Senator.

Senator THURMOND. And then we had Mr. Lloyd Cutler here, who called himself a liberal Democrat. And he says he is with the mainstream. I do not know what you people are worried about. Do you have anything good at all to say about Judge Bork? Is there a single word complimentary to Judge Bork?

I think you are overly concerned. I think you just have been misinformed. I think in some way his record has been distorted. It has been misrepresented. There has been a lot of untruths about it. And I just want to tell you folks that after he is confirmed, I think you will be well pleased with him.

That is all. Thank you, Mr. Chairman.

Mr. GEWIRTZ. Senator Thurmond, I simply wanted to comment on two things that you said. I, for one, do not oppose Judge Bork because I disagree with his views. There are an extraordinary number of people who have been nominated and confirmed or could have been nominated and confirmed whose views I disagree with but whom I think should be supported. The problem here as I see it is that Judge Bork's views in area after area cumulatively seem to fall outside an appropriate range of views that can be held.

As far as comparisons with other judges go—and the point that Mr. Cutler made comparing Judge Bork to Justice Harlan, say, and Justice Black—let me just say this. It is true that Justice Harlan dissented from some of the decisions that Judge Bork criticized. But it is also true that Justice Harlan was the leading exponent of the views about privacy reflected in the *Griswold* case.

Justice Harlan supported and wrote the much-praised opinion in *Cohen* v. *California* which Judge Bork has criticized. Justice Harlan joined the Court in upholding the 1964 Civil Rights Act, which Judge Bork found serious constitutional problems with.

It seems to me that Justices like Harlan had overall a sense of the balance between majority rights and individual rights which was a fair balance. The problem with Judge Bork is that in area after area he is so opposed to so many Supreme Court decisions that the balance overall in his views seems extraordinarily tilted in the direction of majority prerogatives and against individual rights.

The CHAIRMAN. Thank you, Senator.

Mr. RESNIK. I might also like to respond——

The CHAIRMAN. Briefly, if you would.

Mr. RESNIK [continuing.] Very briefly about the claim that, because he has not been overruled by the United States Supreme Court, we know something important about Judge Bork's qualifications. I think we are all too sophisticated here and realize that those numbers cannot tell us very much. In the U.S. District Courts of Appeals in 1985 there were some 31,000 cases decided. In the D.C. Circuit alone, there were about 1,350 cases decided. The U.S. Supreme Court receives about 5,000 requests for review and it only decided about 170 cases with full opinion.

That Judge Bork's cases happen not to be among those in which either litigants decide, for whatever reason, not to petition for certiorari or that the court decides not to renew does not tell us whether or not his reasoning or his decision is approved of by the U.S. Supreme Court.

That Court has reminded us time and time again that the fact that it does not take a case has absolutely zero legal weight. And so it seems inappropriate for us to give any weight to whether or not the Court took a case here.

The CHAIRMAN. Thank you very much. Senator Hatch.

Senator HATCH. Thank you. Welcome to all of you.

Mr. Chairman, at this point I would like to place in the record a letter from Harvard law professor Clark Byss.

Professor Byse states, quote: "It seems to me that it is correct to attribute to him as a judge all the views he expressed as a professor."

He also says that, quote: "If Judge Bork is confirmed, I would suggest that the balance of the Court would not be predictably, quote, 'liberal,' unquote, or, quote, 'conservative,' unquote. Such a Court would have three liberals, three conservatives and three middle-of-the-roads."

Further he says, quote: "Any allegation that he is a right-wing ideologue is manifestly absurd."

So I ask that his be placed in the record at this time.

The CHAIRMAN. Without objection.

[Letter follows:]

HARVARD LAW SCHOOL
CAMBRIDGE . MASSACHUSETTS . 02138

September 17, 1987

The Honorable Orrin G. Hatch
United States Senate
SR-135 Russell Senate Office Building
Washington, DC 20510-4002

Dear Senator Hatch:

As one who thinks of himself as a moderate (having voted for Reagan in 1980 and Mondale in 1984), and concerned about civil liberties (as an ex-president of the Philadelphia chapter of the ACLU and an ex-member of the Massachusetts Advisory Committee to the U.S. Commission on Civil Rights) and as a professor of law who for more than a half century has been interested in the administration of justice, I write concerning the nomination of Robert Bork. Incidentally, he is not a friend of mine; I have never met him.

First, I believe it is appropriate for the members of the Senate to consider a nominee's view of the proper role of a judge in our society. But that is only one factor among many that should be considered in deciding whether to approve or disapprove a particular nominee. In Judge Bork's case, it seems to me that it is incorrect to attribute to him as a judge all of the views he expressed as a professor. Professors are by nature critical creatures and Judge Bork is preeminently an exmaple of that genre. At times as a professor he has made or written statements that I, and very likely you, would not agree with. But I believe that taking extreme positions and writing provocative law review articles are far different from discharging the sobering responsibility of deciding the citizen's rights and writing judicial opinions explaining those decisions. Far more relevant, I believe, is his record as a judge and the positions he espouses in the proceedings before the Judiciary Committee.

Second, Judge Bork is an extraordinarily intelligent and capable individual with extensive and varied experience as a lawyer, law teacher and government official. I think it would be a very good thing to have a person of Judge Bork's capacity and general approach concerning the appropriately limited role of the judiciary in our democratic, representative constitutional system serve on the Court so as to provide a counter balance to other members of the Court who have a more expansive view of the judge's role in constitutional and statutory interpretation.

Third, if Judge Bork is confirmed, I suggest that the balance on the Court would not be either predictably "liberal" or "conservative". Such a court would have three Justices who could fairly be termed liberal (Justices Brennan, Marshall and Blackmun), three who could be fairly termed conservative (Chief Justice Rehnquist and Justices Scalia and Bork), and three who might fairly be termed middle of the road (Justices Stevens, White and O'Connor). You might question my assessment of Justice O'Connor, but I think it is fair; she is no clone of Chief Justice Rehnquist.

Fourth, if Judge Bork is rejected because of his conception of the limited role of the judge, then would it not follow that an academic who had written widely endorsing and advocating an aggressive judicial role similar to or more extreme than that reflected in Justice Brennan's opinions and writings should also be rejected because of his or her expansive view of the role of the judge? Would it be a better court to have all middle of the roaders or is it preferable to have a Brennan at one extreme and a Rehnquist at the other? I am not sure of the proper answer to this question, but I rather believe that in a society as diverse as ours, a diverse Supreme Court is to be preferred.

Finally, in my own field of administrative law, although I do not agree with all he has written, the quality of his opinions is very high indeed. Based on his performance in this field, any allegation that he is a right-wing ideologue is manifestly absurd. He is, rather, an outstanding, open-minded judicial craftsman.

In sum, although I would not want to have a Court composed of nine Borks -- or nine Brennans -- I do believe that Judge Bork is eminently qualified and should be confirmed. I hope that after you have heard and considered all the evidence, you will agree.

Sincerely yours,

Clark Byse

Clark Byse
Byrne Professor of
Administrative Law, Emeritus

Senator Hatch. Mr. Chairman, I would also like to place in the record a letter signed by several attorneys who served with Judge Bork in the Office of the Solicitor General during his tenure in that position.

Now, this letter speaks generally as to the Judge's character, judgment and legal abilities, as these attorneys witnessed while working with him.

Attached to the letter is an interesting addendum, because there are four sitting judges who affix their names to this letter, with this caption: "The undersigned subscribe to the statements in this letter regarding Judge Bork's character, judgment and legal ability, but do not believe that it is appropriate for them as judges to make any recommendations to the Senate with respect to the confirmation decision." And they are Judge Danny J. Boggs, of the Sixth Circuit Court of Appeals; Judge Frank Easterbrook, of the Seventh Circuit Court of Appeals; Judge Daniel M. Freedman, of the U.S. Court of Appeals for the Federal Circuit; and Judge Edward R. Clemon, U.S. District Judge for the Eastern District of New York.

So, if I could put that in the record also, I would appreciate it.

The Chairman. Without objection.

[The letter follows:]

September 17, 1987

The Honorable Joseph Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

The undersigned served as attorneys in the Office of the Solicitor General during the tenure of Robert H. Bork. We are writing to advise the Committee of our collective opinion regarding Judge Bork's traits of character, judgment, and legal ability, which bear upon his fitness to hold the office of Associate Justice of the Supreme Court of the United States. Some of us served only with Judge Bork, while others served with one or more other distinguished Solicitors General. We constitute a group with diverse backgrounds and varying political and philosophical outlooks. We are united, however, in the views expressed herein.

In cataloguing Judge Bork's qualifications, one must begin with his legal talents. He has a penetratingly logical mind, seasoned by a thoughtful and wise understanding of the nature of law and the judicial process. We think there can be (and in fact is) no dispute that Judge Bork would make a very substantial intellectual contribution to the work of the Supreme Court.

As Solicitor General, Judge Bork displayed a profound respect for the role of the Supreme Court in our system of government and an enlightened appreciation of the Solicitor General's unique relationship with and responsibility to the Court. As a teacher, scholar, and practitioner, Judge Bork had given serious thought to, and had written extensively about, many of the fundamental issues that confront the Supreme Court. During his tenure as Solicitor General, however, he never allowed his personal views to interfere with his obligation to represent the interests of the United States.

In all cases within our experience, including those that presented issues on which Judge Bork had previously formed well-developed legal judgments, he was without fail accessible to those with whom he worked and tolerant of views at odds with his own. He listened carefully to opposing arguments, frequently relishing the opportunity to test his own views in the cauldron of debate. He fully considered all sides before reaching a final judgment, and he always provided cogent reasons for his conclusions, particularly on those rare occasions where his judgment departed from the recommendations of his staff.

In short, our sense, based on years of dealings with Judge Bork concerning a host of difficult and sensitive legal issues, is that he is genuinely open to persuasion, even on questions to which he has devoted extensive thought. The Robert Bork we know bears no resemblance to the image of a closed-minded ideologue that some have sought to foster.

While Judge Bork's jurisprudence has been accurately characterized as "conservative" -- in the sense that he has held firmly to principles of judicial restraint -- his opinions have been well within the mainstream of American legal thought. Judge Bork's philosophy embodies a deep respect for and thoughtful consideration of the nature of the judicial process and an unflinching dedication to reasoned decision-making. Moreover, we know from first-hand experience that, as Solicitor General, Judge Bork displayed an abiding commitment to the rule of law and to respect for individual liberties and civil rights.

We appreciate the opportunity to convey these views to the Committee.

Richard A. Allen, Esq.
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The undersigned subscribe to the statements in this letter regarding Judge Bork's character, judgment, and legal ability but do not believe that it is appropriate for them, as judges, to make any recommendation to the Senate with respect to the confirmation decision.

Judge Danny J. Boggs
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cc: Members of the Senate Judiciary Committee

Senator HATCH. Now, finally, I would like to place in the record a letter from the Chief Counsel of the Office of the Chairman of the National Labor Relations Board.

This letter was written in an effort to clarify certain facts that may have been misconstrued during our questioning of Judge Bork last week, so I ask unanimous consent that all three of these documents be placed in the record. Is that all right, Mr. Chairman?

The CHAIRMAN. Without objection.

[The letter from the National Labor Relations Board follows:]

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
Washington, D.C. 20570

21 September 1987

The Honorable Orrin G. Hatch
United States Senate
SR-135 Russell Senate Office Building
Washington, D.C. 20510-4402

Dear Senator Hatch:

Judge Robert T. Bork testified before the Senate Judiciary Committee in a rare Saturday session on the morning of 19 September 1987. The Committee is considering Judge Bork's nomination to the U.S. Supreme Court. I write because I believe that a decision on a question of this importance ought to be bottomed on a correct view of public facts.

During the televised proceeding, Senator Kennedy (D-Mass.) questioned Judge Bork about a D.C. Court of Appeals case, *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 106 S. Ct. 313, 352 (1985). Judge Bork had dissented in this case from his fellow panel members Judges Edwards and Wald. Senator Kennedy unfortunately misstated the decision of the Court's panel majority.

Prill was before the D.C. Circuit on a petition for review of a National Labor Relations Board (NLRB) order in the case of *Meyers Industries, Inc.*, 268 NLRB 493 (1984). As Judge Bork stated in his reply to Senator Kennedy, *Prill* involved the interpretation of the concerted activity language in Section 7 of the National Labor Relations Act (NLRA). The question in the case, as Judge Bork also stated, was whether a single individual, acting alone could be said to be engaged in concerted activity. If so, that individual would, other things being equal, be entitled to statutory protection in the event he or she was discharged or disciplined as a result of such activity.

In the last dozen years, this Board had developed theories of so-called "constructive concerted activity." Beginning with *Alleluia Cushion Co.*, 221 NLRB 999 (1975), the Board held in a large number of cases that an employee, acting alone, was engaged in concerted activity where he sought to bring into play a statute protective of employee interests or where it could be presumed that his fellow employees, being benefited by the individual's actions, supported them. Considered as a statutory interpretation, there exist serious intellectual difficulties with the theory of constructive concerted activity. Not the least of these is that it acts to reverse normal burdens of proof in a labor board unfair labor practice trial. The Board's General Counsel had previously to prove the existence of a specific concerted aspect to employee activity. Under the new theory it was up to the defendant, if it could, *to disprove* the existence of a collective purpose. I am sure all lawyers know the difficulties involved in demonstrating such generalized negatives. I think I am safe in saying that no federal circuit court which considered *Alleluia* and the Board's subsequent applications of the constructive concerted activity theory ever approved the Board's reasoning. The courts uniformly refused enforcement of such Board orders.

The Board's 1984 decision in *Meyers* attempted to recognize these legal difficulties and frame a satisfactory definition of concerted activities. Senator Kennedy was, of course, correct when he intimated that the NLRB had been unsuccessful in convincing a majority of the D.C. Circuit Court panel that it had done this task in an appropriate fashion. Certain further comments on the Court's majority position in *Prill* were incorrect. These were: (1) that the Court had reversed the Board; (2) that the Court majority held that petitioner Prill's activities were concerted and that the NLRB was incorrect in holding that individual activity under the circumstances of the case could not be concerted. The D.C. Circuit panel majority did neither the one nor the other. It *remanded* the case to the NLRB for further proceedings. It remanded the case because, in its view, the United States Supreme Court, in *NLRB v. City Disposal Systems*, 104 S. Ct. 1505 (1984) had raised issues concerning the potential extent of concerted activity unconsidered by the NLRB in its *Meyers* decision. The Board had not considered those issues because *City Disposal* had issued after *Meyers*.

The *City Disposal* Court considered the very different question of an individual who, acting alone, sought to enforce the provisions of a collective bargaining contract. At one point in its opinion, the Supreme Court in considering the meaning of the phrase "concerted activities," referred to the possible meaning as being "two or more employees . . . working together at the same time and the same place toward a common goal." The Supreme Court continued by saying that "the language of Section 7 does not confine itself to such a narrow meaning." The Court concluded by finding that a single individual who sought, on his or her own, to enforce the terms of a collective contract was engaged in concerted activity. This finding accorded with old Board law first enunciated in *Interboro Contractors*, 157 NLRB 1295, 1298 (1966), enforced at 388 F.2d 495 (CA 2, 1967). While the 1984 Board considered that its *Meyers* discussion properly distinguished the *Interboro* issue, the D.C. Circuit panel majority quite obviously disagreed in light of the intervening *City Disposal* opinion. Accordingly, following the teaching of *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943), the Court majority remanded the case to the NLRB. What was involved then, was not the definition of concerted activity under Section 7 of the NLRA but only a relatively narrow administrative law question. The D.C. Court's panel majority made clear that it was not ruling on the substantive aspects of the Board's *Meyers* opinion: "We do not undertake to decide in this case whether the Board is required to follow any particular approach to concerted activity under section 7."

The D.C. Circuit panel elsewhere said: "Our remand in this case is intended to afford the Board a full opportunity to consider such issues in light of the analysis of section 7 in *City Disposal*." The current Board has availed itself of that opportunity in *Meyers Industries, Inc.* ("*Meyers II*"), 281 NLRB No. 118 issued on 30 September 1986. *Meyers II* reaches the same result. There has again been a petition for review addressed to the D.C. Circuit Court of Appeals.

I am enclosing copies of both the Board's *Meyers* decisions and the opinion of the D.C. Circuit Court in *Prill*. I believe it important to state that these Board decisions do not constitute ethical approval of the employer's conduct in the case nor do they evince lack of concern for highway or employee safety. Both contain explicit comments to that effect. The only real policy question involved is whether the NLRB is to be the ombudsman of the workplace to remedy every injustice. There is considerable doubt that Congress assigned such a role to this agency. The courts have said, at times, that this agency has expert knowledge in industrial relations. They have never, to my knowledge, assigned it special expertise in industrial or highway safety, clean air, banking laws or any of the thousand and one concerns Congress and the states have regulated over the years. Issues in those areas are better left to the agencies and instrumentalities specifically designed by the Legislature and staffed with people who know something about them. Our *Meyers* decisions are a reflection of that thinking.

Senator Kennedy, by misstating the majority opinion in *Prill*, has left the impression it did something it did not do and decided questions that it did not touch. I believe that the United States Senate and the Judciary Committee should be informed on those questions so that it does not misconstrue the context or significance of Judge Bork's dissent in *Prill*. I am taking the liberty of writing to you rather than Judge Bork because the case is currently under review in the D.C. Circuit Court of Appeals. Under that circumstance, Judge Bork might not wish to receive any *ex parte* comment on the case or address it further in the event he should again be called to testify before the Judiciary Committee.

Sincerely,

Charles M. Williamson

Charles M. Williamson
Chief Counsel
Office of the Chairman
National Labor Relations Board

Enclosures

281 NLRB No. 118

DBS

D--4044
Tecumseh, MI

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MEYERS INDUSTRIES, INC.

and

KENNETH P. PRILL, an Individual

Case 7--CA--17207

SUPPLEMENTAL DECISION AND ORDER [1]

On 6 January 1984 the National Labor Relations Board issued its Decision and Order in this proceeding (Meyers I) [2] in which it overruled Alleluia Cushion Co.[3] and its progeny; defined the concept of concerted activity for purposes of Section 7 of the National Labor Relations Act; and reversed the judge's finding that the Respondent had violated Section 8(a)(1) of the Act by discharging employee Kenneth P. Prill. In finding a violation of Section 8(a)(1), the judge had relied on Alleluia to conclude that Prill's individual activity in refusing to drive an unsafe vehicle and in reporting the vehicle to state authorities constituted concerted activity for purposes of Section 7. The Board, however, held that the definition of concerted activity which was expressed in Alleluia does not comport with Section 7. Having rejected the Alleluia standard, the Board formulated a definition of concerted activity to comport with Section 7. Then, applying that standard to the facts surrounding Prill's discharge, the Board upheld the discharge and dismissed the complaint.

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[1] Member Johansen did not participate in this decision.
[2] 268 NLRB 493 (1984).
[3] 221 NLRB 999 (1975).

Thereafter, Prill, the Charging Party, filed a petition for review of the Board's Decision and Order with the United States Court of Appeals for the District of Columbia Circuit.[4] On 26 February 1985 the court remanded *Meyers I* on the grounds that the Board, first, erroneously assumed that the Act mandated its *Meyers I* interpretation of ''concerted activities'' and, second, relied on a misinterpretation of prior Board and court precedent, indicating to the court a lack of rationale for the new definition.[5] As to the first ground, the court did not express an opinion as to the correct test of concerted activity or whether the *Meyers I* test is a reasonable interpretation of the Act.[6] The court instead determined that the U.S. Supreme Court's recent decision in *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), made clear that the Board was not required to give a ''narrowly literal interpretation'' to the term ''concerted activities,'' but had substantial authority to define the scope of Section 7. The court concluded that a remand was appropriate ''to afford the Board a full opportunity to consider such issues in light of the analysis of section 7 in *City Disposal*''[7] and to particularize more fully its rationale for the adoption of the *Meyers I* definition.

On 29 July 1985 the Board notified the parties that it had accepted the remand from the court of appeals and invited the parties to submit statements of position with regard to the remand issues. Thereafter, all parties filed statements of position.[8] The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL--CIO filed an amicus brief.[9]

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[4] *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985) (2-1 decision), cert. denied *106 S.Ct. 313*, 352 (1985).

[5] Id. at 942, 948.

[6] Id. at 948 fn. 46.

[7] Id. at 957.

[8] On 27 September 1985 the Respondent filed a motion to stay further consideration of the case pending the U.S. Supreme Court's disposition of a petition for writ of certiorari filed by the Respondent. On 4 November 1985 the Court denied certiorari. 106 S.Ct. 313, 352 (1985). In light of the (Footnote continued)

Having accepted the remand, the Board must observe the court's opinion as the law of the case and, necessarily, its judgment that the Meyers I definition is not mandated by the Act.[10]

The Board has reconsidered this case in light of the court's opinion, the parties' statements of position, and the Auto Workers' amicus brief and has decided to adhere to the Meyers I definition of concerted activity as a reasonable construction of Section 7 of the Act. Consistent with City Disposal, supra, we have exercised our discretion and have chosen the Meyers I definition over other possibly permissible standards for the reasons set forth below.[11]

Court's action, we deny the Respondent's motion.

The Charging Party has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[9] On 1 October 1985 the Auto Workers filed a motion for leave to file an amicus brief. We have granted the motion and have accepted the amicus brief.

[10] The court also did not consider whether the Board's application of the Meyers I test to Prill's situation was supported by substantial evidence. 755 F.2d at 957 fn. 92. Because our understanding of the court's opinion is that the Board is faced with legal issues on remand, we find it unnecessary to give a detailed statement of the facts or to reiterate the Board's earlier discussion of the application of the Meyers I definition to those facts. Basically, there is no evidence in this case that employee Prill joined forces with any other employee or by his activities intended to enlist the support of other employees in a common endeavor. As a result, the Board found that Prill did not engage in concerted activities.

We also note that, in her closing argument, counsel for the General Counsel did not contend that Prill's actions constituted concerted activity under ''traditional concepts''; rather, she relied on the Board's ''expanded'' concept of ''concertedness'' in Alleluia and its progeny.

[11] The court's remand calls for an illumination of our reasons for adopting the Meyers I definition apart from the concerns raised by the rejection of the Alleluia standard. For this reason, we have refrained from repeating here why the Alleluia standard was rejected in Meyers I.

A. Meyers I is Faithful to the Central Purposes of the Act

At the outset, we reaffirm our recognition that the Board has a wide latitude in interpreting Section 7 of the Act, as the Supreme Court has stated on numerous occasions.[12] That latitude is not without limit, however; and even within the conceivable limits of a general phrase such as ''concerted activities,'' it is surely appropriate to choose that construction that is most responsive to the central purposes for which the Act was created. We believe that our choice in Meyers I, as elucidated in this opinion on remand from the court, does fully reflect those purposes.

The precise phrase in Section 7 that we are construing, as the Supreme Court has recently noted in City Disposal, can be traced back to the Norris-LaGuardia Act of 1932.[13] In that statute Congress sought to protect the trade union movement from the hostility of the courts in their use of ''the doctrine that concerted activities were conspiracies, and for that reason illegal.'' Auto Workers Local 232 v. Wisconsin Employment Relations Board (Briggs & Stratton), 336 U.S. 245, 257 (1949). Several years later, in the Wagner Act, in an effort to reduce the industrial unrest produced by the lack of appropriate channels for the collective efforts of employees to improve workplace conditions, Congress gave employees affirmative protections from employer reprisal for collective activity. The emphasis on collective, as distinct from purely individual, activity is made clear in the Act's ''Findings and declaration of policy'' (29 U.S.C. § 151): they note the

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[12] It reiterated this principle in City Disposal, the decision of greatest relevance here. 465 U.S. at 829--830.

[13] 465 U.S. at 834--835. As the Court also noted (id.), Congress had similarly sought to protect peaceful union activities from indiscriminate use of the antitrust laws through exemptions added to the Clayton Act in 1914. See generally H. Wellington, Labor and the Legal Process 38--43 (1968).

> . . . inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association

and they propose to overcome this inequality by encouraging

> . . . the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[14]

To be sure, as Professors Gorman and Finkin have pointed out, the intent of the Wagner Act to extend protections to group action for the improvement of wages and working conditions is not necessarily incompatible with an intent to protect purely individual action for the same purpose;[15] but the fact remains, as the Supreme Court has repeatedly recognized, that it is protection for joint employee action that lies at the heart of the Act.[16] (Congress' addition, in the Taft-Hartley Act, of a right to ''refrain'' from participating in concerted activities, did not shift the focus of the Act from collective action to individual action, but merely made it possible for individual employees to choose not to participate in the former.) It is therefore entirely appropriate for us to take that focus on joint employee action as the touchstone for our analysis of what kinds of activities we must find within the scope of Section 7 in order to effectuate the purposes of the Act. The definition of concerted activity which the Board provided in Meyers I proceeds logically from such an analysis insofar as it requires some linkage to group action in order for conduct to be deemed ''concerted'' within the meaning of Section 7.

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[14] These findings echoed views of Francis Biddle (who was chairman of the first National Labor Relations Board, established under Public Resolution 44) in a speech that Senator Wagner placed in the Congressional Record not long after he introduced the bill that became the basis for the Wagner Act. In that speech, which Senator Wagner evidently saw as setting forth the theoretical underpinnings of his legislation, Francis Biddle explained:

> For freedom to work and live decently no longer means the theoretical freedom of a man to make a contract with a steel corporation. There is no freedom of contract where power is all on one side and the choice is to take what you get or starve. Mr. John Lewis, with half a million miners behind him, can make a contract, because he, too, can say, ''Take it or leave it.'' The forces are balanced; the game is even.
>
> There are two theories about the relationship of capital and labor. One is the partnership theory, the other is the class-war theory. . . .
>
> . . . .
>
> There is, however, one real flaw in the argument that the relationship is one of partnership, which is usually overlooked. A partnership is the result of agreement and presupposes equality of bargaining. This condition does not, as we have already said, apply to an individual seeking a job. The partnership is created as the result of an agreement. Thus it becomes fair to describe the relationship as a partnership only after an agreement has been entered into by the parties from some equality of bargaining power. Such agreements are collective bargaining agreements, signed by employer and union, and are real partnerships, which carry with them the joint good will and spirit of team play of real partnerships.

''Theory of Collective Bargaining---Address by Francis Biddle,'' reprinted in 79 Cong. Rec. 3183 (1935), and in I Leg. His. 1314, 1317--18 (NLRA 1949).

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[15] Gorman & Finkin, *The Individual and the Requirement of ''Concert'' Under the National Labor Relations Act*, 130 U. Pa. L. Rev. 286, 338 (1981).

To give full meaning to the notion of liberty, of course, both avenues of recourse---individual action and group activity---are necessary and desirable. As de Tocqueville observed, a century and a half ago:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow-creatures, and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty.

A. de Tocqueville, *Democracy in America* 98 (R. Heffner ed. 1956). In the Wagner Act, Congress sought to vindicate the exercise of associational rights for attaining improved wages and working conditions. See Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and its Prospects*, 51 U. Chi. L. Rev. 1012, 1028--29 (1984).

[16] See, for example, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (citing *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921)), in explaining the background of the Wagner Act (''[A] single employee was helpless in dealing with an employer. . . . [U]nion was essential to give laborers opportunity to deal on an equality with their employer''); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) (contrasting Title VII of the Civil Rights Act, concerned with ''an individual's right to equal employment opportunities'' with the ''majoritarian processes'' of the NLRA); *NLRB v. City Disposal Systems*, 465 U.S. 822, 835 (1984) (Sec. 7 embodies congressional intent ''to create an equality in bargaining power between the employee and the employer throughout the entire process of labor organizing, collective bargaining, and enforcement of collective-bargaining agreements''); *Metropolitan Life Ins. Co. v. Massachusetts*, 106 S.Ct. 2380, 2396--98 (1985) (distinguishing minimum-labor-standard laws, which apply to all employees without regard to the collective-bargaining process, from the NLRA, with its protections for employee self-organization and collective bargaining).

B. Meyers I is Consistent with City Disposal

In Meyers I, the Board indicated that a serious problem with the analysis in Alleluia and its progeny was that its focus on the purpose or subject matter of a particular action---whether it was a subject with which a group was likely to be concerned---reflected the ''mutual aid or protection'' clause of Section 7 but had little apparent linkage to the notion of action taken in ''concert.''[17] The Board noted that its pre-Alleluia cases had, with court approval, distinguished between the two clauses and regarded them as separate tests to be met in establishing Section 7 coverage; the Board determined it should return to this approach.[18] This approach is consistent with the groundwork laid by the Supreme Court in City Disposal.[19]

In City Disposal the Supreme Court addressed the question of whether an individual employee's invocation of a right contained in a collective-bargaining agreement constituted concerted activity within the meaning of Section 7. The Court answered this question in the affirmative and found reasonable the Board's longstanding Interboro doctrine [20] recognizing as concerted an individual employee's reasonable and honest invocation of a collective-bargaining right.

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[17] 268 NLRB at 495--496.

[18] Id. at 494--495, 496.

[19] 465 U.S. at 830--831. It is also consistent with the analytical framework of Eastex, Inc. v. NLRB, 437 U.S. 556 (1978), where the employees' distribution of a union newsletter was plainly ''concerted activity,'' but the Court considered the separate question whether, given the subject matter of the newsletter, it could be said that the concerted activity was engaged in for ''mutual aid or protection.''

The Court noted that the Board had relied on ''two justifications'' for its Interboro doctrine:

> First, the assertion of a right contained in a collective-bargaining agreement is an extension of the concerted action that produced the agreement, Bunney Bros. Construction, [139 NLRB 1516,] 1519 [(1962)]; and second, the assertion of such a right affects the rights of all employees covered by the collective-bargaining agreement. Interboro Contractors, supra, at 1298.[21]

In the Court's only subsequent reference to the second justification, it described the effect that a single employee's invocation of a contract right exerts on the rights of other employees as the

> . . . type of generalized effect [that is] sufficient to bring the actions of an individual employee within the ''mutual aid or protection'' standard, regardless of whether the employee has his own interests most immediately in mind.[22]

The Court then proceeded to an analysis of the ''concerted activity'' issue that, as we explain below, relies only on the first justification---that the individual's action is an extension of the concerted action that produced the agreement.

It is noteworthy that the second justification---affecting the rights of others---which the Court linked to the ''mutual aid or protection'' clause closely resembles the reasoning that underlay the Board's decision in Alleluia to deem as ''concerted'' activity an individual employee's action to enforce ''statutory provisions relating to occupational safety designed for the benefit of all employees'' in the absence of employee disavowal of such action.[23] While it would be going too far to say that the Court in City Disposal held that questions of who is benefited by an action to go to the ''mutual aid or protection'' clause only and not to the ''concerted'' activity element of Section 7, it is surely reasonable to conclude from the Court's analysis that it deems some linkage to collective employee action to be at the heart of the ''concertedness'' inquiry.

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[20] Interboro Contractors, 157 NLRB 1295, 1298 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).

[21] 465 U.S. at 829.

[22] Id. at 830 (citation omitted).

Thus, in considering what constitutes ''concerted activities'' under Section 7, the Court stated that the inquiry was one in which it must determine ''the precise manner in which particular actions of an individual employee must be linked to the actions of fellow employees.''[24] The Court approved the Interboro doctrine because it found an individual employee's invocation of a collective-bargaining right to be ''unquestionably an integral part of the process that gave rise to the agreement.''[25] The Court reviewed the stages of the process, including the organization of the union, the negotiation of the collective-bargaining agreement, and the assertion of rights under the agreement as ''a single, collective activity.''[26] The Court concluded: ''A lone employee's invocation of a right grounded in his collective-bargaining agreement is, therefore, a concerted activity in a very real sense.''[27] Further support was found from the fact that joining and assisting a labor organization can be engaged in by an individual employee, whose action, nevertheless, bears an integral relationship to the actions of other employees. It was recognized that the actions of the individual employee engaged in concerted activity might be remote in time and place from group action [28] but, at some point, there would be an outer limit to concerted activity in order to be faithful to the collective-action component of Section 7.[29]

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[23] 221 NLRB at 1000.
[24] 465 U.S. at 831.
[25] Ibid.
[26] Id. at 831--832.
[27] Id. at 832.

Even though the precise issue concerning the scope of ''concerted activities'' now before us was not before the Supreme Court in *City Disposal*,[30] several guiding principles concerning what might constitute a permissible definition of ''concerted activities'' emerge. First, a definition of concerted activity could include some, but not all, individual activity. Both the majority and dissenting opinions in *City Disposal* approve a definition of concerted activity encompassing individual employee activity in which the employee acts as a representative of at least one other employee,[31] whereas only the majority opinion endorses the inclusion of the individual activity reflected by the *Interboro* doctrine. Second, inasmuch as an essential component of Section 7 is its collective nature, a definition of concerted activity should reflect this component as well. Third, like the Board in *Meyers I*, the Court in *City Disposal* separated the concept of ''concerted activities'' and ''mutual aid or protection,'' thereby giving its imprimatur to the reasonableness of such a separation of the two concepts underlying Section 7.[32]

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[28] Id. at 832--833.

[29] Id. at 833 fn. 10.

[30] Id. at 829 fn. 6. In *Meyers I* we specifically distinguished the issues presented by the *Interboro* doctrine from those presented here. 268 NLRB at 496. The Court in *City Disposal* agreed with that distinction, stating in fn. 6 of its decision, ''The Board, however, distinguished that case from the cases involving the *Interboro* doctrine, which is based on the existence of a collective-bargaining agreement. The *Meyers* case is thus of no relevance here.'' The Court did, however, favorably cite *Meyers I* in its preliminary analysis of Sec. 7.

[31] Id. at 831, 846--847.

Keeping these objectives in mind, we have scrutinized the Meyers I definition of ''concerted activities.'' In our view, the Meyers I definition strikes a reasonable balance. It is not so broad as to create redundancy in Section 7, but expansive enough to include individual activity which is connected to collective activity, which lies at the core of Section 7.

C. ''Individual Activity'' Under the Meyers I Standard

In Meyers I, the Board adopted the following definition of the term ''concerted activities'': ''In general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.''[33] The Meyers I definition expressly distinguishes between an employee's activities engaged in ''with or on the authority of other employees'' (concerted) and an employee's activities engaged in ''solely by and on behalf of the employee himself'' (not concerted). There is nothing in the Meyers I definition which states that conduct engaged in by a single employee at one point in time can never constitute concerted activity within the meaning of Section 7. On the contrary, the Meyers I definition, in part, attempts to define when the act of a single employee is or is not ''concerted.''

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[32] Id. at 830--831. In this regard, the Court concluded first that asserting a collective-bargaining right was for ''mutual aid or protection'' before considering whether an individual who does so alone engages in concerted activity. If the Court did not consider the two concepts underlying Sec. 7 as distinct, then the Court's remaining analysis pertaining to the concept of ''concerted activities'' would have been superfluous.

[33] 268 NLRB at 497.

The court of appeals raised several questions as to whether individual activity is indeed covered by the *Meyers I* definition. We interpret the court's opinion as inviting us to respond to the concerns raised by those questions.

1. The court queried whether *Meyers I* is consistent with *NLRB v. Lloyd A. Fry Roofing Co.*, 651 F.2d 442 (6th Cir. 1981), a case which the *Prill* court stated was ''a case quite similar on its facts to *Meyers*.'' 755 F.2d at 953 fn. 72. We respectfully point out that *Lloyd A. Fry* and the instant case are factually distinguishable in a critical respect. In *Lloyd A. Fry*, where concerted activity was established, the record was replete with instances in which the discharged employee (Varney) acted on a collective basis with other employees preceding his discharge. Thus, as found by the Sixth Circuit, Varney engaged in ''numerous discussions'' with his fellow drivers regarding the safety of the employer's trucks and Varney and a fellow employee (Wade) collectively met with management representatives specifically to discuss solutions to truck maintenance problems that had engendered numerous complaints by other employees. In the instant case, there is no record evidence whatsoever that employee Prill at any relevant time or in any manner joined forces with any other employee, or by his activities intended to enlist the support of other employees in a common endeavor. Since *Lloyd A. Fry* is not on all fours with the instant case, a different result is not inconsistent with the results reached here.

2. The court of appeals also noted that, in previous Board cases,[34]

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[34] In *Charles H. McCauley Associates, Inc.*, 248 NLRB 346 (1980), enfd. 657 F.2d 685 (5th Cir. 1981), an employee spoke to his fellow employees and apprised them of his intention to seek improvements in certain working conditions. The employee then expressly informed the employer of his intended group action, i.e., to discuss these matters with his coworkers

(Footnote continued)

concerted activity was found where an individual, not a designated spokesman, brought a group complaint to the attention of management. The court questioned whether *Meyers I* is consistent with those cases. We discern no basis upon which the *Meyers I* standard deviates from those cases in the manner suggested by the court's question. Indeed, *Meyers I* recognizes that the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence. When the record evidence demonstrates *group* activities, whether ''specifically authorized'' in a formal agency sense, or otherwise, we shall find the conduct to be concerted. In Board cases subsequent to *Meyers I*, we have followed that principle.[35] The Board decisions in *Mannington Mills*,[36] and *Allied Erecting Co.*,[37] cited by the court of appeals, are not contrary to that principle.

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and, possibly, with a union. The employer forbade the employee to discuss these matters with his coworkers or with a union and terminated him. In *Hugh H. Wilson Corp.*, 171 NLRB 1040 (1968), enfd. 414 F.2d 1345 (3d Cir. 1969) cert. denied 397 U.S. 935 (1970), a group of employees attended an employer-sponsored meeting and vocally took issue with the employer's administration of an employee profit-sharing plan. The employees subsequently held a group discussion about the profit-sharing plan. In *Guernsey-Muskingum Electric Coop., Inc.*, 124 NLRB 618 (1959), enfd. 285 F.2d 8 (6th Cir. 1960), three employees made a common decision, following group discussions among all three, that each would take their complaint to a high management representative. In *Carbet Corp.*, 191 NLRB 892 (1971), enfd. 80 LRRM 3054 (6th Cir. 1972), an employee complained to management about the employer's inadequate ventilation system. The employee's complaints had been instrumental in bringing about a union campaign and the employee previously had spoken to other employees about the ventilation problem, one of whom had replied, ''We've got to get a union, and maybe they could help us get it [an improved ventilation system].'' 191 NLRB at 898.

[35] See *Walter Brucker & Co.*, 273 NLRB 1306 (1984); *Advance Cleaning Service*, 274 NLRB No. 141 (Mar. 13, 1985); *Spencer Trucking Corp.*, 274 NLRB No. 206 (Mar. 29, 1985); *Dayton Typographical Service*, 273 NLRB 1205 (1984), enfd. in relevant part 778 F.2d 1188 (6th Cir. 1985).

[36] 272 NLRB 176 (1984).

[37] 270 NLRB 277 (1984).

In Mannington Mills, supra, the Board majority found that employee Frie was not acting in concert with any other employee when he threatened a work stoppage in protest of certain extra work assignments. Former Member Zimmerman, dissenting on other grounds, did not take issue with the majority finding that Frie acted alone in making this threat.[38] According to the Board's findings, there was no evidence to show (1) that any employee had authorized or instructed Frie to make the threat;[39] (2) that any employee had discussed with him the possibility of a work stoppage; or (3) that any employee was aware of and supported Frie's threat. The Board majority suggested that had any one of these facts which was missing from the record been present, Frie's threat may have been found to be concerted.

In Allied Erecting Co., supra, an employee contacted a representative of an employer (other than his immediate employer) to inquire whether employees on the project were covered by a contract. No evidence was presented that other employees in any way supported the employee's visit and the employee himself equivocated as to whether he even told any other employee about the prospective visit. The employee was fired because he had spoken to the other employer about his employer not paying union scale wages as required by the project contract. Concerted activity was not found.

In both Mannington and Allied, the circumstances failed to establish that the individual employee acted other than solely by and on behalf of himself. Neither case stands for the proposition that a group spokesman must be

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[38] See dissenting opinion of former Member Zimmerman in Mannington, 272 NLRB at 177--178.

[39] According to Frie's version, which was not specifically credited, other employees may have indicated to him their objection to perform certain work. The Board was unwilling to equate possible declarations of this kind with authorization, formal or informal, to Frie to pursue the action which he took.

''specifically authorized'' by the group to act in some formal declarative manner. Rather, there was not even a general awareness on the part of the group as to the intended action of the individual employee.

In Walter Brucker & Co., supra, which issued subsequent to Meyers I, the Board found that an individual employee acted on the authority of other employees within the meaning of Meyers I when that employee discussed with other employees a common wage complaint. The conduct was deemed concerted under the circumstances because a second employee refrained from making his own wage complaint, relying instead on the first employee to resolve the matter. Although there was no ''specific authorization'' in the formal agency sense, the record established that the employees acted as a group even though only the first employee further pursued the wage complaint, while the second employee was only generally aware that the first employee would take whatever action he deemed necessary to obtain the information concerning their wage dispute.

3. As to the court's question regarding Mushroom Transportation Co. v. NLRB,[40] the court stated that ''[it] is not clear, however, that the Meyers standard would protect an individual's efforts to induce group action.''[41] To clarify, we intend that Meyers I be read as fully embracing the view of concertedness exemplified by the Mushroom Transportation line of cases. We reiterate, our definition of concerted activity in Meyers I encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.

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[40] 330 F.2d 683 (3d Cir. 1964).
[41] 755 F.2d at 955.

In Meyers I we noted with approval Root-Carlin, Inc., 92 NLRB 1313, 1314 (1951), a decision antedating Meyers I by 33 years, wherein the Board recognized that:

> Manifestly, the guarantees of Section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization.

More recently, in Vought Corp., 273 NLRB 1290, 1294 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986), the Board noted with approval the Third Circuit's comments in Mushroom Transportation, supra, that:

> It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.

Ontario Knife Co. v. NLRB,[42] relied on by the Board in support of the Meyers I test, indicates that individual activity ''looking toward group action''[43] is deemed concerted. Although Meyers I did not expressly endorse Mushroom Transportation, it did so implicitly by its reliance on Ontario Knife Co., supra. To recall, the Board cautioned in Meyers I that the definition formulated was by no means exhaustive and that a myriad of factual situations would arise calling for careful scrutiny of record evidence on a case-by-case basis. The record facts of the case simply did not warrant an examination of the viability of Mushroom Transportation, supra.

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[42] 637 F.2d 840 (2d Cir. 1980). In this case, the Second Circuit found the action of an individual employee in walking off the job in protest of a work assignment was not concerted in the absence of evidence that other employees participated in or approved the walkout or evidence that the employee looked toward group action in walking off the job.

[43] 637 F.2d at 844--845 (quoting Mushroom Transportation Co. v. NLRB, supra, 330 F.2d at 685).

D. Contract Rights Versus Statutory Rights

Finally, because the Alleluia Cushion doctrine at its origin and in its most appealing form concerns a single employee's invocation of a statute enacted for the protection of employees generally, we must consider whether any linkages to concerted activity may be discerned in such an individual employee act or whether overall public policy considerations should move us to protect even purely individual activity that is aimed at securing employer compliance with other statutes that benefit employees.

As explained in our discussion of City Disposal, supra, the Supreme Court regarded proof that an employee action inures to the benefit of all simply as proof that the action comes within the ''mutual aid or protection'' clause of Section 7. It found ''concerted'' activity because the employee's invocation of the contract was an extension of the collective employee activity that produced the contract. We freely acknowledged that efforts to invoke the protection of statutes benefiting employees are efforts engaged in for the purpose of ''mutual aid or protection.'' As the Supreme Court noted in Eastex, Inc. v. NLRB, 437 U.S. 556, 565, 566 (1978), ''labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context''; and the Court thus observed that employees' resort to ''administrative and judicial forums'' and their ''appeals to legislators to protect their interests as employees are within the scope of [the 'mutual aid or protection'] clause.''

But this does not resolve the separate ''concerted activity'' issue.[44] As the Board noted in Meyers I, the courts of appeals have rejected the Alleluia doctrine of constructive concerted activity stemming from an employee's invocation of a statute. We reiterate the comments of the Fourth Circuit in Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304, 309 (4th Cir. 1980):

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[44] There was no question whether concerted activity was present in Eastex, since the activity there was employees' request that they be allowed to distribute on the employer's premises a union newsletter that discussed minimum-wage laws and a pending proposal concerning a state ''right-to-work'' law.

> The only courts which have considered it [the theory of presumed ''concerted activity''] have flatly rejected any rule that where the complaint of a single employee relates to an alleged violation of federal or state safety laws and there is no proof of a purpose enlisting group action in support of the complaint, there is ''constructive concerted action'' meeting the threshold requirement under Section 7.

Can an employee's invocation of a statute be regarded as the extension of ''concerted activity'' in any realistic sense? Certainly the activity of the legislators themselves cannot be said to be concerted activity within the contemplation of the Wagner Act. And while there may be concerted activity in the lobbying process preceding the passage of such legislation, the linkage is attenuated; any such activity is far removed from the particular workplace, and the critical link between lobbying and enforcement of the law is the legislative process itself, which is not a part of any ongoing employee-generated process such as the negotiation and administration of collective-bargaining agreements. If it was appropriate for the Supreme Court in Eastex to consider that ''at some point'' the relationship between some kinds of concerted activity and ''employees' interests as employees'' may be ''so attenuated'' that it cannot ''fairly be deemed to come within the 'mutual aid or protection' clause,'' then it is surely appropriate to conclude that at some point the relationship between some kinds of individual conduct and collective employee action may be ''so attenuated'' as not to mandate inclusion of that conduct in the ''concerted activity'' clause. Indeed, the Court in City Disposal made that very point, noting that

> . . . at some point an individual employee's actions may become so remotely related to the activities of fellow employees that it cannot reasonably be said that the employee is engaged in concerted activity.

465 U.S. at 833 fn. 10. Furthermore, a doctrine that rested on the presence of concerted employee activity prior to passage of a particular law would require a choice between two unattractive positions: either we would have to indulge in a presumption that all statutes that benefit employees are the product of concerted employee activity or we would have to make factual inquiries into who had worked for passage of the law in question.

In short, in construing Section 7 we are not holding that employee contract rights are more appropriate subjects for joint employee action than are rights granted by Federal and state legislation concerning such matters as employee safety. We merely find that invocation of employee contract rights is a continuation of an ongoing process of employee concerted activity, whereas employee invocation of statutory rights is not. We believe that we best effectuate the policies of the Act when we focus our resources on the protection of actions taken pursuant to that process.

With respect to the public policy question, we must simply note that, although it is our duty to construe the labor laws so as to accommodate the purposes of other Federal laws (see, e.g., Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 892--894 (1984); Southern Steamship Co. v. NLRB, 316 U.S. 31, 47 (1942)), this is quite a different matter from taking it upon ourselves to assist in the enforcement of other statutes. The Board was not intended to be a forum in which to rectify all the injustices of the workplace. In Meyers I, the Board noted that although we may be outraged by a respondent who may have imperiled public safety, we are not empowered to correct all immorality or illegality arising under all Federal and state laws (268 NLRB at 499). We note Judge Bork's comments in his dissenting opinion in this case that employee Prill may

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have a cause of action under state law,[45] and that the policy interests underlying his colleagues' suggestion should be addressed to the legislature or to the state courts. We further note that section 405 of the Surface Transportation Assistance Act of 1982, although enacted after Prill's discharge and not available to him, expressly prohibits the discharge, discipline, or imposition of other adverse treatment because an employee has filed a complaint or instituted any proceeding relating to motor carrier safety or because the employee has refused to drive a vehicle in certain circumstances. That statute provides for complaint procedures before the United States Department of Labor.

E. The ''Chilling Effect'' Question

We do not view Prill's discharge as having a ''chilling effect'' on the exercise of Section 7 rights by other employees. In City Disposal, the Court noted that the discharge of an employee who is not himself involved in concerted activity may violate Section 8(a)(1) if the employee's actions ''are related to other employees' concerted activities in such a manner as to render his discharge an interference or restraint on those activities.'' 465 U.S. at 833 fn. 10. Here, employee Prill acted alone and without an intent to enlist the support of other employees. The record fails to establish that his purely individual activities were ''related to other employees' concerted activities'' in any demonstrable manner. Even assuming arguendo that an otherwise lawful discharge may have some remote incidental effect on other employees, such an incidental effect does not render the discharge unlawful.

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[45] Prill filed a complaint with the Michigan Department of Labor alleging that his discharge violated the Michigan Occupational Safety and Health Act. On 5 November 1979 the Department dismissed Prill's complaint, finding he failed to satisfy his burden of establishing that his discharge violated the Michigan statute.

See Panaderia Sucesion Alonso, 87 NLRB 877, 881--882 (1949). Compare Parker-Robb Chevrolet, Inc., 262 NLRB 402, 404 (1982), enfd. sub nom. Automobile Salesmen Local 1095 v. NLRB, 711 F.2d 383 (D.C. Cir. 1983).

Conclusion

Accordingly, we adhere to the definition of concerted activity set forth in Meyers I as a reasonable construction of the Act. As we find that employee Prill acted alone and did not engage in concerted activities within the meaning of Section 7, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. 30 September 1986

Donald L. Dotson, Chairman

Marshall B. Babson, Member

James M. Stephens, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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268 NLRB No. 73

D--1277
Tecumseh, MI

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MEYERS INDUSTRIES, INC.

and

Case 7--CA--17207

KENNETH P. PRILL, an Individual

DECISION AND ORDER

On 14 January 1981 Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed cross-exceptions with supporting briefs, after which the General Counsel filed a brief in response to the Respondent's exceptions.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions only to the extent consistent with this Decision and Order.[3]

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[1] On 4 November 1980, after the hearing and before the judge's decision, the General Counsel, with the Charging Party's concurrence, moved to amend the complaint to include an additional allegation that the unlawful nature of Prill's discharge is supported by Sec. 502 of the National Labor Relations Act, as amended. The relevant portion of that section states:

> [N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

The judge, after considering the arguments of all parties, denied the General Counsel's motion by telegram of 11 November 1980. The General (continued)

Relying on Alleluia Cushion Co., 221 NLRB 999, the judge concluded that the Respondent violated Section 8(a)(1) of the Act when it discharged employee Kenneth P. Prill because of his safety complaints and his refusal to drive an unsafe truck after reporting its condition to the Tennessee Public Service

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[1] Counsel and the Charging Party cross-except. We note that counsel for the General Counsel engaged in lengthy argument at the hearing concerning the theory of her case both before as well as after the presentation of evidence, but gave no indication that Sec. 502 formed the basis for any portion of the General Counsel's case. In addition, although counsel for the Charging Party took the position at the hearing that Sec. 502 was applicable, counsel for the General Counsel thereafter reiterated that the theory of her case rested on Alleluia Cushion Co., 221 NLRB 999 (1975), and at no time adopted the Charging Party's position. Thus, although we agree with the judge that the General Counsel's motion to amend the complaint should be denied, we do so for the reason that the General Counsel neither raised nor litigated the Sec. 502 issue at the hearing. Accordingly, we affirm the judge's ruling and therefore do not reach the issue discussed in fn. 6 of the attached decision of whether Sec. 502 protects an employee in the circumstances of this case.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Respondent also asserts that the judge's decision is the result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit. There is no basis for finding that bias and partiality existed merely because the judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in NLRB v. Pittsburgh Steamship Co., 337 U.S. 656, 659 (1949), ''[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact.'' See generally Jack August Enterprises, 232 NLRB 881 (1977).

[3] The Charging Party urges, as part of its cross-exceptions, that it be awarded a reasonable attorney's fee for this litigation. When a respondent's defense is dependent upon resolutions of credibility and hence is ''debatable'' rather than ''frivolous,'' the Board has consistently refused to award litigation costs, even if the respondent has ''engaged in 'clearly aggravated and pervasive misconduct,' or in the 'flagrant repetition of conduct previously found unlawful.''' Heck's Inc., 215 NLRB 765, 767 (1974); see also Tiidee Products, 194 NLRB 1234 (1972). Upon a review of the record, we cannot say that Respondent's defenses were frivolous. Accordingly, we deny the Charging Party's request for reasonable attorney's fees.

Commission. Upon careful consideration, and for the reasons set forth below, we reject the principles the Board adopted in Alleluia, and do not agree with the view of protected concerted activity which that decision and its progeny advance. We, therefore, find that Respondent did not violate Section 8(a)(1) by discharging Prill.

I. The Concept of Protected Concerted Activity

The concept of concerted action has its basis in Section 7 of the Act, which states in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

Although the legislative history of Section 7 does not specifically define ''concerted activity,'' it does reveal that Congress considered the concept in terms of individuals united in pursuit of a common goal. The immediate antecedent of Section 7 was Section 7(a) of the National Industrial Recovery Act of 1933,[4] the purpose of which was, as then Congressman Boland suggested, to ''afford [the laboring person] the opportunity to associate freely with his fellow workers for the betterment of working conditions . . . . [and it] primarily creates rights in organizations of workers.''[5]

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[4] 48 Stat. 195, 198.
See also § 2 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 102. The Supreme Court has stated that ''Congress modeled the language of § 7 after that found in § 2 of the Norris-LaGuardia Act . . . which declares that it is the public policy of the United States that 'workers shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of . . . representatives or in self organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .''' Eastex, Inc. v. NLRB, 437 U.S. 556, 565 fn. 14 (1978).

[5] 79 Cong. Rec. H 2332 (daily ed. February 20, 1935) (statement of Rep. Boland), reprinted in II NLRB, Legislative History of the National Labor Relations Act of 1935, at 2431--32 (1935). (continued)

A review of the language of Section 7 leads to a similar united-action interpretation of ''concerted activity.'' The wording of that section demonstrates that the statute envisions ''concerted'' action in terms of collective activity: the formation of or assistance to a group, or action as a representative on behalf of a group. Section 7 limits the employee rights it grants to the examples of concerted activities specifically enumerated therein---''self-organization''; forming, joining, or assisting labor organizations; and bargaining collectively through representatives---and to engaging in ''other concerted activities for the purpose of collective bargaining or other mutual aid or protection.'' (Emphasis added.) Thus, the statute requires that the activities in question be ''concerted'' before they can be ''protected.'' Indeed, Section 7 does not use the term ''protected concerted activities,'' but only ''concerted activities.''[6]

Consistent with this interpretation, the Board and courts before Alleluia generally analyzed the concept of protected concerted activity by first considering whether some kind of group action occurred and, only then, considering whether that action was for the purpose of mutual aid or

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[5] Boland's analysis of the ''collectivist'' antecedents of what became Sec. 7 of the Act was recognized by others. See, e.g., William H. Spencer, Collective Bargaining Under Section 7(a) of the National Industrial Recovery Act 3--6 (1935).

[6] The Act does not protect all concerted activity. It is not a violation of the Act to restrain or coerce an employee because he engages in concerted activity that is not protected---either, for example, because such activity contravenes another section of the Act or another statute, or because it was not engaged in ''for the purpose of collective bargaining or other mutual aid or protection.'' See Eastex, 437 U.S. at 568 fn. 18. See generally Gregory, Unprotected Activity and the NLRA, 39 Va. L. Rev. 421 (1953).

protection.[7] In a 1951 case, *Root-Carlin, Inc.*,[8] the Board addressed the issue of what was required in order for activity to be ''concerted.'' The case involved only conversation among employees about the need for a union in their workplace. The *Root-Carlin* Board stated:

> Manifestly, the guarantees of Section 7 of the Act extend to concerted activity which *in its inception involves only a speaker and a listener*, for such activity is an indispensable preliminary step to employee self-organization. [Emphasis added. 92 NLRB at 1314.]

Significantly, the Board described concerted activity in terms of interaction among employees.

Several years later, the Board again considered what constituted concerted activity in *Traylor-Pamco*.[9] That case involved the discharge of two men who consistently ate their lunch in the ''dry shack'' even during a concrete pour, while everyone else ate in the less pleasant surroundings of the tunnel so as to minimize ''downtime.'' The trial examiner, with Board approval, declined to find the employees' refusal to eat in the tunnel to be concerted, stating: ''There is not even the proverbial iota of evidence that there was any consultation between the two in the matter, that either relied in any measure on the other in making his refusal, or that their association in refusing to eat in the tunnel was anything but accidental.'' 154 NLRB at 388. Thus, in *Traylor-Pamco*, the Board continued to define concerted activity in terms of employee interaction in support of a common goal.

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[7] See, e.g., *Texas Textile Mills*, 58 NLRB 352 (1944); *Hymie Schwartz d/b/a Lion Brand Mfg. Co.*, 55 NLRB 798 (1944), enfd. in relevant part 146 F.2d 773 (5th Cir. 1945); *Globe Co.*, 54 NLRB 1 (1943); *M. F. A. Milling Co.*, 26 NLRB 614 (1940), enfd. in relevant part 115 F.2d 140 (8th Cir.).

[8] 92 NLRB 1313 (1951).

[9] 154 NLRB 380 (1965).

Thereafter, the Board decided Continental Mfg.,[10] in which employee Ramirez prepared and signed, on her own, a letter that she handed to respondent's owner. The letter stated that a majority of employees were disgusted with their treatment, that a supervisor played favorites, and that a janitor was needed for the women's bathroom. The letter concluded, ''We all want to continue working here with you; please help us to improve our working conditions.'' The Board reversed the trial examiner's finding that Ramirez' letter constituted concerted activity, stating:

> The letter, which was directed only to the Respondent, was prepared and signed by Ramirez acting alone. She did not consult with . . . any other employee, or the Union about the grievances therein stated or her intention of sending the letter to DeSantis [an owner of respondent]. There is no evidence that the criticisms in the letter reflected the views of other employees, nor is there evidence that the letter was intended to enlist the support of other employees. This letter received no support from union representatives. . . . [155 NLRB at 257.]

Once again, the Board defined concerted activity in terms of interaction among employees.[11]

In recent years, but before Alleluia, the Board often decided the circumstances under which apparently individual activity may properly be characterized as ''concerted.'' One of these cases, G. V. R., Inc.,[12] is factually indistinguishable from Alleluia, but equivocal in its reasoning. Glace and Curry were two employees who reported to the United States Army and the Department of Labor that their employer forced them to ''kickback'' portions of their wages. The judge found that Glace and Curry were discharged in violation of Section 8(a)(1) of the Act because they concertedly made complaints to United States agencies about their wages, hours, and working conditions.[13] At footnote 2 of its decision, the Board majority noted:

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[10] 155 NLRB 255 (1965).

[11] The Board's analysis of the facts in Continental Mfg., which were similar to those in Alleluia, was directly contrary to the Alleluia Board's reasoning.

[12] 201 NLRB 147 (1973) (former Chairman Edward Miller dissenting).

> The Administrative Law Judge found, in substance, that even in the absence of concerted activity, ''Public policy would be frustrated if employees . . . could not, with full protection of the Act, make complaints to public agencies about wages, hours, etc., without fear of reprisals.''

The Board majority specifically disavowed the judge's language, stating:

> We do not adopt this improper extension of our enunciated principle that it would be contrary to public policy to hold that the making of complaints to public authorities in the course of concerted activity removes the protection of the Act from the concerted activity. . . . [Emphasis in original. 201 NLRB 147 at fn. 2.]

Despite the Board's rejection of the judge's extension of the concept of concerted activity, the Board majority stated:

> We also find, in addition to these reasons [the evidence of Glace's and Curry's actual concerted activities], that an employee covered by a federal statute governing wages, hours, and conditions of . . employment who participates in a compliance investigation of his employer's administration of a contract covered by such a statute, or who protests his employer's noncompliance with the contract, is engaged in concerted activity for the mutual aid and protection of all the employer's employees similarly situated. [Emphasis added. 201 NLRB at 147.][14]

Thus, with G. V. R., the Board apparently declined to extend its concept of concerted action as a matter of policy, but did so as a matter of law. The distinction is a difficult one to discern.

II. Alleluia, Its Progeny, and the Development of the Per Se Standard of Concerted Activity

With Alleluia, the transformed concept of concerted activity was at last revealed. In that case, maintenance employee Jack Henley registered safety complaints with respondent. Henley was later transferred to another facility,[15] where he encountered similar safety problems. Not satisfied with Alleluia's response to these problems, Henley wrote a letter of complaint to the California OSHA office (Occupational Safety and Health Administration), with a copy to respondent. The Board found no evidence that, before complaining to respondent or writing to California OSHA, Henley discussed the safety problems with other employees, sought their support in remedying the problems, or requested assistance in preparing the letter. Henley accompanied the OSHA inspector on a plant tour and was discharged the following day.

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[13] The judge and the Board majority found evidence that Glace and Curry had actually acted in concert during the course of the investigation.

[14] The ''contract'' referred to in the decision was not a collective-bargaining agreement, but a contract for services entered into between respondent and the United States Army.

The judge dismissed the complaint in its entirety, finding no outward manifestation of group action. The Board disagreed and found concerted activity. The Board reasoned from the premise that ''[s]afe working conditions are matters of great and continuing concern for all within the work force.'' In support of that premise, the Board noted that both the Federal Government and the States had made known their concern with this area of industrial life through occupational safety and health legislation. The Board, therefore, reasoned that because Congress and the States made manifest the apparent national will in the area of industrial safety, ''the consent and concert of action emanates from the mere assertion of such statutory rights.''

Under the Alleluia approach, an observable manifestation of ''group will'' in the workplace (as distinguished from the legislature) was no longer required to find concert of action. The existence of relevant legislation and its invocation by a solitary employee became sufficient to find concerted activity. The practical effect of this change was to transform concerted activity into a mirror image of itself. Instead of looking at the observable evidence of group action to see what men and women in the workplace in fact chose as an issue about which to take some action, it was the Board that determined the existence of an issue about which employees *ought* to have a group concern. Stated another way, under the *Alleluia* analytical framework, the Board questioned whether the purpose of the activity was one it wished to protect and, if so, it then deemed the activity ''concerted,'' without regard to its form. This is the essence of the *per se* standard of concerted activity. We emphasize that the Board, in *Alleluia*, presumed to divine the relevance of the safety issue to the ''theoretical'' employee group by pointing to the existence of legislation in the health and safety area. *Alleluia*'s progeny, however, dropped even the requirement of legislative action, and the Board ultimately decided what ought to be the subject matter of working persons' concern when the statutory manifestation of such ''group concern'' was slim or nonexistent.[16]

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[15] The transfer was not at issue.

Another aspect of the *Alleluia* doctrine warrants scrutiny. Perhaps in an attempt to retain some element of the previous requirement of observable evidence of group support, the Board stated:

> Accordingly, where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, *in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity* to be concerted. [Emphasis added. 221 NLRB at 1000.]

This is yet another mirror image turn that the definition of concerted activity has taken. In the past, we required the General Counsel to prove support by other employees in order to find activity concerted. With *Alleluia*, the Board seemed to require a respondent to submit evidence that other employees disavowed the activity to prove that it was not concerted. This is a clear shift in the burden of proof, not countenanced by either the legislative history or judicial interpretation of Section 7.[17]

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[16] In *Air Surrey Corp.*, 229 NLRB 1064 (1977), enf. denied 601 F.2d 256 (6th Cir. 1979), and *Pink Moody, Inc.*, 237 NLRB 39 (1978), *Alleluia* was expanded to include state banking statutes and motor vehicle laws, respectively.

In *Steere Dairy, Inc.*, 237 NLRB 1350 (1978), and *Ontario Knife Co.*, 247 NLRB 1288 (1980), enf. denied 637 F.2d 840 (2d Cir. 1980), the statutory element of *Alleluia* was not present, and individual conduct was deemed to be concerted solely on the theory that it involved a matter the Board considered to be of concern to the group.

The courts of appeals that have reviewed the post-Alleluia cases have rejected the per se standard of concerted activity.[18] In Krispy Kreme, the Fourth Circuit summarized the response of the courts as follows:

> The Board cites no circuit decision supporting its theory of presumed ''concerted activity'' in this case. The only courts which have considered it have flatly rejected any rule that where the complaint of a single employee relates to an alleged violation of federal or state safety laws and there is no proof of a purpose enlisting group action in support of the complaint, there is ''constructive concerted action'' meeting the threshold requirement under Section 7. [635 F.2d at 309.]

For all the foregoing reasons, we are persuaded that the per se standard of concerted activity, by which the Board determines what ought to be of group concern and then artificially presumes that it is of group concern, is at odds with the Act. The Board and courts always considered, first, whether the activity is concerted, and only then, whether it is protected. This approach is mandated by the statute itself, which requires that an activity be both ''concerted'' and ''protected.'' A Board finding that a particular form of individual activity warrants group support is not a sufficient basis for labeling that activity ''concerted'' within the meaning of Section 7.[19]

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[17] Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304, 310 (4th Cir. 1980).

[18] E.g., Ontario Knife Co. v. NLRB, 637 F.2d 840 (2d Cir. 1980); Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304 (4th Cir. 1980); NLRB v. Dawson Cabinet Co., 566 F.2d 1079 (8th Cir. 1977).

[19] Southern Steamship Co. v. NLRB, 316 U.S. 31 (1942), cited by the Board in Alleluia, is not to the contrary. That case involved a strike on board a ship moored in an American port. The strike, which was found to be in violation of the Federal mutiny statutes, would otherwise have been protected by the National Labor Relations Act. The Supreme Court resolved the conflict between the Act and the mutiny statutes by instructing the Board that it could not order the reinstatement of strikers who, under the circumstances, had engaged in a criminal act. In short, the (continued)

III. Interboro Distinguished From Alleluia

The Board's decision in Interboro Contractors [20] holds that actions an individual takes in attempting to enforce a provision of an existing collective-bargaining agreement are, in effect, grievances within the framework of that agreement.[21] It is not our intention to set forth the parameters of Interboro in this case, but rather to distinguish Interboro from Alleluia.

The focal point in Interboro was, and must be, the attempted implementation of a collective-bargaining agreement. By contrast, in the Alleluia situation, there is no bargaining agreement, much less any attempt to enforce one, and we distinguish the two cases on that basis.

IV. Definition of Concerted Activity

Based on the foregoing analysis, we hold that the concept of concerted activity first enunciated in Alleluia does not comport with the principles inherent in Section 7 of the Act. We rely, instead, upon the ''objective'' standard of concerted activity---the standard on which the Board and courts relied before Alleluia. Accordingly, we hereby overrule Alleluia and its progeny.

Although the definition of concerted activity we set forth below is an attempt at a comprehensive one, we caution that it is by no means exhaustive. We acknowledge the myriad of factual situations that have arisen, and will

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[19] Board was required to accommodate its own mandates to those of another statutory scheme. Such accommodation, we emphasize, had the effect of narrowing the scope of the National Labor Relations Act. The ''accommodation'' the Alleluia decision compelled, however, involved nothing less than using other statutes to create rights that do not exist under the Act.

[20] 157 NLRB 1295, 1298 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).

[21] The issue of the validity of the Interboro doctrine is presently pending before the Supreme Court. City Disposal Systems, 256 NLRB 451 (1981), enf. denied 683 F.2d 1005 (6th Cir. 1982), cert. granted 51 U.S.L.W. 3703 (U.S. March 28, 1983) (No. 82--960).

continue to arise, in this area of the law. In general, to find an employee's activity to be ''concerted,'' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.[22] Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity.[23]

We emphasize that our return to a pre-*Alleluia* standard of concerted activity places on the General Counsel the burden of proving the elements of a violation as set forth herein. It will no longer be sufficient for the General Counsel to set out the subject matter that is of alleged concern to a theoretical group and expect to establish concert of action thereby.

We also emphasize that, under the standard we now adopt, the question of whether an employee engaged in concerted activity is, at its heart, a factual one, the fate of a particular case rising or falling on the record evidence. It is, therefore, imperative that the parties present as full and complete a record as possible.

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[22] See *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 845 (2d Cir. 1980); *Pacific Electricord Co. v. NLRB*, 361 F.2d 310 (9th Cir. 1966).

[23] See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, approved in *NLRB v. Transportation Management Corp.*, 113 LRRM 2857, 97 LC ¶ 10,164 (1983).

Under this standard, an employee ''may be discharged by the employer for a good reason, a poor reason, or no reason at all, so long as the terms of the statute are not violated.'' *NLRB v. Condenser Corp. of America*, 128 F.2d 67, 75 (3d Cir. 1942). Thus, absent special circumstances like *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), there is no violation if an employer, even mistakenly, imposes discipline in the good-faith belief that an employee engaged in misconduct.

V. Application of the Definition of Concerted Activity to the Facts of the Instant Case

As the judge found, Charging Party Kenneth P. Prill drove trucks for a number of years and was an owner-operator for the 4 years before his employment by the Respondent. The Respondent assigned Prill to drive what was described as the ''red Ford truck'' and its accompanying trailer, with which he hauled boats from the Respondent's facility in Tecumseh, Michigan, to dealers throughout the country. Prill's equipment, particularly the brakes and steering, gave him difficulty on a number of occasions, and he often lodged complaints with the Respondent concerning malfunctions.

Although the red Ford truck and trailer were assigned to Prill on what might fairly be described as a permanent basis, during the first 2 weeks of June 1979 Prill's fellow employee, Ben Gove, was assigned that equipment while Prill was absent from work. On a trip to Sudberry, Ontario, Gove experienced steering problems which nearly caused an accident. On Gove's return, he informed Supervisor Dave Faling of difficulties with the truck. Prill, who had by then returned to work, was also in Faling's office to receive paperwork for an upcoming trip. Prill was present when Gove told Faling that he ''wouldn't take the truck as far as Clinton and back, until they had done some repair on it. Until someone repaired it. I [Gove] didn't care who done it, but I wasn't going to drive it no farther.''

The Respondent's mechanic, Buck Maynard, made an unsuccessful attempt to correct the problems. Thereafter, on a trip to Xenia, Ohio, during which the brakes malfunctioned, Prill voluntarily stopped at an Ohio State roadside inspection station where the trailer was cited for several defects, some relating to the brakes. Prill forwarded the citation to the Respondent's officials.

In July 1979, while driving through Tennessee, Prill was involved in an accident caused by the malfunctioning brakes. Prill telephoned the Respondent's president, Alan Beatty, who instructed Prill to have a mechanic look at the equipment, but to get it home as best he could. The following morning Prill again called Beatty. The Respondent's vice president, Wayne Seagraves, joined the conversation on an extension telephone. Both Beatty and Seagraves were upset with Prill for not having left Tennessee, and a decision was made to send Maynard to Tennessee to examine the equipment.

Thereafter, Prill, of his own volition, contacted the Tennessee Public Service Commission to arrange for an official inspection of the vehicle. The following morning a citation was issued, and the unit was put out of service due to bad trailer brakes and damage to the hitch area of the truck. The citation mentioned several Department of Transportation regulations, including 49 C.F.R. § 396.4, which prohibits the unsafe operation of a vehicle. A commission representative instructed Prill that certain repairs would have to be made before the vehicle could be moved.

When Maynard arrived in Tennessee, Prill showed him the citation. Maynard called Beatty, and it was decided to sell the trailer for scrap. Prill then drove the truck back to Tecumseh.

The judge found that when Prill reported in on 5 July 1979 he turned in his paperwork and was summoned to Seagraves' office. Seagraves questioned him about the accident and the damage to the truck. He asked why Prill did not chain the truck and trailer together and drive back. Prill responded that he did not believe it was safe to drive the vehicle. Seagraves then said that Prill would be terminated because ''we can't have you calling the cops like this all the time.'' Beatty, who had entered the office during the conversation, also asked why Prill did not chain the truck and trailer. Prill responded that it would have been unsafe and unlawful in view of the citation.

The judge concluded that Prill was discharged for two reasons: (1) his refusal to drive an unsafe vehicle after filing the report with the Tennessee Public Service Commission, and (2) his earlier safety complaints, including a complaint to Ohio authorities. The judge held that Prill's discharge was unlawful, relying on Alleluia, which he noted, ''established a presumption that an individual employee engages in concerted activity where his conduct arises out of the employment relationship and is a matter of common concern among all employees.'' (Decision of the administrative law judge, sec. II,B, par. 2.) [24] The judge further noted in support of his Alleluia analysis that Prill's refusal to drive the equipment was mandated by Department of Transportation regulations, which require that an inspection be made after an accident to determine the extent of damage, and also that a vehicle cited as unsafe not be operated until it is repaired.[25]

The judge found that Prill, by contacting local authorities and refusing to drive the vehicle, was enforcing the cited provisions of the national transportation policy, and that his invoking the Tennessee Public Service Commission's inspection apparatus was the legal equivalent of a safety complaint to OSHA. See Alleluia. The judge concluded his analysis by stating that Respondent was ''free, under Alleluia Cushion, to rebut the inference that Prill's activity inured to the benefit of all employees. It could have been shown, for example, that Prill's protests and complaints were not made in good faith or were simply the idiosyncrasies of a super sensitive individual whose concerns could not have been shared by other truckdrivers in similar circumstances. This Respondent failed utterly to accomplish.'' (Decision of the administrative law judge, sec. II,B, par. 10.)

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[24] The judge additionally relied on Ontario Knife Co., 247 NLRB 1288 (1980), enf. denied 637 F.2d 840 (2d Cir.); Steere Dairy, 237 NLRB 1350 (1978); and Pink Moody, Inc., 237 NLRB 39 (1978).

[25] Citing Federal Motor Carrier Safety Regulations, 49 C.F.R. § 396.4.

Rejecting, as we do, the judge's reliance on Alleluia we find that the Respondent did not violate Section 8(a)(1) of the Act when it discharged Prill for refusing to drive his truck and trailer and for contacting state authorities. Prill alone refused to drive the truck and trailer; he alone contacted the Tennessee Public Service Commission after the accident; and, prior to the accident, he alone contacted the Ohio authorities. Prill acted solely on his own behalf. It follows that, without the artificial presumption Alleluia created, the facts of this case do not support a finding that Prill engaged in concerted activity.

There is one other point that warrants consideration. The judge stated that ''Prill's complaints about the trailer brakes prior to the accident were clearly concerted since they were joined by driver Gove who made similar complaints, in Prill's presence, to management officials about the safety of Prill's vehicle when he, Gove, was assigned to drive it for 2 weeks.'' (Decision of the administrative law judge, sec. II,B, par. 8.) It is not certain whether the judge cited this evidence in support of his Alleluia analysis, or in support of an alternative pre-Alleluia rationale. To the extent that the judge appears to have concluded that this record evidence would lead to a finding of concerted action under a pre-Alleluia analysis, we reject his conclusion.

The record is clear that Prill merely overheard Gove's complaint while in the office on another matter, and there is no evidence that anything else occurred. The record reflects, and the judge found, only that Prill stood by when Gove made his complaint; the judge correctly made no factual finding that

Prill and Gove in any way joined forces to protest the truck's condition. Indeed, the most that can be inferred from this scenario is that another employee was individually concerned, and individually complained, about the truck's condition. Taken by itself, however, individual employee concern, even if openly manifested by several employees on an individual basis, is not sufficient evidence to prove concert of action.

In this regard, the Alleluia presumption has only engendered analytical confusion. Thus, under Alleluia, concern is presumed unless otherwise rebutted; to affirmatively show that another employee is individually concerned, or even lodges a complaint, adds not one whit to an Alleluia analysis. Yet, evidence of individual concern by more than one employee has come to be viewed as evidence of concert itself, and has so blurred the distinction between the two types of evidence that the Board has lost sight of what is required of a pre-Alleluia analysis.

In its pre-Alleluia days the Board had, in fact, considered factual patterns similar to that presented herein and had declined to find concerted activity. See, e.g., Traylor-Pamco and Continental Mfg., discussed supra. As with the employees who ate their lunch together in Traylor-Pamco, there is no evidence here that there was any concerted plan of action between Gove and Prill, or that either relied in any measure on the other when each refused to drive the truck. In addition, as in Continental Mfg., there is no support for a finding that either Gove's or Prill's refusal was intended to enlist the support of other employees. Prill's refusal to drive the truck and trailer and his report to the Tennessee Public Service Commission were made by himself and for himself alone, and thus cannot be deemed concerted.

One might nonetheless fairly argue that Prill's situation is a sympathetic one that should cause us concern. We do not believe, however, that

Section 7, framed as it was to legitimize and protect group action engaged in by employees for their mutual aid or protection, was intended to encompass the case of individual activity presented here. Although it might be argued that a solitary over-the-road truckdriver would be hard pressed to enlist the support of coworkers while away from the home terminal, the Board, to paraphrase former Chairman Edward Miller's dissent in G. V. R., is neither God nor the Department of Transportation. Outraged though we may be by a respondent who---at the expense of its driver and others traveling on the nation's highways---was clearly attempting to squeeze the last drop of life out of a trailer that had just as clearly given up the ghost, we are not empowered to correct all immorality or even illegality arising under the total fabric of Federal and state laws.

In conclusion, we acknowledge that there are few areas of the law that are entirely free of uncertainty or disagreement. We are persuaded, however, that Alleluia and its progeny have been an unfortunate deviation from the objectives and purposes of the Act, as defined by its legislative and judicial history, and it will not serve us well, nor those whom we are charged to protect, to continue to adhere to Alleluia's precepts.

Accordingly, based on all the foregoing reasons, and the record as a whole, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. 6 January 1984

Donald L. Dotson, Chairman

Robert P. Hunter, Member

Patricia Diaz Dennis, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER ZIMMERMAN, dissenting:

My colleagues today reject the theory of implied concerted activity developed in Alleluia Cushion Co., 221 NLRB 999 (1975). Their ruling allows Respondent to lawfully discharge employee Prill for filing a complaint with the Tennessee Public Service Commission (Tennessee Commission) after having an accident due to faulty brakes. My colleagues admit there may be something outrageous about an employer who is willing to endanger its employees by attempting to force the use of a trailer which had ''clearly given up the ghost.'' They also concede that a solitary over-the-road truckdriver would be hard pressed to enlist the support of coworkers while away from the home terminal. Nevertheless, they find this employee unprotected by the Act because no other employee expressly joined him in lodging the complaint with the Tennessee Commission.

My colleagues report today that the Board is not God. If only their expectation of employees covered by this Act were equally humble. Protection for such employees, they now announce, will be withheld entirely if in trying to insure reasonably safe working conditions they happen not to be so omniscient as to rally other employees to their aid in advance. No matter that the conditions complained of are highly hazardous, or that they are a potential peril to other employees, or that they are the subject of government safety regulation. This is a distortion of the rights guaranteed employees by the Act. The historical roots of ''concerted activity'' lie in the movement to shield organized labor from the criminal conspiracy laws and the injunctive power of the courts. It goes against the history and spirit of Federal labor laws to use the concept of concerted activity to cut off protection for the individual employee who asserts collective rights. It is my colleagues who use mirrors on Section 7 and not the Board which decided Alleluia Cushion Co.

I. The Alleluia, Decision Is Based On Two Rationales

Alleluia involved the discharge of an employee for filing a complaint with the California office of the Occupational Safety and Health Administration (OSHA). It was undisputed that the employee acted alone in protesting the lack of safety precautions. The Board nevertheless found this individual action to be concerted and protected by the Act on the ground that it must be presumed that other employees shared the interest in safety and supported the single employee's complaint. The Board's decision contains two rationales for the presumption of concerted action. First, reference is made to safe working conditions as ''matters of great and continuing concern for all within the workforce''[1] and occupational safety is identified as ''one of the most important conditions of employment.''[2] In addition, the Board emphasized that the nature and extent of the employee's complaints demonstrated that while the employee was concerned for his individual safety, his object also encompassed the well-being of his fellow employees. Second, the Board pointed to the public policy enunciated in the Occupational Safety and Health Act and made the following analysis:

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[1] 221 NLRB at 1000.

> [S]ince minimum safe and healthful employment conditions for the protection and well-being of employees have been legislatively declared to be in the overall public interest, the consent and concert of action emanates from the mere assertion of such statutory rights. Accordingly, where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted.[3]

The two rationales are discrete: the first presumes concert from the presence of a matter of ''great and continuing concern'' to the work force and requires an analysis of the specific complaint to determine whether it goes beyound individual concerns; the second presumes concert from the legislative declaration of public interest in a matter relating to the workplace and requires the assertion of a statutory right. Neither rationale was articulated with precision. Though these two approaches are different, the Alleluia decision intertwined them, treating them as one. This mixture of rationales undoubtedly created conditions for court opposition to the concept of concerted activity in Alleluia. Criticism of the opinion is therefore understandable. But that alone is not sufficient ground for rejecting the principles established in the decision.

The case before us involves only one of the principles embodied in Alleluia---that an employee's assertion of an employment-related statutory right can be presumed to be activity covered by the NLRA. As such it requires no consideration of general arguments concerning a presumption of concert in the assertion of a matter of common concern to the work force.

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[2] Id.
[3] Id.

I would find in this case, as did the Board in Alleluia, that the presumption of concert in the assertion of an employment-related statutory right is proper and valid. This position is based on the Board's recognized authority to apply presumptions and on the finding that the presumption of concerted activity in the individual assertion of a statutory right concerning the workplace is consistent with the legislative history of Section 7 of the Act, is supported by the policies of the Act, and fulfills the Board's responsibility to accommodate the Act to other employment legislation.

II. The Policies of the Act and the Historical Use of the Term ''Concert'' Indicate that Section 7 Protects the Individual Assertion of a Work-Related Statutory Right

The central purpose of the Act is to avoid or minimize industrial strife which interferes with the normal flow of commerce. Section 1(b) of the Labor Management Relations Act (29 U.S.C. 141(b)) asserts that this purpose can be achieved if employers, employees, and labor organizations ''each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety or interest.'' Section 1 of the Act further declares that it is ''the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by protecting the exercise by workers of full freedom of association . . . for the purpose of . . . mutual aid or protection.'' Section 7 of the Act then sets forth the boundaries of employees' protected rights, establishing the right ''to engage in other concerted activities for the purpose of . . . mutual aid or protection.''

There is no question that the assertion of a work-related statutory right by two or more employees falls within the above-described policies and protections of the Act. It involves association for the purpose of mutual aid or protection and opposes an act or practice by the employer which may jeopardize public health, safety, or interest. However, an individual employee's assertion of such a statutory right raises a question concerning the applicability of the Act because it is not taken in physical and simultaneous concert with at least one other employee and the language of Section 7 specifically mentions ''concerted activity.''

Opposing courts have taken the view that ''concerted'' means literal group action. The legislative history of the Act neither supports nor refutes this interpretation. It is vitually silent as to the precise meaning and applicability of ''concerted activities.'' But the likely explanation for this silence is that, in view of the history leading up to enactment of Section 7, there existed, at the time of enactment, no need for precise definition of the term.

A. The Earliest Use of the term Concerted was in Opposition to the Application of the Doctrine of Criminal Conspiracy to Employees' Organizing Efforts

The earliest attempts of American labor to organize in order to improve working conditions were met by judicial application of the doctrine of criminal conspiracy as established in England in the 18th century.[4] That doctrine permitted individual conduct, but proscribed the same conduct by two or more persons acting together:

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[4] See generally Russell A. Smith, Leroy S. Merrifield, and Theodore J. St. Antoine, Labor Relations Law (4th ed. 1968) at 1--54 and Robert (continued)

> As in the case of journeymen conspiring to raise their wages; each may insist on raising his wages if he can; but if several meet for the same purpose, it is illegal and the parties may be indicted for a conspiracy. Rex. v. Mawbey, 6 T.R. 619, 636 (1796).

In a 19th century case, Justice Holmes noted the anomaly which allowed individual action but found criminal the same action taken collectively by a group. He took issue with the conspiracy doctrine in a dissenting opinion in Vegelahn v. Gunter:[5]

> But there is a notion which latterly has been insisted on a good deal, that a combination of persons to do what any one of them lawfully might do by himself will make the otherwise lawful conduct unlawful. It would be rash to say that some as yet unformulated truth may not be hidden under this proposition. But in the general form in which it has been presented and accepted by many courts, I think it plainly untrue, both on authority and on principle.

Despite use of the conspiracy doctrine and the attendant labor injunction, the movement toward organized labor continued and eventually made an impact on the legislative process. Some of the earliest labor legislation was directed toward insulating organized labor from the criminal conspiracy doctrine and the injunctive power of the courts. It is in this context that the term ''concert'' first appeared. The Clayton Act of 1914 provided that ''no . . . injunction shall prohibit any person or persons, whether singly or in concert, from . . . ceasing to perform any work or labor . . . .''[6] The term appeared again in the Norris-LaGuardia Act both in a clause prohibiting injunctions [7] and in a clause which is similar to the language used in Section 7 of the Act: ''it is necessary that [the individual unorganized worker] shall be free from the interference, restraint or coercion of employers . . . in self-organization or in other concerted activities for the purpose of

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[4] A. Gorman and Matthew W. Finkin, The Individual and the Requirement of ''Concert'' under the National Labor Relations Act, 130 U. Pa. L. Rev. 286.

[5] 167 Mass. 92, 44 N.E. 1077 (1896).

[6] 38 Stat. 738 (1914), 29 U.S.C. § 51 (1946).

[7] 47 Stat. 70 (1932), 29 U.S.C. § 104 (1946).

collective bargaining or other mutual aid or protection . . . .''[8] Identical language was used in Section 7(a) of the National Industrial Recovery Act,[9] and subsequently in Section 7 of the NLRA, providing that ''concerted activities for the purpose of collective bargaining or other mutual aid or protection'' shall not be interfered with. It thus appears that the concept of concerted activities which first emerged in the Clayton Act of 1914 as a check against the use of the criminal conspiracy doctrine was picked up, without comment, in subsequent labor legislation.

B. ''Concerted Activities'' May Reasonably be Contrued as Supplementing an Individual Employee's Rights

Given this history, it is reasonable to construe the term ''concerted'' in the Act as expanding preexisting employee rights concerning the workplace, assuring that acts lawfully undertaken by an individual could not be deemed unlawful when undertaken as a group. While the Act focuses on collective action, there is no indication that the term applies only to literal collective action or was intended by Congress to limit the assertion of employee rights.[10] Rather, the term appears to limit only the assertion of individual rights which have no relationship to any collective effort to improve working conditions or to extend aid or protection to fellow workers.

C. The Assertion of a Work-Related Statutory Right Falls Within the Meaning of ''Concerted Activity''

A work-related statutory right is not in essence an individual right; instead, it is a right shared by and created for employees as a group through the legislative process at the Federal or state level. In such a case, the legislature determines that maintenance or establishment of a particular condition of employment is in the public interest. The statute is addressed to the needs of employees as a class or strata within the society at large. When viewed against the historical background of the Act, an individual employee's assertion of this type of statutory right is fully consistent with the literal group action of employees requesting higher wages for all. In both instances, the action concerns employees as a group constituting an opposing force to the economic power of employers, the very type of action that the earliest uses of the term ''concerted'' were designed to protect.

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[8] 47 Stat. 70 (1932), 29 U.S.C. § 102 (1942).

[9] 48 Stat. 198 (1938).

[10] Congressman Bolard's remarks, cited by the majority, provide no such indication, as they merely focus on the expansion of rights.

III. The Supreme Court Has Long Acknowledged the Board's Authority to Use Presumptions in Administering the Act

The Alleluia decision makes the presumption that the individual assertion of an employment-related statutory right is a concerted act. The creation of presumptions by the Board based on the realities of the workplace is not a unique phenomenon. In 1945 the Supreme Court approved the Board's use of such a presumption in Republic Aviation Corp.[11] That case involved the presumption that a rule prohibiting union solicitation by employees outside of working hours is an unreasonable impediment to self-organization and hence unlawful. In rejecting the attack on the Board's use of this presumption, the Court stated:

> An administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. One of the purposes which led to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration. [Citations omitted.][12]

The Court found no error in the Board's adoption of the presumption, noting that it was ''the product of the Board's appraisal of normal conditions about industrial establishments. Like a statutory presumption or one established by regulation, the validity, perhaps in a varying degree, depends upon the rationality between what is proved and what is inferred.''[13] .

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[11] Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).
[12] Id. at 800.

Here, it is undisputed, and therefore proven, that a right concerning the workplace has been established by a legislature and an individual has suffered adverse consequences from asserting that right. Unlike my colleagues, I would infer that the assertion of the right is, at its core, a concerted act. Thus, a matter concerning conditions of employment which legislatively has been deemed in the public interest may certainly be presumed a matter of concern to all the employees for whom the statute has been enacted.[14] For the reasons set forth in section II, this inference of concert is one rationally drawn from the proven facts and is, therefore, valid under the standards of Republic Aviation Corp.

IV. The Inference of Concert in the Individual Assertion of a Work-Related Statutory Right is Supported by the Act's Policies and the Board's Mandate to Accommodate Other Employment Legislation

As shown above, there is a rational connection between the assertion of a statutory right governing the workplace and the inference that all employees whose rights are protected by the statute support the individual assertion of those rights. Not only is this presumption of concerted action supported by the historical use of the term ''concerted,'' but also by the Act's policies and by the Board's mandate to administer the Act in accommodation with other employment legislation.

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[13] Id. at 804--805.

[14] See, e.g., Bethlehem Shipbuilding Corp. v. NLRB, 114 F.2d 930, 937 (1st Cir. 1940), petition for cert. dismissed on motion of petitioner 312 U.S. 710 (1941) (involving unlawful interference with employee efforts to secure favorable workmen's compensation legislation).

The Act specifically states that the purpose of avoiding and minimizing industrial strife can be achieved if employers, employees, and labor organizations ''above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety or interest.''[15] The Act therefore contemplates a concern by employees for matters affecting the public health, safety, or interest. Further, the Board has been admonished to recognize the purposes of other employment legislation and to construe the Act in a manner supportive of the overall statutory scheme. The Supreme Court stated in Southern Steamship Co. v. NLRB, 316 U.S. 31, 47 (1942):

> [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

Given these policies and admonitions, it is reasonable to presume that when an individual employee invokes a statute governing a condition in the workplace he is within the scope of employee action contemplated by the Act (i.e., a challenge to an employer's practice concerning the public health, safety, or interest). Further, it would be incongruous with the public policy embedded in employment-related legislation---and indeed inconsistent with the very act of passage---to assume that, in the absence of an express manifestation of support, other employees do not collectively share an interest in an attempted vindication of the statutory right created for their benefit. Presuming concert in the individual assertion of an employment-related statutory right running to all employees, therefore, accommodates the

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[15] 29 U.S.C. 141(b)

Act to the overall legislative policy regarding the workplace and working conditions.

Conclusion

For all the reasons set forth above, it is appropriate to presume that the individual assertion of an employment-related statutory right is concerted. Making this presumption does not end the matter; it merely shifts the burden to the employer to show that, in a particular case, the employees, for whatever reasons, opposed the individual's assertion of that interest or that the individual specifically acted in his own interest.[16] The presumption is no less valid, and the employer's burden no heavier, than in cases involving, as did Republic Aviation, solicitation rules.

Considering the facts of this case, as found by the judge, I conclude that Prill was discharged in violation of Section 8(a)(1). The judge found that Prill was discharged because of his complaints about the safety of equipment he was required to drive, including a complaint to the Tennessee Commission following an accident, and because of his refusal, for safety reasons, to drive the equipment following the accident. By reporting to the Tennessee Commission, Prill invoked laws regulating motor carriers, and initiated an investigation which resulted in issuance of a citation by the Tennessee Commission based on Department of Transportation regulations. I would find that in resorting to this legislation Prill engaged in concerted activity.

Although the Department of Transportation regulations concern the safety of public highways generally, they also regulate, among other things, the safety of equipment that drivers for motor carriers are required to operate and the obligations of drivers in case of accidents. Since the highways they regulate are the workplace of commercial drivers, they, in effect, concern conditions of employment for such drivers of motor carriers. In these circumstances, it is appropriate to presume that other drivers support the assertion of those regulations.

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[16] See Comet Fast Freight, 262 NLRB 430 (1982), for an example of such a demonstration that the individual did not act in the interest of his fellow employees.

The presumption is validated by the record. Employee Gove drove Prill's regularly assigned truck and trailer for a 2-week period while Prill was absent. Prill was present when Gove reported problems with the steering and told Supervisor Faling that he would not drive the truck until someone repaired it. It is, therefore, indisputable that two employees were concerned with the safety of the truck and trailer and tried to do something about it. It is certainly valid to presume, at the very least, that Gove supported Prill's complaint to the Tennessee Commission. Yet my colleagues allow Prill's fate to be dictated by such happenstance as the failure to make a phone call. If, after the accident in Tennessee, Prill had phoned Gove, discussed the problem, and received his likely approval to contact the Tennessee Commission, his action would have been concerted and he would be working today. Because he failed to make such a call, and instead individually invoked regulations designed to protect commercial drivers as a group and others using the highways, his case is dismissed. Surely the concerted activity provision in Section 7 was not intended to produce such anomalous results when the safety of employees' working conditions is at issue.

My colleagues' concern with the need to draw a line in this area is, like the criticism of Alleluia, understandable. But, wherever the line should be drawn it assuredly should not be drawn at such a point where it creates a safe zone for employers to retaliate against employees who protest over matters which strike at the heart of the economic relationship between employer and employee. To do so runs against one of the central aims of the National Labor Relations Act: to guarantee that employees do not lose their jobs because they challenge an employer on a matter concerning group wages, hours, or terms and conditions of employment. The use of the term ''concerted'' in this arena merely insures that collective action cannot be subject to charges of criminal conspiracy and that the Act's protection extends only to matters addressed to employees as a class or group. I dissent from my colleagues' use of the term to distort the fundamental principles of the statute they are charged to enforce.

Dated, Washington, D.C. 6 January 1984

Don A. Zimmerman, Member

NATIONAL LABOR RELATIONS BOARD

JD-730-80
Tecumseh, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MEYERS INDUSTRIES, INC.

and

Case 7-CA-17207

KENNETH P. PRILL, An Individual

Amy Bachelder, Esq., for
the General Counsel.
Ellis Boal, Esq., of
Detroit, MI, for the
Charging Party.
Douglas C. Dahn, Esq., of
(Tolleson, Mead, Welchli &
Dahn), of Detroit, MI,
for the Respondent.

DECISION

Statement of the Case

ROBERT A. GIANNASI, Administrative Law Judge: This case was tried in Adrian, Michigan on August 1, 1980. The Complaint alleges that Respondent violated Section 8(a)(1) of the Act by discharging truckdriver Kenneth Prill because he engaged in protected concerted activity, i.e., making complaints about the safety of his trailer, contacting the Tennessee Public Service Commission about the safety of his vehicle after it was involved in an accident, which contact resulted in the issuance of an out-of-service notice, and refusing thereafter to drive the vehicle. Respondent denied the essential allegations in the Complaint. Respondent and the Charging Party filed briefs.

Based upon the entire record in this case, including the testimony of the witnesses and my observation of their demeanor, I make the following:

Findings of Fact

I. The Business of Respondent

Respondent, a Michigan corporation, is engaged in the manufacture, sale and distribution of aluminum boats, canoes, jeep tops and related products at several locations in Michigan. Its principal office and place of business is located at 9133 Tecumseh-Clinton Road in Tecumseh, Michigan, the only facility involved herein. During a representative one year period, Respondent manufactured, sold and distributed, at its Tecumseh, Michigan facility, products valued in excess of $2 million dollars,of which products valued in excess of $500,000 were shipped from its Tecumseh facility to points located outside the State of Michigan. Accordingly, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Unfair Labor Practices

A. The Facts

Kenneth Prill was hired by Respondent on April 24, 1979 as a skilled driver. He had driven trucks for a number of years before being hired. He was an owner-operator for the 4 years prior to his employment by Respondent. His employment application notes that he had "good driving experience" and had 2 years of schooling as a mechanic.

Prill was assigned to drive what was described as the red Ford truck and its accompanying trailer. He hauled boats from Respondent's facility in Tecumseh, Michigan to dealers throughout the country. His supervisor, Dave Faling, had no complaints about Prill's work and he testified that Prill took "very good care of his equipment." Prill was never given a disciplinary warning during his employment with Respondent which lasted until his discharge on July 5, 1979. [1]

Prill experienced a number of problems with his equipment. The most significant problem was the failure of the brakes on the trailer to operate properly. On one trip, as he was driving through Chicago, Prill experienced a brake failure which almost caused an accident. Prill also noticed a steering problem on his equipment. Fellow driver Ben Gove drove Prill's equipment for the first 2 weeks in June 1979. Gove noticed the steering problem on a trip to Sudberry, Ontario. The steering problem nearly caused an accident on that trip. When Gove returned, he told Faling about the problem and stated, in Prill's presence, that he would not take the truck out again until it was repaired. Faling promised to make the needed repairs.

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[1] It is uncontested that Prill never received a written warning. Respondent's President, Alan Beatty, testified that he never orally reprimanded Prill. Vice-President Wayne Seagraves testified that he did, but Prill credibly denied receiving any such oral warnings before his discharge.

Prill made numerous complaints about the deficiencies in his equipment. He made these complaints to President Alan Beatty, Mechanic Buck Maynard and his supervisor, Dave Faling. Faling corroborated Prill's testimony that he made complaints to Faling. Faling transmitted these complaints to Maynard. Maynard also corroborated Prill's testimony that complaints concerning the brakes on the trailer were made to him.

During his employment, Prill made 11 trips in his truck and he complained after several of them. Most of his problems were with the trailer's brakes. He testified credibly and in detail about each of these complaints. Buck Maynard made some repairs on the brakes after one of Prill's complaints, but the problem was still not fully resolved. Maynard told Prill that the axles were so old that replacement parts could not be secured. Prill insisted that new parts should be purchased. On Prill's next trip, the brakes continued to give Prill trouble, even to the point of causing him to take longer on the trip than planned because he had to drive slower. Prill asked Faling when the brakes would be repaired but Faling simply referred him to Maynard.

On a subsequent trip to Xenia, Ohio, the brakes continued to be inoperative. Prill stopped at a roadside inspection conducted by the Ohio State Highway Patrol. As a result of that inspection, the truck was issued a citation for a number of defects, including problems with the brakes. Prill turned the citation in to Respondent's officials.

The brake problem was never resolved and the truck continued to give its driver problems.

In late June 1979, Prill was assigned to drive a load to Jacksonville, Florida. The brakes gave him trouble on that trip. He described them as inoperative. On the return trip with an empty trailer, he had an accident at Athens, Tennessee.

The accident took place on Sunday, July 1, 1979. It was caused when a pickup truck struck the left rear of Prill's trailer causing it to jack-knife. Prill's trailer ended up off the road and immobile. Respondent concedes that the accident was not Prill's fault and was not a consideration in his discharge. The equipment was towed to a nearby truck stop in Knoxville, Tennessee.

The night of the accident, Prill called Respondent's President, Alan Beatty, at his home. Prill advised Beatty of the damage to the trailer, more specifically, the hitching areas of the truck and trailer. Beatty asked Prill to chain the tractor and trailer hitches together and to tow the trailer back to Tecumseh. Prill told Beatty that this would be dangerous since the hitch area was cracked. Beatty told Prill to have a mechanic in Tennessee look at the equipment but to get it home as best he could.

The following morning, Prill called Beatty again. Wayne Seagraves, the Vice-President of Production, also got on the phone. They were upset with Prill for not having left Tennessee. Seagraves said, "Why in the hell haven't you come back?" Prill said that the vehicle was unsafe. He cited the brake problem and said the hitch was damaged. Toward the end of the conversation, Beatty and Seagraves decided to send Mechanic Buck Maynard to Tennessee to look at the vehicle.

After the phone call, Prill decided to call the Tennessee Public Service Commission and have an official inspection of the vehicle. The next morning, Tuesday, a Captain Charles Bain inspected the vehicle and issued a citation. The unit was put out of service because of the bad trailer brakes and the damage to the hitch area of the truck. The citation mentioned several Department of Transportation regulations, including 49 C.F.R. §396.4 which prohibits the unsafe operation of a vehicle. Bain told Prill that before the vehicle could be moved, certain repairs had to be made. Prill turned the citation over to Respondent with his paperwork.

When Maynard arrived later in the day on Tuesday, Prill showed him the citation. Maynard called Beatty and they agreed that the trailer was not worth returning to Tecumseh or even being repaired. They decided to leave the trailer behind and sell it for scrap after removing the tires. Prill then drove the truck back to Tecumseh.

On Thursday, July 5, Prill reported for work and turned in the paperwork on his trip. Seagraves summoned Prill to his office. Seagraves questioned him about the accident and the damage to the truck. He asked why Prill did not chain the truck and trailer together and drive back. Prill responded that he did not believe it was safe to drive the vehicle. Seagraves then said that Prill would be terminated because "we can't have you calling the cops like this all the time." Beatty, who had come into the office during the conversation, also asked why Prill did not chain the truck and trailer. Prill responded that it would have been unsafe and unlawful in view of the citation.

Beatty testified that he was not in Seagraves' office when Prill was terminated but he met Prill afterwards. He testified that they talked briefly about the accident but his version of their conversation is different than Prill's. To the extent that Beatty's testimony differs from that of Prill on this or any other issue, I credit Prill. He impressed me as a candid and honest witness who testified in meaningful detail about all the issues in this case. His recollection was lucid and precise. Beatty, on the other hand, was not a reliable witness. He dissembled when he tried to intimate that Prill was both laid off and discharged. He exaggerated Prill's alleged work deficiencies in order to strengthen his case. On numerous occasions he went far beyond the scope of the question to denigrate Prill as an employee, even though there is no evidence of written reprimands against Prill. Moreover, he was unable to be specific when recounting Prill's alleged deficiencies. After stating that probationary employees, like Prill, are not issued written reprimands, he conceded that he himself had never even orally reprimanded Prill. Indeed, Respondent's written rules provide for written reprimands and they make no exception for probationary employees. This is significant because there are specific references in the rules to permanent employees where such references are thought to be necessary. In my view, Beatty was unable to give objective testimony about Prill.

Seagraves also gave a different version of the July 5 termination interview. To the extent his version differs from Prill's I also discredit Seagraves' testimony because I found him to be an unreliable witness. Seagraves testified that, after he terminated Prill, Prill asked him if he was being fired because "I called the cops." Seagraves said he was not, but he interjected, in his testimony, "I had no knowledge that he did call the police." Later, he conceded he told Prill he did not appreciate him calling the police but it was not the reason for his termination. Actually it is quite likely that Seagraves did know that Prill notified the police in Tennessee. Mechanic Maynard testified he told Beatty about the citation and it is reasonable to assume that Beatty spoke to Seagraves prior to Prill's discharge. Significantly, Seagraves did not tell Prill that he and Beatty had decided, before Prill's trip to Jacksonville, to terminate him. This lack of candor was reflected in Seagraves' testimony. Moreover, Seagraves attempted to show that he orally reprimanded Prill. But he was not specific in his testimony. In contrast, Prill was candid and detailed in his testimony. In these circumstances, I credit Prill over Seagraves where their testimony conflicts.

The same day that Prill was discharged, Respondent hired Glenn Bolduc as a driver. Bolduc did not take his first trip until about a week and one half later.

In late July, Faling had a conversation with Beatty about Prill's termination. Faling, who was returning from a 2 week layoff, asked where Prill was. Beatty said he had "let him go." Faling asked the reason for the termination. He testified that Beatty said "he had an accident or what had happened, and he was a little upset because he had to send another man down there to get the equipment." Beatty also said that Prill refused to drive the truck back to Tecumseh. 2/

B. Discussion and Analysis

It is well settled that an employer violates Section 8(a)(1) of the Act when he discharges an employee for engaging in protected concerted activity within the meaning of Section 7 of the Act. Protected activity includes a refusal to work in protest of a working condition. N.L.R.B. v. Washington Aluminum Co., 370 U.S. 9 (1962). In such cases the Board does not inquire into the reasonableness of the work related complaint. It only requires that the complaint or protest be undertaken in good faith. See E.R. Carpenter Co., 252 NLRB No. 5 (1980).

Although concerted activity is often undertaken by a group of employees 3/ or by a single employee enforcing a collective-bargaining agreement which is the ultimate result of concerted group action, 4/

2/ The above is based on the credited testimony of Faling, a supervisor of Respondent. Beatty did not contradict this testimony.

3/ See Washington Aluminum, supra.

4/ See Interboro Contractors, Inc., 157 NLRB 1295, 1298 (1966), enf'd, 388 F. 2d 495 (C.A. 2, 1967).

the Board has also held that even the activity of a single worker may be concerted if it inures to the benefit of all employees. Thus, a single employee's refusal to work to protest a change in terms and conditions of employment for all employees may be concerted notwithstanding that other employees do not join in that refusal. See Ontario Knife Co., 247 NLRB No. 168 (1980); Steere Dairy, Inc., 237 NLRB 1350 (1978). The Board has established a presumption that an individual employee engages in concerted activity where his conduct arises out of the employment relationship and is a matter of common concern among all employees. Alleluia Cushion Co., 221 NLRB 99 (1975). Indeed, in a decision which is almost on all fours with the instant case, the Board found that an employer who discharges a single employee for refusing to drive an unsafe vehicle, about which he and other employees had complained, violates Section 8(a)(1) of the Act. See, Pink Moody, Inc., 237 NLRB No. 7 (1978).

The following is an excerpt from the Pink Moody decision (98 LRRM 1463, 1464):

> In Alleluia Cushion, supra, we held that where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find implied consent thereto and deem such activity to be concerted. In Air Surrey, supra, we found as concerted activity an employee's individual inquiry at his employer's bank as to whether the employer had sufficient funds on deposit to meet the upcoming payroll, because the matter inquired into by the employees was of vital concern to all employees. And in Dawson Cabinet Company, 228 NLRB 290, 96 LRRM 1373 (1977), we extended the Alleluia Cushion principle in order to find as concerted activity a female employee's individual refusal to perform a certain job unless she was paid the same wages as a male employee doing the same job, because the employee was attempting to vindicate the equal pay rights of the female employees.[1]
>
> In the instant case, the facts clearly establish that Salinas' refusal to drive truck 25 on March 5 was concerted activity within the meaning of Alleluia Cushion, Air Surrey, and Dawson Cabinet. Respondent acknowledged its own concern over the brakes on truck 25 when it took the truck out of service for a few nights in January after the brakes had malfunctioned while

Salinas was driving his route. In March, Respondent became aware that other drivers besides Salinas were concerned about the malfunctioning brakes on truck 25. Thus, on March 3, Salinas had a telephone conversation with Horn, who had driven truck 25 that day and had experienced the malfunctioning brakes. Horn stated that he (Horn) would not drive truck 25 again. The next day, when directed by Respondent to drive truck 25, Horn refused. Nothing happened, however, because another truck became available before Horn started his run. The very next day, Salinas refused to drive truck 25 back to the garage when ordered to do so by Respondent. Thus, at the time Respondent suspended Salinas, it was on notice that on successive days two of its drivers had refused to drive truck 25 because of the brake problem.

In addition, compliance with an order to drive a motor vehicle with malfunctioning brakes would clearly violate traffic regulations,[2] and thus any benefits resulting from Salinas' refusal to drive such an unsafe vehicle would inure to the benefit of all of Respondent's drivers.

In light of these facts, it is clear that Salinas' actions on March 5 were part of a continuing effort by Salinas and at least one other employee to have Respondent repair the brakes on truck 25, that Respondent was fully aware of such effort as well as the specific problem with the brakes on truck 25, and, thus, that Salinas' activity was concerted. Inasmuch as Respondent suspended Salinas for engaging in protected concerted activities, we find that his suspension violated Section 8(a)(1) of the Act.

1/ Thus, the Administrative Law Judge's conclusion that Salinas' refusal to perform his normal work tasks distinguished this case from the Alleluia Cushion line of cases is clearly incorrect.

2/ An employer's ordering of a commercially licensed driver to violate traffic regulations and ordinances would be a matter of grave concern to all drivers.

Applying these principles and the Board's reasoning in Pink Moody and Alleluia Cushion, I find that Respondent's discharge of Prill was violative of Section 8(a)(1) of the Act.

The General Counsel has made a prima facie showing that Prill was discharged for refusing to drive his truck and trailer back to Tecumseh, Michigan, and, by his insistence that the truck was unsafe to drive, causing Respondent to dispatch its mechanic to Knoxville, Tennessee. This finding is supported by the uncontradicted testimony of Supervisor Dave Faling. Faling testified that President Alan Beatty said that this was the reason for the termination. He mentioned no other reasons. This admission by the highest ranking official of Respondent is confirmed by the circumstances of Prill's termination. He was fired the day after he reported to work following his return from Knoxville, Tennessee. He was told by Seagraves that Respondent could not have him "calling the cops all the time," an obvious reference to the fact that Prill had asked local authorities in Tennessee to inspect the vehicle which resulted in a citation being issued that prevented the trailer from being moved. The timing of the discharge makes it clear that what happened in Tennessee precipitated the discharge. Respondent conceded that Prill was not discharged because of the accident itself. Seagraves and Beatty were clearly insistent upon Prill's driving the vehicle back to Tecumseh and were upset when Prill balked. In these circumstances, the inference is clear that Prill was fired for refusing -- for safety reasons -- to drive the truck and trailer back to Tecumseh. The credited testimony also shows that Respondent was concerned with Prill's earlier safety complaints, including a complaint to Ohio authorities which resulted in a citation of the vehicle for safety violations, and that this too formed a basis for the discharge. Thus, Seagraves told Prill, when he fired him, "we can't have you calling the cops like this all the time" (emphasis added). In view of the many earlier problems with the trailer brakes which were not satisfactorily resolved and of the citation of the Tennessee authorities directing that the trailer not be moved unless repaired, Prill's refusal to drive the equipment back to Tecumseh was made in good faith.

At the hearing, Respondent attempted to show, through the testimony of Seagraves and Beatty, that it decided to lay off Prill for economic reasons prior to the Jacksonville trip and that he was fired for being a poor employee. Apart from the inconsistency and contradiction of these two reasons, they fly in the face of the uncontradicted testimony of Supervisor Faling which made it clear that Beatty conveyed the view to him that Prill was fired for refusing to drive the truck back to Tecumseh. Beatty did not mention any other reasons to Faling. Moreover, the reasons related at the hearing are based on the discredited testimony of Beatty and Seagraves. I have discussed some of this testimony above as well as my reasons for discrediting it. In addition, the assertion that Prill was to be laid off for economic reasons prior to the Jacksonville trip is implausible. Why would an employer who has allegedly decided to lay off a particular employee send him on a lengthy trip without even telling him he was going to be laid off? And why would an employer then hire another driver the same day Prill was discharged and not give Prill the opportunity to handle the job? As I have indicated, the testimony concerning Prill's alleged poor work performance was unreliable. Prill received no written warnings although Respondent's rules require written warnings before a discharge. Probationary employees are not excluded from such rules. Beatty did not even orally reprimand Prill. There is no evidence that Faling, his immediate supervisor, ever did. Seagraves' testimony as to oral warnings was undetailed and ambiguous. The testimony was pointedly and credibly rebutted by Prill. Faling's testimony also controverts Seagraves since he had no problems with Prill.

In these circumstances, I find that Respondent's reasons for the termination, advanced by its officials at the hearing, were pretexts. Respondent has thus failed to rebut the General Counsel's evidence or show that Prill would have been discharged notwithstanding his safety complaints and his refusal to drive an unsafe vehicle after reporting its condition to the Tennessee Public Service Commission.

The question then becomes whether Prill's safety complaints and his refusal to drive an unsafe vehicle in the circumstances of this case constituted protected concerted activity under Section 7 of the National Labor Relations Act. Prill's refusal to drive the vehicle was mandated by Department of Transportation regulations which require that an inspection be made after an accident to determine the extent of damage and also require that a vehicle cited as unsafe not be operated until it is repaired. [5] Prill was, by contacting local authorities and refusing to drive the vehicle, enforcing these provisions of the national transportation policy. This policy obviously reflects concern not only for the safety of the general driving public but also for particular drivers. Obeying Respondent's orders to drive an unsafe vehicle would have caused a violation of DOT regulations. Moreover, Prill's refusal to drive the vehicle was also based, in part, upon his earlier experience which had resulted in numerous complaints about the inoperative trailer brakes on this same vehicle. The Tennessee citation mentioned the inoperative trailer brakes as one of two deficiencies which rendered the vehicle inoperable. Prill's complaints about the trailer brakes prior to the accident were clearly concerted since they were joined by driver Gove who made similar complaints, in Prill's presence, to management officials about the safety of Prill's vehicle when he, Gove, was assigned to drive it for 2 weeks. These concerted complaints were thus a sufficient basis upon which a refusal to drive the truck could be made. See, Pink Moody, supra.

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[5] The Federal Motor Carrier Safety Regulations provide, in 49 C.F.R., as follows:

> Section 396.4 Unsafe operations forbidden.
>
> No motor carrier shall permit or require a driver to drive any motor vehicle revealed by inspection or operation to be in such condition that its operation would be hazardous or likely to result in a breakdown of the vehicle nor shall any driver drive any motor vehicle which by reason of its mechanical condition is so imminently hazardous to operate as to be likely to cause an accident or a breakdown of the vehicle. If while any motor vehicle is being operated on a highway, it is discovered to be in such unsafe condition, it shall be continued in operation only to the nearest place where repairs can safely be effected, and even such operations shall be conducted only if it be less hazardous to the public than permitting the vehicle to remain on the highway.
>
> Section 396.6 Damaged vehicles, inspection.
>
> No motor carrier shall permit or require a driver to drive nor shall any driver drive a motor vehicle which has been damaged in an accident or by other cause until inspection has been made by a person qualified to ascertain the nature and extent of the damage and the relationship of such damage (Continued)

Prill's effort to have the Tennessee Public Service Commission to inspect the damaged trailer was the equivalent of a safety complaint to OSHA. Indeed, the application of Department of Transportation regulations in this respect is mandatory. After an accident, a driver must report the accident, and, if a citation is issued which states that the truck not be driven, the citation must be complied with. In contrast, the processes of OSHA are voluntary: An employee may or may not take a work related safety complaint to OSHA. Furthermore, the safety of a driver's vehicle is at least the equivalent of a work place safety problem which affects all employees. A truckdriver's place of work is behind the wheel of a truck just as the manufacturing employee's place of work is the plant environment. An employee who complains about the safety of a particular truck speaks for the safety of any employee who may drive that truck and for any employee who has an interest in the safety of his vehicle. It is not a remote inference that an employer who seeks to have one driver drive an unsafe vehicle may do likewise with another driver or another vehicle. Indeed, the evidence in this case shows that Respondent had dispatched another driver, Gove, to operate Prill's vehicle. Gove expressed his reluctance to drive the vehicle in the future. Thus, under the rationale of Alleluia Cushion and Pink Moody, employee Prill's refusal to drive an unsafe vehicle was tantamount to making a work related safety complaint which would inure to the benefit of all employees and the activity of Prill was thus presumptively protected.

57/ (Continued)
to the safe operation of the motor vehicle, nor shall such motor vehicle be operated until such person has determined it to be in safe operating condition.

Respondent was, of course, free, under Alleluia Cushion, to rebut the inference that Prill's activity inured to the benefit of all employees. It could have shown, for example, that Prill's protests and complaints were not made in good faith or were simply the idiosyncrasies of a super sensitive individual whose concerns could not have been shared by other truckdrivers in similar circumstances. This Respondent failed utterly to accomplish. Indeed, three witnesses, Maynard, Faling and Gove, essentially corroborated Prill on the safety problems of the vehicle Prill was driving. Respondent did not even attempt to return the trailer from Tennessee, thus confirming Prill's judgment and that of the Tennessee Public Service Commission that the vehicle was unsafe. In these circumstances, I find that Respondent has not rebutted the presumption that Prill's safety complaints and refusal to drive an unsafe vehicle inured to the benefit of all employees and thus constituted protected concerted activity. 6/

6/ The General Counsel and the Charging Party allege that the illegality of Prill's discharge is buttressed by reference to Section 502 of the Act which states, in pertinent part, ". . . nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act." In my view, Section 502 has no applicability to this case which must be decided under Section 7 and 8(a)(1) of the Act. Section 502 offers no particular help in defining the contours of protected concerted activity in the circumstances of this case. Section 502 does not define either an unfair labor practice or concerted protected activity. And it adds nothing to the existing body of law interpreting the phrase "protected concerted activity." Section 502 is, of course, useful in helping to determine the rights of employees who refuse to perform work in unsafe situations where a contractual no-strike provision would make such activity unprotected. Thus, in a case where an individual's refusal to work is prima facie protected and concerted because, under the Interboro rationale, he seeks to enforce a contractual provision, such as the specific provision that an employee may refuse to drive a vehicle he believes to be unsafe, reference to Section 502 may rebut an employer's defense that such refusal is unprotected because it is a "strike" in violation of a contractual no-strike clause. See, Banyard v. N.L.R.B., 505 F. 2d 342, 348 (C.A.D.C., 1974), citing Gateway Coal Co. v. United Mine Workers, 414 U.S. 368 (1974). The instant case is distinguishable. The protected concerted activity here is not based on the enforcement of a contractual clause under the Interboro rationale. Here there is no contract involved, no bargaining representative and no no-strike clause. The concertedness of the activity must be established by reference to Washington Aluminum, Alleluia Cushion and its progeny.

Conclusions of Law

1. By discharging employee Kenneth Prill for engaging in protected concerted activity, Respondent committed an unfair labor practice in violation of Section 8(a)(1) of the Act. 7/

2. This unfair labor practice affected commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that Respondent has engaged in the unfair labor practice set forth above, I will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. The Respondent will be ordered to reinstate Kenneth Prill to his former job, or, if that job no longer exists, to a substantially equivalent job, and to make him whole for any losses of wages and other benefits he may have suffered as a result of his unlawful discharge. Such losses are to be computed in the manner prescribed in F.W. Woolworth Co., 90 NLRB 289 (1950), with interest as set forth in Florida Steel Corp., 231 NLRB No. 117 (1977). 8/

7/ Respondent alleged that the State of Michigan Department of Labor dismissed a complaint filed by Prill alleging that the discharge violated the Michigan Occupational Safety and Health Act. I have considered the evidence submitted by Respondent in support of this allegation and I conclude that it does not detract from my findings in this case. The statutory procedure under which the Michigan Department of Labor operates does not result in a final determination which can be equated with the result obtained under the Labor Act. Indeed, the Department essentially conducts investigation which may result in the issuance of a complaint which is then taken to a local court. No hearing was held. The Department's standard for issuing a complaint is that the "over riding factor" in the employee's discharge be his "safety related" complaint. In these circumstances, the Department's refusal to issue a complaint is of scant relevance in determining whether the General Counsel has proved, by a preponderance of the evidence, in an adversary hearing where an Administrative Law Judge must assess the credibility of witnesses, that Prill was fired for engaging in activity which was, under the Labor Act, protected and concerted.

8/ See generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

Upon the foregoing findings of fact and conclusions of law, and, in accordance with Section 10(c) of the Act, I hereby issue the following recommended: 9/

ORDER

Respondent, Meyers Industries, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discharging, disciplining, retaliating against, or otherwise interfering with, restraining or coercing employees in the exercise of their rights under Section 7 of the National Labor Relations Act.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed them under Section 7 of the National Labor Relations Act.

2. Take the following affirmative action:

(a) Offer Kenneth Prill immediate and full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings or benefits he may have suffered in the manner set forth in the "Remedy" section of this Decision.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records and reports and all other documents necessary and relevant to analyze and compute the amount of backpay due under this Order.

(c) Post at its Tecumseh, Michigan facility, copies of the notice attached hereto marked "Appendix."10/ Copies of said notice, on forms to be provided by the Regional Director for Region 7, after being duly signed by Respondent's authorized representative shall be posted by

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9/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

10/ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for Region 7, in writing, within 20 days of the date of this Decision, what steps have been taken to comply herewith.

Dated, Washington, D.C. January 14, 1981

Robert A. Giannasi
Robert A. Giannasi
Administrative Law Judge

APPENDIX JD-730-80

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD An Agency of the UNITED STATES GOVERNMENT

After a trial in which all sides had the opportunity to give evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act, and has ordered us to post this notice.

WE WILL NOT discharge, discipline, retaliate against, or otherwise interfere with, restrain or coerce employees in the exercise of their rights under Section 7 of the National Labor Relations Act.

WE WILL NOT, in any like or related manner, interfere with, restrain or coerce employees in the exercise of rights guaranteed them under Section 7 of the National Labor Relations Act.

WE WILL offer Kenneth Prill immediate and full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges, and WE WILL make him whole for any loss of earnings or benefits he may have suffered in the manner set forth in the Remedy section of this Decision.

MEYERS INDUSTRIES, INC
(Employer)

Dated ______________________ By ______________________ ____________
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office.

Patrick V. McNamara Federal Building, 477 Michigan Avenue - Room 300
Detroit, Michigan 48226 (Tel. No. (313) 226-3244)

PRILL v. NLRB

(Meyers Industries, Inc.)

U.S. Court of Appeals, District of Columbia Circuit

PRILL v. NATIONAL LABOR RELATIONS BOARD, No. 84-1064, February 26, 1985

LABOR MANAGEMENT RELATIONS ACT

1. NLRB's authority — Established precedents — Scope ► 40.01 ► 38.201

NLRB has been granted broad authority to construe LMRA in light of its expertise, and in appropriate circumstances, Board may even elect to abandon or modify established precedent. However, judicial deference is not accorded decision of Board when Board acts pursuant to erroneous view of law and, as a consequence, fails to exercise discretion delegated to it by Congress.

2. 'Concerted activities' — Meyers test — Validity — NLRB's authority ► 52.2534 ► 40.01

NLRB erred when it decided that definition of statutory term "concerted activities" as enunciated in Board's decision in Meyers Industries (115 LRRM 1025), under which an employee's conduct is not considered "concerted" unless it is "engaged in with or on the authority of other employees," was required by LMRA, since statutory language does not compel Board to adopt its Meyers test, but rather gives it substantial responsibility to determine scope of "concerted activities" provision in light of its own policy judgment and expertise. Neither language of Section 7 of Act nor history of that provision requires that term "concerted activities" be interpreted to protect only most narrowly defined forms of common action by employees.

3. 'Concerted activities' — Meyers test — Return to traditional standard ► 52.2534 ► 38.52 ► 52.16

NLRB's definition of term "concerted activities" as enunciated in its Meyers Industries decision (115 LRRM 1025), under which an employee's conduct is not considered "concerted" unless it is "engaged in with or on the authority of other employees," does not represent return to standard relied on by Board and courts before its decision in Alleluia Cushion Co. case (91 LRRM 1131), but instead constitutes new and more restrictive standard. Both Board and courts have long held that individual who brings group complaint to attention of management is engaged in concerted activity even though he was not designated or authorized to be spokesman by group; courts also have long followed Board's view that individual efforts to enlist other employees in support of common goals are protected by Section 7 of LMRA.

4. Interference — Discharge — 'Concerted activities' — Meyers test — Remand ► 38.50 ► 52.2534 ► 52.2731

Court of appeals will remand for reconsideration NLRB's determination that employer did not violate Section 8(a)(1) of LMRA when it discharged truck driver who repeatedly complained about unsafe condition of company truck and trailer, including complaint to state authorities, and ultimately refused, for safety reasons, to continue driving truck and trailer following accident, where Board based its conclusion on its determination that driver was not engaged in protected "concerted activities" within meaning of Section 7 of Act. Board enunciated new and more restrictive definition of term "concerted activities," in this case, and in doing so, it failed to rely on its own judgment and expertise, and thus based its decision on erroneous view of law.

Petition for review of an order of the NLRB (115 LRRM 1025, 268 NLRB No. 73). Remanded.

Ellis Boal, for petitioner.

David Fleischer (Wilford W. Johansen, Acting General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Associate General Counsel, and Elliott Moore, Deputy Associate General Counsel, with him on brief), for respondent.

Ira Jay Katz, filed brief for Workers' Rights Law Project, et al., amici curiae, urging reversal.

Before WALD, EDWARDS, and BORK, Circuit Judges.

Full Text of Opinion

EDWARDS, Circuit Judge: —

I. Prologue

On this petition for review, we consider a case in which the petitioner, Kenneth Prill, was discharged from his job at Meyers Industries, Inc. ("Meyers"), because he complained about the unsafe condition of a company truck and trailer, including a complaint to state authorities following an accident, and because he refused, for safety reasons, to continue driving the truck and trailer following the accident. An investigation by state officials determined that the company vehicle was in fact unsafe due to faulty brakes and a damaged hitch, and a citation was issued against Meyers. Notwithstanding the concededly unsafe condition of the vehicle, Prill was fired because company officials decided that they could not have him "calling the cops all the time."

In protest against his discharge, Prill filed an unfair labor practice charge with the National Labor Relations Board ("NLRB" or "Board"), and a complaint was issued against Meyers. An Administrative Law Judge ("ALJ"), following existing Board precedent, found that Prill's conduct constituted "concerted activit[y] for ... mutual aid or protection" under section 7 of the National Labor Relations Act ("NLRA" or "Act"),[1] and recommended his full reinstatement. However, the Board, over the dissent of one member, reversed the decision of the ALJ, overruled its earlier decisions, and dismissed the complaint against Meyers.[2] In rejecting Prill's charge, the Board adopted a new definition of "concerted activities;" under the enunciated test, an employee's conduct is not "concerted" unless it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[3] Finding that Prill had acted alone and "solely on his own behalf,"[4] the Board held his conduct unprotected by section 7.

[1] It is not the responsibility of the courts to second-guess the lawful judgments of the NLRB. The Board has been granted broad authority to construe the NLRA in light of its expertise. In appropriate circumstances, the Board even may elect to abandon or modify established precedent. However, judicial deference is not accorded a decision of the NLRB when the Board acts pursuant to an erroneous view of law and, as a consequence, fails to exercise the discretion delegated to it by Congress.

In the instant case, we find that the Board erred when it decided that its new definition of "concerted activities" was *mandated* by the NLRA. Because the Board misconstrued the bounds of the law, its opinion stands on a faulty legal premise and without adequate rationale. Accordingly, we remand this case under the principles of SEC v. Chenery Corp.,[5] so that the Board may reconsider the scope of "concerted activities" under section 7. We express no opinion as to the correct test of "concerted activities;" we require only that the Board exercise the full measure of administrative discretion granted to it by Congress and reconsider this matter free from its erroneous conception of the bounds of the law.

II. Background

A. *Facts*

The facts were found by the Administrative Law Judge[6] and accepted by the Board,[7] and are largely undisputed on review. Kenneth Prill was hired as a skilled driver on April 24, 1979, by Meyers Industries, a Michigan company engaged in the manufacture, sale and distribution of aluminum boats and related products. Prill had driven trucks for several years before going to work for Meyers, and he had received two years of training as a mechanic. Throughout the period that he was employed by Meyers, he had a good work record.

Prill was assigned to drive a red Ford truck and its accompanying trailer to haul boats from Meyers' main facility in Tecumseh, Michigan, to dealers throughout the country. Prill soon began to experience problems with his equipment, especially with the steering and the trailer's brakes.[8] In addition to discussing these problems with other drivers,[9] Prill made numerous complaints to his supervisor, Dave Faling, to the company president, Alan Beatty, and to the mechanic, Buck Maynard, after returning from trips on which the brakes malfunctioned.

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[1] NLRA § 7, 29 U.S.C. § 157 (1982), provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1) (1982), provides:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

[2] Meyers Indus., Inc., 268 NLRB No. 73, 115 LRRM 1025 (Jan. 6, 1984) (hereinafter referred to as "Meyers").

[3] Id. at 12, 115 LRRM at 1029.

[4] Id. at 16, 115 LRRM at 1030.

[5] 318 U.S. 80 (1943).

[6] Meyers Indus., Inc., Case 7-CA-17207, slip op. at 2-5 (Jan. 14, 1981), reprinted in Joint Appendix ("J.A.") 280, 281-84 (hereinafter referred to as "ALJ Decision").

[7] Meyers at 1-2, 13-15, 115 LRRM at 1029-30.

[8] As Prill explained in his testimony before the ALJ, his vehicle was equipped with braking systems on both the truck and the trailer components. These systems, although they can be operated independently, ordinarily would function together when the brake pedal is depressed. On the vehicle assigned to

On one trip, for example, while he was driving through Chicago, Illinois, Prill narrowly escaped an accident when his brakes failed during a sudden stop in heavy traffic. On his return Prill asked Faling and Maynard to have the brakes repaired, but Maynard's efforts were unsuccessful. He told Prill that the axles were so old that it was impossible to secure replacement parts; Prill insisted that new parts be purchased. After his next trip, during which the brakes remained inoperative, Prill again asked Faling when the brakes would be repaired, but was simply referred to Maynard or Beatty.

On a subsequent trip to Xenia, Ohio, Prill stopped at a roadside inspection conducted by the Ohio State Highway Patrol. As a result of that inspection, the truck was issued a citation for a number of defects, including the brakes. When Prill returned to Michigan, he showed the citation to Faling and submitted it together with his post-trip paperwork.

During the first two weeks in June, 1979, another driver, Ben Gove, drove Prill's equipment on a trip to Sudberry, Ontario. Gove testified before the ALJ that he experienced a steering problem which made it difficult to hold the road and "caused [the truck] to swerve back and forth like Ken Prill described," nearly causing an accident.[10] When Gove went to Faling's office to submit his post-trip report, Prill was there at the same time to receive paperwork for the next trip. Gove described the steering and brake problems to Faling, and stated, in Prill's presence, that he would not drive the truck again until it was repaired.[11] Faling promised to make the needed repairs.

In early July, Prill was driving through Athens, Tennessee, when he had an accident which the Board found was caused by the malfunctioning brakes.[12] A pickup truck struck the left rear of Prill's trailer, causing the truck to jack-knife and sending both vehicles into a ditch.[13] After giving a statement to the state highway patrol at the scene of the accident, Prill unsuccessfully sought to have the truck and trailer inspected by the state public service commission.[14]

Following the accident, Prill called Meyers' president Alan Beatty at home to advise him of the incident and of the extensive damage to the unit. Beatty asked Prill to chain the tractor and trailer together and tow the trailer back to Tecumseh for repairs. Prill responded that "it would be possible to do that, but it would still be a hazard on the highway" because the hitch area was cracked and might give way and cause an accident.[15] Beatty repeated that Prill should chain and tow the trailer home, but told him that if he insisted he could have a mechanic in Tennessee look at it.

The following morning, Prill called Beatty at work and spoke to him and to Warren Seagraves, the company's vice president for production. Both were upset that Prill was still in Tennessee, and demanded to know why he had not yet left. Prill stated that the vehicle was unsafe because the hitch was damaged and the trailer lacked brakes. Seagraves responded that the company had been running its trucks like that for 20 years.[16] At the end of the conversation, Beatty and Seagraves decided to send Maynard down to check the equipment.

After this conversation, Prill decided to contact the Tennessee Public Service Commission to arrange for an official inspection of the vehicle. The inspection resulted in a citation putting the unit out of service because of bad brakes and damage to the hitch area. The citation was based on several Department of Transportation regulations, including 49 C.F.R. § 396.4, which prohibited the operation of an unsafe vehicle.[17] Prill was instructed to notify

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Prill, however, the brakes on the trailer were essentially inoperative. See Transcript of Hearing (Aug. 1, 1980) ("Tr.") at 16-17, J.A. 40-41.

[9] See Tr. at 18, J.A. 42.

[10] Tr. at 62, J.A. 86.

[11] Gove testified at the hearing that he told Faling, "I wouldn't take the truck as far as Clinton and back, until ... someone reapired [sic] it. I didn't care who done it, but I wasn't going to drive it no further." Tr. at 63, J.A. 87. In its brief, the Board reads this statement to mean that Gove did not care who drove the truck. Brief for NLRB at 3. We agree with the petitioner, Reply Brief of Petitioner at 1-2, that the more natural reading of Gove's statement is that he did not care who repaired the truck so long as repairs were made.

[12] Meyers at 14, 115 LRRM at 1029.

[13] Meyers conceded before the agency that the accident was not Prill's fault and that it was not a consideration in his discharge. ALJ Decision at 3, J.A. 282.

[14] Tr. at 34-35, J.A. 58-59.

[15] Tr. at 36, J.A. 60.

[16] Tr. at 37, J.A. 61.

[17] 49 C.F.R. § 396.4 (1978), the regulation in effect at the time of the events herein, provided as follows:

the police or Public Service Commission immediately if anyone attempted to move the vehicle before required repairs were made. When Maynard arrived in Tennessee later the same day, Prill showed him the citation. Maynard and Beatty then decided that the trailer was not worth repairing and should be sold for scrap after removing the tires.

Two days later Prill reported for work and was summoned to Warren Seagraves' office, where he was questioned about the accident and damage to the truck. Both Seagraves and Beatty asked Prill why he had not towed the trailer back as requested; Prill responded that this would have been both unsafe and unlawful.[18] At the end of the conversation, Seagraves told Prill that he was discharged because "we can't have you calling the cops like this all the time."[19]

B. *The Decisions of the ALJ and the Board*

On the basis of these facts, the ALJ found that Prill was discharged because of his safety complaints and his refusal to drive an unsafe vehicle in accordance with Department of Transportation regulations.[20] Relying on the rationale of Alleluia Cushion Co.,[21] the ALJ held that Prill's actions were "concerted activities for ... mutual aid or protection" under section 7 of the NLRA, and thus protected, because they inured to the benefit of all employees.[22] In order to understand this conclusion, it is necessary briefly to review the development of the Board's doctrine of "constructive concerted activity."

During the past 25 years, the Board has gradually extended the concept of "concerted activities" under section 7 to include certain types of actions taken by individual employees. For example, under the so-called Interboro doctrine, the Board has long held that the assertion by a single employee of rights derived from a collective bargaining agreement is protected under section 7, on the reasoning that such an act is an extension of the concerted action that produced the agreement and that it affects the rights of all employees covered by the agreement.[23] In addition, in a series of cases since 1959, the Board developed the position that section 7 protects complaints made by an individual, even absent authorization by other employees, "if the matter at issue is of moment to the group of employees complaining and if that matter is brought to the attention of management by a spokesman, voluntary or appointed for that purpose, so long as such person is speaking for the benefit of the interested group."[24]

In Alleluia Cushion Co.,[25] the Board extended the doctrine of constructive concerted activity to include an individual employee's efforts to invoke state and federal laws regulating occupational safety. In Alleluia an employee was discharged for notifying the California Occupational Safety and Health Administration (OSHA) of unsafe conditions at his plant. Observing that "[s]afe working conditions are matters of great and continuing concern for all

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Unsafe operations forbidden.

No motor carrier shall permit or require a driver to drive any motor vehicle revealed by inspection or operation to be in such condition that its operation would be hazardous or likely to result in a breakdown of the vehicle nor shall any driver drive any motor vehicle which by reason of its mechanical condition is so imminently hazardous to operate as to be likely to cause an accident or a breakdown of the vehicle. If while any motor vehicle is being operated on a highway, it is discovered to be in such unsafe condition, it shall be continued in operation only to the nearest place where repairs can safely be effected, and even such operations shall be conducted only if it be less hazardous to the public than permitting the vehicle to remain on the highway.

[18] Prill testified that he told Seagraves "that the law requires that all vehicles that are involved in an accident be inspected by either a state authority or a certified mechanic of somekind [sic] before they are moved or put back on the highway again." Tr. at 54, J.A. 78. Prill testified that in this conversation he was relying on § 396.6 of the Federal Motor Carrier Safety Regulations, which were contained in a manual for truck drivers published by the Federal Highway Administration, U.S. Department of Transportation. The section provided as follows:

Damaged vehicles, inspection.

No motor carrier shall permit or require a driver to drive nor shall any driver drive a motor vehicle which has been damaged in an accident or by other cause until inspection has been made by a person qualified to ascertain the nature and extent of the damage and the relationship of such damage to the safe operation of the motor vehicle, nor shall such motor vehicle be operated until such person has determined it to be in safe operating condition.

49 C.F.R. § 396.6 (1978).

[19] Tr. at 44, J.A. 68.

[20] ALJ Decision at 8-9, J.A. 287-88.

[21] 221 NLRB 999, 91 LRRM 1131 (1975).

[22] ALJ Decision at 9-10, J.A. 288-90.

[23] See Interboro Contractors, Inc., 157 NLRB 1295, 1298, 61 LRRM 1537 (1966), enforced, 388 F.2d 495, 67 LRRM 2083 (2d Cir. 1967); Bunney Bros. Constr. Co., 139 NLRB 1516, 1519, 51 LRRM 1532 (1962).

[24] Carbet Corp., 191 NLRB 892, 892, 77 LRRM 1722 (1971); Hugh H. Wilson Corp., 171 NLRB 1040, 1046, 69 LRRM 1264 (1968), enforced, 414 F.2d 1345, 71 LRRM 2827 (3d Cir. 1969), cert. denied, 397 U.S. 935, 73 LRRM 2600 (1970); Guernsey-Muskingum Elec. Coop., Inc., 124 NLRB 618, 624, 44 LRRM 1439 (1959), enforced, 285 F.2d 8, 47 LRRM 2260 (6th Cir. 1960).

[25] 221 NLRB 999, 91 LRRM 1131 (1975).

within the workforce," and that filing the OSHA complaint "was an action taken in furtherance of guaranteeing Respondent's employees their rights under the California Occupational Safety and Health Act," the Board held that

> [i]t would be incongruous with the public policy enunciated in such occupational safety legislation ... to presume that, absent on outward manifestation of support, Henley's fellow employees did not agree with his efforts to secure compliance with the statutory obligations imposed on Respondent for their benefit. Rather, since minimum safe and healthful employment conditions for the protection and well-being of employees has been legislatively declared to be in the overall public interest, the consent and concert of action emanates from the mere assertion of such statutory rights. Accordingly, where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted.[26]

The rationale of Alleluia thus was composed of two stands: (1) the Board's familiar view that an individual's activity should be protected if it relates to a matter of "mutual concern" to employees, and (2) a more specific rationale that concert may be presumed when an individual asserts rights under a statute enacted for the benefit of employees.[27]

Applying the principles of Alleluia and its progeny,[28] the ALJ in the instant case held Prill's conduct protected under section 7. He reasoned that Prill's refusal to drive the vehicle was mandated by Department of Transportation regulations that reflected a concern for the safety of particular drivers as well as for that of the general public, and that "[a]n employee who complains about the safety of a particular truck speaks for the safety of any employee who may drive that truck."[29] The ALJ also held that Prill's complaints prior to the accident "were clearly concerted because they were joined by driver Gove," who had made similar complaints to supervisor Dave Faling in Prill's presence.[30] Therefore, the ALJ ruled that Prill's discharge violated section 8(a)(1).

The Board disagreed and dismissed the complaint. Overruling Alleluia and its progeny, the Board argued that activity could be "concerted" only if it in fact involved "some kind of group action," and criticized Alleluia as inconsistent with the statute because it allowed group support to be presumed rather than proven.[31] Claiming to return to "the standard on which the Board and courts relied before Alleluia,"[32] the Board announced the following test for protected concerted activity:

> In general, to find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other employees, and not solely by or on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity.[33]

Applying this standard, the Board held that Prill had acted alone and "solely on his own behalf" when he refused to drive the truck and contacted the Tennessee Public Service Commission.[34] As to whether Prill's complaints prior to the accident were joined by Gove, the Board found that the record was clear that "Prill merely overheard Gove's complaint while in the office on another matter."[35] Stating that "the most that can be inferred from this scenario is that another employee was individually concerned ... about the truck's condition," the Board ruled that "[t]aken by itself, ... *individual* employee concern, even if openly manifested by several employees on an *individual* basis, is not sufficient evidence to prove concert of action."[36] Although the Board admitted to being "[o]utraged ... by a respondent who — at the expense of its driver and others traveling on the nation's highways — was clearly attempting to squeeze the last drop of life out of a trailer that had just as clearly given up the ghost," it nevertheless concluded that it did not believe "that section 7, framed as it was to legitimize and protect group action engaged in by employees for their mutual aid and protection, was intended to encompass the case of individual activity presented here."[37] Therefore, the Board held that Prill's discharge did not violate his rights under section 7.[38]

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[26] Id. at 1000.

[27] See Meyers at 20-21, 115 LRRM at 1031-32 (Member Zimmerman, dissenting); Gorman & Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. Pa. L. Rev. 286, 305 (1981).

In later cases, the Board extended the reasoning of Alleluia to protect the assertion of rights under other statutes, as well as to complaints over matters of mutual concern and to employee complaints made to the employer rather than to governmental agencies. See, e.g., Krispy Kreme Doughnut Corp., 245 NLRB 1053, 102 LRRM 1492 (1979), enforcement denied, 635 F.2d 304, 105 LRRM 3407 (4th Cir. 1980) (worker's compensation claim); Steere Dairy, Inc., 237 NLRB 1350, 99 LRRM 1434 (1978) (protest over pay and working conditions); Self Cycle & Marine Distrib. Co., 237 NLRB 75, 98 LRRM 1517 (1978) (unemployment compensation claim); Air Surrey Corp., 229 NLRB 1064, 95 LRRM 1212 (1977), enforcement denied, 601 F.2d 256, 102 LRRM 2599 (6th Cir. 1979) (inquiry concerning employer's ability to meet payroll); Dawson Cabinet Co., 228 NLRB 290, 96 LRRM 1373, enforcement denied, 566 F.2d 1079, 97 LRRM 2075 (8th Cir. 1977) (protest over failure to comply with Equal Pay Act).

While the Alleluia decision itself did not receive judicial review, the post-Alleluia decisions were generally rejected by the courts of appeals. See, e.g., Ontario Knife Co. v. NLRB, 637 F.2d 840, 106 LRRM 2053 (2d Cir. 1980); Krispy Kreme, supra; Pelton Casteel, Inc. v. NLRB, 627 F.2d 23, 105 LRRM 2124 (7th Cir. 1980); NLRB v. Bighorn Beverage, 614 F.2d 1238, 103 LRRM 3008 (9th Cir. 1980); Dawson Cabinet Co., supra. But see, e.g., NLRB v. Lloyd A. Fry Roofing Co., 651 F.2d 442, 107 LRRM 2926 (6th Cir. 1981); NLRB v. Ambulance Serv. of New Bedford, Inc., 564 F.2d 88, 97 LRRM 2110 (1st Cir.), enforcing mem. 229 NLRB 106, 95 LRRM 1239 (1977); see also NLRB v. Parr Lance Ambulance Serv., 723 F.2d 575, 57[illegible]-80, 115 LRRM 2193 (7th Cir. 1983). We discuss below, see note 72 infra, the relevance of these decisions to the instant case.

[28] In particular, the ALJ relied on Pink Moody, Inc., 237 NLRB 39, 98 LRRM 1463 (1978), in which the Board found a violation of section 8(a)(1) on facts nearly identical to those in Meyers.

[29] ALJ Decision at 9-10, J.A. 288-89.

[30] Id. at 10, J.A. 289.

[31] Meyers at 3, 8-10, 115 LRRM at 1026, 1027-28.

[32] Id. at 11, 115 LRRM at 1029.

[33] Id. at 12, 115 LRRM at 1029 (footnotes omitted).

[34] Id. at 16, 115 LRRM at 1030.

III. ANALYSIS

A. *Standard of Review*

Because the Board is entrusted with the "responsibility to adapt the Act to changing patterns of industrial life,"[39] a reasonable construction of the Act by the Board is entitled to considerable deference.[40] An agency decision cannot be sustained, however, where it is based not on the agency's own judgment but on an erroneous view of the law. For it is a fundamental principle of law that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."[41] As the Supreme Court stated in its landmark decision in SEC v. Chenery Corp.:

> [I]f [agency] action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law .... [T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.[42]

These principles were concisely stated by Judge Bork in his separate opinion in Planned Parenthood Federation of America, Inc. v. Heckler:[43]

> Under SEC v. Chenery Corp., 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943), we must judge the validity of an administrative regulation solely on "the grounds upon which the [agency] itself based its action." Id. at 88, 63 S.Ct. at 459. In particular, an agency regulation must be declared invalid, even though the agency might be able to adopt the regulation in the exercise of its discretion, if it "was not based on the [agency's] own judgment but rather on the unjustified assumption that it was Congress' judgment that such [a regulation is] desirable." FCC v. RCA Communications, Inc., 346 U.S. 86, 96, 73 S.Ct. 998, 1005, 97 L.Ed. 1470 (1953). If a regulation is based on an incorrect view of applicable law, the regulation cannot stand as promulgated, unless the "mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached." Massachusetts Trustees v. United States, 377 U.S. 235, 248, 84 S.Ct. 1236, 1245, 12 L.Ed.2d 268 (1964).[44]

We think that the teachings of Chenery are plainly implicated in this case. The Board's opinion clearly reveals that it considered its adoption of a narrow test for "concerted activities" both to be mandated by the NLRA itself and to be merely a return to "the standard on which the Board and courts relied before Alleluia."[45] We believe that the Board misinterpreted the law in two respects. First, we think, especially on the basis of recent Supreme Court decisions, that the Board erred in assuming that the NLRA *man-*

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[35] Id.

[36] Id. at 17, 115 LRRM at 1030 (emphasis in original).

[37] Id. at 18, 115 LRRM at 1031. The Board added, paraphrasing Chairman Miller's-dissent in G.V.R., Inc., 201 NLRB 147, 148, 82 LRRM 1139 (1973), that it was "neither God nor the Department of Transportation," and that it was "not empowered to correct all immorality or even illegality arising under the total fabric of Federal and state laws." Meyers at 18, 115 LRRM at 1031.

[38] One member of the Board dissented, arguing that the Board's "use [of] the concept of concerted activity to cut off protection for the individual employee who asserts collective rights" violated "the history and spirit of Federal labor laws." Id. at 20, 115 LRRM at 1031 (Member Zimmerman, dissenting).

[39] NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266, 88 LRRM 2689 (1975).

[40] See, e.g., NLRB v. City Disposal Sys., Inc., 104 S.Ct. 1505, 1510, 115 LRRM 3193 (1984); Ford Motor Co. v. NLRB, 441 U.S. 488, 496, 101 LRRM 2222 (1979).

[41] SEC v. Chenery Corp., 318 U.S. 80, 95 (1943) ("Chenery"); see also SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).

[42] 318 U.S. at 94.

[43] 712 F.2d 650 (D.C. Cir. 1983).

[44] Id. at 666 (Bork, J., concurring in part and dissenting in part); see also FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); White v. United States Dep't of the Army, 720 F.2d 209, 210-11 (D.C. Cir. 1983); The Diplomat Lakewood Inc. v. Harris, 613 F.2d 1009, 1018-19 (D.C. Cir. 1979). *See generally* Friendly, Chenery *Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199.

[45] Meyers at 11, 115 LRRM at 1029.

dates its present interpretation of "concerted activities." In other words, the Board's opinion is wrong insofar as it holds that the agency is without discretion to construe "concerted activities" except as indicated in the Meyers test.[46] Second, contrary to the view expressed by the Board, we find that the Meyers test does not represent a return to the standard relied on by the courts and by the Board before Alleluia, but instead constitutes a new and more restrictive standard. We therefore conclude that, because the Board's decision stands on a faulty legal premise and without adequate rationale, we must remand the case for reconsideration.

B. *The Meyers Test*

The Board announced in this case that, "[i]n general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[47] As counsel for the Board confirmed at oral argument, this test in effect requires that two or more employees join in or authorize conduct before activity can be "concerted" under section 7.

The Board's decisions since Meyers indicate that the new definition will be strictly construed to include only activity clearly joined in or endorsed by other employees. Thus, to find that a complaint by an individual employee was made "on behalf of" others, the Board in effect will require that the complaint have been specifically authorized by other employees.[48] Further, a single employee who files a complaint with a state agency will not be held to have engaged in concerted activities, regardless of how clearly his concern is shared by other employees.[49]

The Board's opinion reveals that it believed its present construction of "concerted activities" both to be required by the NLRA and to be a return to standards used by the courts as well as by the Board itself before Alleluia. Although it conceded that "the legislative history of Section 7 does not specifically define 'concerted activity,'" the Board maintained that "it does reveal that Congress considered the concept in terms of individuals united in pursuit of a common goal."[50] The Board argued that a similar interpretation emerged from an analysis of the language of section 7.[51] The Board then reviewed its pre-Alleluia decisions to show that, "[c]onsistent with this interpretation," they had required "some sort of group action" to be present in order to find conduct to be concerted under section 7.[52] The opinion criticized Alleluia for deviating from this norm, and observed that the Board's post-Alleluia decisions had been rejected by the courts of appeals.[53] The Board concluded:

> For all the foregoing reasons, we are persuaded that the [Alleluia] *per se* standard of concerted activity ... is at odds with the Act. The Board and courts always considered, first, whether the activity is [actually] concerted, and only then, whether it is protected. This approach is mandated by the statute

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[46] We express no view on whether, under § 7, the Board may adopt the Meyers test as an exercise of discretion.

[47] Meyers at 12, 115 LRRM at 1029.

[48] See, e.g., Mannington Mills, Inc., 272 NLRB No. 15, 117 LRRM 1233 (Sept. 21, 1984); see also Allied Erecting & Dismantling Co., 270 NLRB No. 48, 116 LRRM 1076 (April 30, 1984). In Mannington Mills, the employee, William Frie, was a crew leader in the respondent's shipping department, as well as the elected representative of that department's employees to the company's safety committee, a joint management-employee forum for both safety and nonsafety complaints. Shipping department employees had a "long-standing complaint" about the employer's practice of requiring the night-shift crews to perform loading operations left unfinished by the previous shift. In July 1980, Frie, "acting in his capacity as employee representative," raised this complaint with the safety committee and was told to take it up with the night-shift foreman. In October, he discussed the matter with the foreman and stated that the night-shift employees would refuse to perform such assignments in the future. Upholding Frie's discharge, the Board stated that, even accepting Frie's testimony that a number of other employees had indicated to him that they would refuse to perform the work, nothing in the record showed that they had authorized him to make such a threat to the employer. Thus, the Board concluded that, under Meyers, Frie's threat constituted individual rather than concerted activity.

[49] In Jefferson Elec. Co., 271 NLRB No. 177, 117 LRRM 1092 (Aug. 21, 1984), a group of workers was exposed to noxious fumes from a production process as a result of a clogged air vent. Some employees complained to management about the fumes, but without success. The next day 11 employees were sent to the employer's doctor; three were hospitalized for periods of up to two weeks. While in the hospital, the employee most severely ill from the fumes filed a complaint about the incident with the state OSHA. She was later discharged for this action and for her pro-union activity. Because it found no evidence that the employee had solicited the support of others before filing her complaint, the Board held her activity unconcerted under Meyers and therefore upheld her discharge to the extent that it was motivated by her OSHA-related activity.

[50] Meyers at 3, 115 LRRM at 1025-26.

[51] According to the Board, "[t]he wording of that section demonstrates that the statute envisions 'concerted' action in terms of collective activity: the formation of or assistance to a group, or action as representative on behalf of a group." Id. at 4, 115 LRRM at 1026. This interpretation of the statutory language appears to correspond, somewhat roughly, to the standard adopted in Meyers, which holds that action is concerted if it is "engaged in with or on the authority of other employees," id. at 12, 115 LRRM at 1029.

[52] Id. at 4, 115 LRRM at 1026.

[53] Id. at 8-10, 115 LRRM at 1027-28.

> itself, which requires that an activity be both "concerted" and "protected." A Board finding that a particular form of individual activity warrants group support is not a sufficient basis for labeling that activity "concerted" within the meaning of Section 7.
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> Based on the foregoing analysis, we hold that the concept of concerted activity first enunciated in Alleluia does not comport with the principles inherent in Section 7 of the Act. We rely, instead, upon the "objective" standard of concerted activity — the standard on which the Board and courts relied before Alleluia. Accordingly, we hereby overrule Alleluia and its progeny.[54]

As the foregoing passage makes clear, the Board believed that, in rejecting Alleluia and adopting the Meyers test, it was returning to the standards applied by the courts and by the Board before Alleluia, and that this approach was "mandated by the statute itself."

Contrary to the dissent's view, it is clear from the Board's opinion that it considered not only its rejection of Alleluia but also its adoption of the Meyers standard to be required by the statute. In the passage quoted above, the Board contrasts the *"per se"* standard of Alleluia with the approach it claims was traditionally taken by "[t]he Board and courts," which required that conduct be actually concerted for protection under section 7. This approach, the Board maintains, "is mandated by the statute itself." The Board states shortly thereafter that it will rely "upon the 'objective' standard of concerted activity — the standard on which the Board and courts relied before Alleluia;" it then proceeds to articulate the Meyers standard. We think it could hardly be more clear that the standard the Board adopts is the same approach that it claims was "mandated by the statute itself." Moreover, the Board's adoption of the "'objective' standard" occurs almost in the same breath as its overruling of Alleluia, and was evidently regarded as based on the same rationale, the Board's view of the requirements of section 7. This reading is confirmed by the Board's opinion as a whole, which is devoted primarily to criticizing Alleluia as inconsistent with the Act and contains not a word of justification for its new standard in terms of the policies of the statute. Thus, even if the dissent were correct that the Board did not regard its adoption of that standard as statutorily compelled, it would still be necessary to remand under Chenery because in that event the Board would have given no rationale whatsoever for the standard it adopted.

Because, in our view, the Board justified its new test as required by section 7 and as a return to traditional standards for concerted activity, we consider these grounds to determine whether they are correct interpretations of law."[55]

C. *The Board's Determination That the Meyers Standard is Statutorily Required*

[2] Our review of the Supreme Court's decisions interpreting section 7 convinces us that, contrary to the Board's view, the statutory language does not compel it to adopt its present definition of "concerted activities," but rather gives the Board substantial responsibility to determine the scope of that provision in light of its own policy judgment and expertise. The Court has upheld the Board's broad construction of section 7 in a variety of contexts,[56] and has emphasized that "the Board has the 'special function of applying the general provisions of the Act to the complexities of industrial life.' "[57]

Last Term, in NLRB v. City Disposal Systems,[58] the Supreme Court specifically rejected the view that the Board was without authority to interpret "concerted activities" broadly to effectuate the purposes of section 7. In City Disposal, as in Meyers, a truck driver was discharged when he refused to drive a vehicle that he reasonably believed to be unsafe because of faulty brakes. Unlike Prill, however, the employee in City Disposal, James Brown, was covered by a collective bargaining agreement which permitted him to refuse to drive an unsafe vehicle unless the refusal was unjustified. The Board held Brown's conduct protected under the Interboro doctrine. The Sixth Circuit, following the prevailing view in the courts of appeals, denied enforcement on the ground that Interboro was inconsistent with a literal reading of "concerted activities.'"[59]

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[54] Id. at 10-11, 115 LRRM at 1028-29 (footnote omitted). The Board then proceeded to articulate its new standard for concerted activity. Id. at 11-12, 115 LRRM at 1029.

[55] See FCC v. RCA Communications, Inc., 346 U.S. 86, 91 (1953); Chenery, 318 U.S. at 87.

[56] See, e.g., Eastex, Inc. v. NLRB, 437 U.S. 556, 98 LRRM 2717 (1978); NLRB v. J. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975); NLRB v. Washington Aluminum Co., 370 U.S. 9, 50 LRRM 2235 (1962).

[57] NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266, 88 LRRM 2689 (1975) (quoting NLRB v. Erie Resistor Corp., 373 U.S. 221, 236, 53 LRRM 2121 (1963)) (citations omitted).

[58] 104 S. Ct. 1505, 115 LRRM 3193 (1984).

[59] City Disposal Sys., Inc. v. NLRB, 683 F.2d 1005,

Reversing the Sixth Circuit, the Supreme Court made clear that section 7 does not compel a narrowly literal interpretation of "concerted activities," but rather is to be construed by the Board in light of its expertise in labor relations. While agreeing with the Meyers Board that the term "concerted activity" "clearly enough embraces the activities of employees who have joined together in order to achieve common goals,"[60] the Court emphasized that "[w]hat is not self-evident from the language of the Act ... is the precise manner in which particular actions of an individual employee must be linked to the actions of fellow employees in order to permit it to be said that the individual is engaged in concerted activity."[61] The Court continued:

> *Although one could interpret the phrase, "to engage in concerted activities," to refer to a situation in which two or more employees are working together at the same time and the same place toward a common goal, the language of § 7 does not confine itself to such a narrow meaning.* In fact, § 7 itself defines both joining and assisting labor organizations — activities in which a single employee can engage — as concerted activities. Indeed, even the courts that have rejected the Interboro doctrine recognize the possibility that an individual employee may be engaged in concerted activity when he acts alone.[62]

Because the Court found that the meaning of "concerted activities" was subject to varying interpretations based on "differing views regarding the nature of the relationship that must exist between the action of the individual employee and the actions of the group in order for § 7 to apply," it held that the question was for the Board to resolve in light of its expertise in labor relations, as long as its judgment was reasonable.[63] The Court concluded that the Interboro doctrine embodied a reasonable view, agreeing with the Board that "[t]he invocation of a right rooted in a collective bargaining agreement is unquestionably an integral part of the process that gave rise to the agreement," a process that extends from the organization of a union to the enforcement of a collective bargaining agreement achieved through group action.[64]

The Court also found that the Interboro doctrine was not inconsistent with the congressional intent in enacting section 7.[65] Reviewing the history of that provision,[66] the Court concluded that Congress, in enacting section 7,

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110 LRRM 3225 (6th Cir. 1982) (per curiam); see, e.g., Royal Dev. Co. v. NLRB, 703 F.2d 363, 374, 112 LRRM 2932 (9th Cir. 1983); Roadway Express, Inc. v. NLRB, 700 F.2d 687, 693-94, 112 LRRM 3152 (11th Cir. 1983), vacated, 104 S. Ct. 1699, 115 LRRM 3416 (1984); NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 719, 83 LRRM 2625 (5th Cir. 1973) (dictum); NLRB v. Northern Metal Co., 440 F.2d 881, 884, 76 LRRM 2958 (3d Cir. 1971); see also Kohls v. NLRB, 629 F.2d 173, 176-77, 104 LRRM 3049 (D.C. Cir. 1980) (expressing doubts about the validity of Interboro), cert. denied, 450 U.S. 931, 109 LRRM 2376 (1981).

[60] 104 S. Ct. at 1511 (citing Meyers at 3, 115 LRRM at 1025).

[61] 104 S. Ct. at 1511.

[62] Id. (emphasis added) (footnote omitted). As the Supreme Court noted, the courts that rejected Interboro "limited their recognition of this type of concerted activity, however, to two situations: (1) that in which the lone employee intends to induce group activity, and (2) that in which the employee acts as a representative of at least one other employee." Id. at 1511 (citations omitted). After City Disposal, of course, it is clear that at least a third instance of individual employee action is protected under section 7 — the assertion of rights rooted in a collective bargaining agreement.

[63] 104 S. Ct. at 1510-11.

[64] Id. at 1511-12.

[65] Id. at 1512.

[66] As the Court explained, the protection for concerted activities originated in §§ 6 and 20 of the Clayton Act, ch. 323. 38 Stat. 730, 731, 738 (1915) (currently codified at 15 U.S.C. § 17 (1982); 29 U.S.C. § 52 (1982)), and § 2 of the Norris-LaGuardia Act, ch. 90, 47 Stat. 70, 70 (1933) (currently codified at 29 U.S.C. § 102 (1982)). These provisions were enacted to exempt peaceful labor activities from the reach of the federal antitrust laws and the common law doctrine of unlawful conspiracy, which held that labor protests that would have been lawful if made by a single individual were nevertheless unlawful if conducted by a group. In Norris-LaGuardia Act § 2, Congress declared that it was the public policy of the United States that "the individual ... worker shall be free from the interference, restraint, or coercion, of employers ... in self-organization or in *other concerted activities for the purpose of collective bargaining or other mutual aid or protection.*" Id. (emphasis added). The Clayton and Norris-LaGuardia Acts, however, granted legal protection to these rights only against interference by the federal courts through use of the labor injunction. When Congress adopted the National Industrial Relations Act, ch. 90, § 7(a), 48 Stat. 195 (1933), and the NLRA, ch. 372, § 7, 49 Stat. 449 (1935), it adopted the language of § 2 of the Norris-LaGuardia Act to define the rights of employees against employer coercion and discipline as well. See City Disposal, 104 S. Ct. at 1512-13. See generally Gorman & Finkin, supra note 27, at 331-46.

The petitioner, joined by the amici, argues on the basis of this history that NLRA § 7 was intended not to protect only conduct engaged in by two or more employees, but rather to extend to group conduct the same protections to which individual actions were entitled. See Brief for Petitioner at 26-29; Brief of Amici Curiae Workers' Rights Law Project (WRLP) and Philadelphia Area Project on Occupational Safety and Health (PHILAPOSH) at 11-17. This interpretation of the history of § 7 has the support of a number of commentators. See, e.g., Gorman & Finkin, supra note 27, at 331-46; Lynd. *The Right to Engage in Concerted Activity After Union Recognition: A Study of Legislative History,* 50 Ind. L.J. 720, 726-34 (1975); Note, *Individual Rights for Organized and Unorganized Employees Under the National Labor Relations Act,* 58 Tex. L. Rev. 991, 1006-08 (1980); see also Illinois Ruan Transp. Corp. v. NLRB, 404 F.2d 274, 289 n.6, 69 LRRM 2761 (8th Cir. 1968) (Lay, J., dissenting). We find it unnecessary to consider this argument in the present case, however, since we find that, in any event, the Board was mistaken in its view that the language, history, and prior interpretation of § 7 left it without discretion to consider adopting a broader interpretation of the Act.

had "sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment."[67] Most importantly, the Court observed that "[t]here is no indication that Congress intended to limit this protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way."[68]

Thus, City Disposal makes unmistakably clear that, contrary to the Board's view in Meyers, neither the language nor the history of section 7 requires that the term "concerted activities" be interpreted to protect only the most narrowly defined forms of common action by employees, and that the Board has substantial responsibility to determine the scope of protection in order to promote the purposes of the NLRA. The Board's failure in Meyers to recognize the extent of its own interpretative authority has significant consequences. For example, in the past, both the Board and some courts have held that it is necessary under certain circumstances to accord protection to individual conduct in order to protect the development of collective activity.[69] Similarly, in City Disposal, the Supreme Court observed that under section 8(a)(1) of the Act "[i]t is possible ... for an employer to commit an unfair labor practice by discharging an employee who is not himself involved in concerted activity but whose actions are related to other employees' concerted activities in such a manner as to render his discharge an interference or restraint on those activities."[70] In Meyers, however, the Board failed even to consider whether the discharge of an employee because of his safety complaints would discourage other employees from engaging in collective activity to improve working conditions.

We recognize that the Board did not have the benefit of the Supreme Court's opinion in City Disposal when it decided Meyers, and that this fact may well have contributed to the Board's misconception of the scope of its authority under section 7. Our remand in this case will permit the Board to reconsider Meyers in light of the Supreme Court's intervening decision in City Disposal.

D. *Decisions of the Courts and Board Before* Alleluia

[3] We also think that the Board was mistaken in its claim that, in adopting the Meyers test, it was simply returning to "the standard on which the Board and courts relied before Alleluia."[71] Because the Board relied on a misreading of precedent in selecting the new standard in Meyers, we remand the decision for reconsideration under the principles of Chenery.[72]

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[67] 104 S.Ct. at 1513.

[68] Id.

[69] See, e.g., Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1347, 71 LRRM 2827 (3d Cir. 1969) ("To protect concerted activities in full bloom, protection must necessarily be extended to 'intended, contemplated or even referred to' group action, ... lest employer retaliation destroy the bud of employee initiative aimed at bettering terms of employment and working conditions.") (quoting Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685, 56 LRRM 2034 (3d Cir. 1964)); cases cited in note 79 infra.

[70] 104 S. Ct. at 1512 n.10.

[71] Meyers at 11, 115 LRRM at 1029.

[72] In its brief, Brief for NLRB at 7, 24-27, the Board urges us to uphold its decision partly because it "reasonably acquiesced" in the judicial decisions rejecting the Alleluia doctrine, see note 27 supra. This argument ignores the basic distinction between the Board's rejection of the sweeping Alleluia principle and its establishment of the new standard. The Board's rejection of Alleluia in no way required it to adopt the test enunciated in Meyers.

For other reasons as well, we find the decisions on which the Board relies to be of limited value in deciding the present case. First, many of the cases that rejected Alleluia relied on reasoning or on earlier decisions that disapproved all forms of "constructive concerted activity," including the Interboro doctrine. See, e.g., Jim Causley Pontiac v. NLRB, 620 F.2d 122, 126 n.7, 104 LRRM 2190 (6th Cir. 1980) (finding adoption of Alleluia foreclosed by ARO, Inc. v. NLRB, 596 F.2d 713, 101 LRRM 2153 (6th Cir. 1979)); NLRB v. Bighorn Beverage, 614 F.2d 1238, 1242, 103 LRRM 3008 (9th Cir. 1980) (relying on several decisions rejecting or criticizing Interboro); NLRB v. Dawson Cabinet Co., 566 F.2d 1079, 1082-84, 97 LRRM 2075 (8th Cir. 1977) (relying on NLRB v. Northern Metal Co., 440 F.2d 881, 76 LRRM 2958 (3d Cir. 1971), and NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 719-20, 83 LRRM 2625 (5th Cir. 1973)). As the Board concedes, see Brief for NLRB at 26 n.8, the rationale of such cases does not survive City Disposal.

Furthermore, many of the judicial decisions refusing to hold individual action to be concerted did not involve occupational safety or other statutory rights, but rather involved individual employee protests about job conditions. See, e.g., Ontario Knife Co. v. NLRB, 637 F.2d 840, 106 LRRM 2053 (2d Cir. 1980); Pelton Casteel, Inc. v. NLRB, 627 F.2d 23, 105 LRRM 2124 (7th Cir. 1980). In such cases, the employee's complaint may appear to the court to be little more than a "personal gripe" unworthy of protection under § 7. See Pelton Casteel, 627 F.2d at 29. Few of the cases rejecting Alleluia involved matters of safety, see, e.g., Jim Causley Pontiac, supra; Bighorn Beverage, supra, and we are aware of no such cases in which the conduct for which the employee was disciplined was *required by law*, as in the present case. In a case quite similar on its facts to Meyers, NLRB v. Lloyd A. Fry Roofing Co., 651 F.2d 442, 107 LRRM 2926 (6th Cir. 1981), the Sixth Circuit *upheld* the Board's finding that a truck driver who was discharged for his safety complaints was engaged in conduct protected by § 7. While the court found that there had been considerable group involvement in the safety issue, it also relied on the principles of Alleluia, concluding that the driver was protected because he had "attempt[ed] to enforce

The test adopted by the Board in Meyers derives from the Ninth Circuit's one-sentence per curiam opinion in Pacific Electricord Co. v. NLRB.[73] The Pacific Electricord standard, however, has been followed only in the Ninth Circuit, at least as an exclusive definition of concerted activity. Furthermore, the Pacific Electricord test, which had been relied upon by the Ninth Circuit in rejecting the Interboro doctrine, was effectively disapproved by the Supreme Court in City Disposal, at least insofar as it applied to individual action in the context of collective bargaining.[74] It is equally noteworthy that no other court has followed Pacific Electricord in defining "concerted activities" under section 7.[75]

The Board and most courts have historically taken a broader approach to defining the scope of section 7.[76] In particular, the Meyers test appears to be narrower in at least two important respects than the standards traditionally applied by the Board and the courts to define concerted activity. First, both the Board and the courts have long held that an individual who brings a group complaint to the attention of management is engaged in concerted activity even though he was not designated or authorized to be a spokesman by the group.[77] In applying the Meyers test, however, the Board has essentially required that such a complaint have been specifically authorized by the group in order to be protected under section 7.[78]

Second, the courts have long followed the Board's view that individual efforts to enlist other employees in support of common goals is protected by section 7.[79] The leading case is Mushroom

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federal safety and state inspection regulations ... intended to provide *all* employees with a safe job environment and the means to protect themselves against job hazards." Id. at 445 (emphasis in original). The Board made no reference to the Lloyd A. Fry decision in its Meyers opinion: moreover, it made no effort to consider whether the case of an employee who is discharged for conduct required by laws designed for the benefit of all employees may be distinguishable from the judicial decisions that have rejected the theory of implied concerted activity in other contexts.

[73] 361 F.2d 310, 63 LRRM 2064 (9th Cir. 1966) (per curiam). The Ninth Circuit's statement granting enforcement gives no indication that the test there stated is necessarily intended to be exclusive. Ontario Knife Co. v. NLRB, 637 F.2d 840, 845, 106 LRRM 2053 (2d Cir. 1980), which the Board cites as authority for its new test in addition to Pacific Electricord, see Meyers at 12 n.22, 115 LRRM at 1029 n.22, articulates no such standard, but rather holds that, to be protected under §7, "the activity must be 'concerted' or, if undertaken by an individual ..., must be looking towards group action." 637 F.2d at 845.

[74] See Royal Dev. Co. v. NLRB, 703 F.2d 363, 372-74, 112 LRRM 2932 (9th Cir. 1983), disapproved in City Disposal, 104 S.Ct. at 1508 n.4.

[75] In ARO, Inc. v. NLRB, 596 F.2d 713, 718, 101 LRRM 2153 (6th Cir. 1979), the Sixth Circuit formulated a standard for concerted activity that resembled — although it was broader than — the Pacific Electricord test adopted by the Board in Meyers:

> For an individual claim or complaint to amount to concerted action under the Act it must not have been made solely on behalf of an individual employee, but it must be made on behalf of other employees or at least be made with the object of inducing or preparing for group action and have some arguable basis in the collective bargaining agreement.

596 F.2d at 718. In reversing the Sixth Circuit in City Disposal, the Supreme Court implicitly disapproved this standard as well, at least as applied to the assertion of rights under a collective bargaining agreement. See 104 S. Ct. at 1509-10.

[76] Indeed, as early as 1953, a review of the Board's decisions found that the Board had adopted an interpretation of §7 that in effect granted protection even to individual activity that had a tendency to further the common interests of employees. See Note, *The Requirement of "Concerted" Action Under the NLRA*, 53 Colum. L. Rev. 514, 516-20 (1953).

[77] See, e.g., NLRB v. Charles H. McCauley Assocs., Inc., 657 F.2d 685, 688, 108 LRRM 2617 (5th Cir. Unit B 1981); Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1349-50, 71 LRRM 2827 (3d Cir. 1969), cert. denied, 397 U.S. 935, 73 LRRM 2600 (1970), enforcing 171 NLRB 1040, 69 LRRM 1384 (1968); NLRB v. Guernsey-Muskingum Elec. Co-op., Inc., 285 F.2d 8, 12, 47 LRRM 2260 (6th Cir. 1960), enforcing 124 NLRB 618, 44 LRRM 1439 (1959); Carbet Corp., 191 NLRB 892, 77 LRRM 1722 (1971).

[78] See note 48 supra.

[79] See, e.g., Root-Carlin, Inc., 92 NLRB 1313, 1314, 27 LRRM 1235 (1951); Central Steel Tube Co., 48 NLRB 604, 612-13, 12 LRRM 119, enforced, 139 F.2d 489, 13 LRRM 712 (8th Cir. 1943). In Root-Carlin, an employee was discharged for discussing with various other employees the need to form a union at their plant. Holding the employee's conduct protected, the Board stated, "Manifestly, the guarantees of section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization." 92 NLRB at 1314.

In Meyers, in order to maintain its view that the NLRB traditionally has required "some kind of group action" to find conduct concerted, the Board treated Root-Carlin as resting on the rationale that the conversations involved "interaction among employees." Meyers at 4-5, 115 LRRM at 1026. Although the Root-Carlin Board mentioned this point, 92 NLRB at n.5, it relied primarily on the policy ground that protecting such activity was essential to the development of employee self-organization. Thus, in explaining the principle the following year, the Board stated, "Group action is not deemed a prerequisite to concerted activity, for the reason that a single person's action may be the preliminary step to acting in concert." Salt River Valley Water Users Ass'n, 99 NLRB 849, 853, 30 LRRM 1156 (1952) (footnote omitted), enforced in relevant part, 206 F.2d 325, 328, 32 LRRM 2598 (9th Cir. 1953). The Board continued to follow this view in later cases. See, e.g., Mason & Hanger-Silas Mason Co., 179 NLRB 434, 439-40, 72 LRRM 1372 (1969), enforcement denied on other grounds, 449 F.2d 425, 78 LRRM 2487 (8th Cir. 1971).

The Board's opinion in Meyers also relied on Continental Mfg. Corp., 155 NLRB 255, 60 LRRM 1290 (1965), in which the Board found no concerted activity where an employee presented to management a complaint that she claimed was shared by a majority of employees although they were too frightened to speak up themselves. As our discussion has shown, we find that Continental did not repre-

Transportation Co. v. NLRB,[80] which holds that conduct is protected if it is "engaged in with the object of initiating or inducing or preparing for group action or ... had some relation to group action in the interest of employees."[81] As the Supreme Court indicated in City Disposal, practically all courts follow Mushroom Transportation in holding such conduct protected.[82] It is not clear, however, that the Meyers standard would protect an individual's efforts to induce group action.[83]

The Mushroom Transportation standard has been given varying interpretations by the courts of appeals. Some courts have applied the standard narrowly;[84] others have given it a more expansive interpretation, emphasizing the Third Circuit's statement that conduct is protected if it "had some relation to group action in the interest of employees."[85] Further, a number of cases have expressed the view that an individual employee engages in concerted activity when the purpose of his acts is to promote the welfare of other workers.[86] Finally, in one case, the Sixth Circuit found concerted activity on facts quite close to those in Meyers.[87]

We do not undertake to decide in this case whether the Board is required to follow any particular approach to concerted activity under section 7. Rather, we review these cases in order to see whether the Board was correct in its view that, in adopting the Meyers test, it was doing no more than conforming to "the standard on which the Board and courts relied before Alleluia." As we have tried to make clear, any fair reading of judicial precedent reveals that the Board's test in Meyers is substantially narrower in important respects than the various standards for concerted activity that have been followed by past Boards and most of the courts of appeals. We therefore conclude that, in adopting the Meyers test, the Board relied on a misinterpretation of judicial decisions and its own prior cases.

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sent the dominant trend of the Board's pre-Alleluia decisions. See also Gorman & Finkin, supra note 27, at 297-98 & n.37 (characterizing Continental as questionable and inconsistent with Board's other decisions). Indeed, less than two months after Continental, the Board, in a decision anticipating Alleluia, held that an employee who, without authorization from other employees, filed a complaint with the Department of Labor seeking an investigation of whether her employer was in violation of the Equal Pay Act was engaged in protected concerted activity under § 7. Montgomery Ward & Co., 156 NLRB 7, 10-11, 60 LRRM 1544 (1965).

[80] 330 F.2d 683, 56 LRRM 2034 (3d Cir. 1964).

[81] Id. at 685.

[82] 104 S. Ct. at 1511; see, e.g., Owens-Corning Fiberglas Corp. v. NLRB, 407 F.2d 1357, 1365, 70 LRRM 3065 (4th Cir. 1969) ("The activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity. The one seldom exists without the other.").

[83] Several considerations suggest that such conduct is not protected under Meyers. First, granting protection to the lone employee who seeks to induce group action is not easy to fit within the language of Meyers, and the Board's subsequent cases show that the definition generally will be construed strictly. More importantly, the Meyers Board had available to it several decades of judicial and administrative decisions construing § 7. Despite its claim to be returning to an interpretation generally accepted before Alleluia, however, it did not adopt the Mushroom Transportation standard, which is accepted, at least as a nonexclusive standard, by most courts of appeals. Nor did it adopt the language of the ARO case, see note 75 supra, which incorporated both the Mushroom Transportation and Pacific Electricord standards. In stead, the Board chose to adopt the language of Pacific Electricord alone. One might assume, therefore, that the Board's choice not to endorse the language of Mushroom Transportation was deliberate.

Several decisions since Meyers contain somewhat conflicting indications on whether the Board will hold efforts to induce group action to be concerted under Meyers. In United Hydraulic Servs., Inc., 271 NLRB No. 18, 116 LRRM 1450 (June 29, 1984), the majority declined to decide the question whether an employee's distribution of a complaint to his co-workers constituted concerted activity, holding the employee's discharge unlawful on other grounds. Member Dennis would have held the conduct protected, relying not on the Meyers standard itself but on Meyers' citation to Ontario Knife Co. v. NLRB, 637 F.2d 840, 845, 106 LRRM 2053 (2d Cir. 1980). See note 73 supra. In two recent cases, divided panels of the Board relied on Mushroom Transportation to hold efforts to promote group action concerted. See Walter Bruckner & Co., 273 NLRB No. 162, 118 LRRM 1127 (Dec. 14, 1984); Vought Corp., 273 NLRB No. 161, 118 LRRM 1271 (Dec. 14, 1984). In both cases, however, the majority consisted of Member Dennis (who wrote separately in United Hydraulic) and Member Zimmerman (who is no longer with the Board); Chairman Dodson dissented or declined to reach the issue.

[84] See, e.g., NLRB v. Datapoint Corp., 642 F.2d 123, 107 LRRM 2032 (5th Cir. Unit A 1981); Pelton Casteel, Inc. v. NLRB, 627 F.2d 23, 105 LRRM 2124 (7th Cir. 1980); NLRB v. Northern Metal Co., 440 F.2d 881, 76 LRRM 2958 (3d Cir. 1971); Indiana Gear Works v. NLRB, 371 F.2d 273, 64 LRRM 2253 (7th Cir. 1967). A number of courts relied on Mushroom Transportation to reject the Interboro doctrine. See, e.g., NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 719, 83 LRRM 2625 (5th Cir. 1973); Northern Metal, supra. These decisions were overruled by City Disposal. Thus, it is clear that while Mushroom Transportation generally establishes a minimum definition of concerted activity applied in the courts of appeals, it is not exhaustive.

[85] See, e.g., Randolph Div., Ethan Allen, Inc., 513 F.2d 706, 708, 89 LRRM 2013 (1st Cir. 1975); Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1355, 71 LRRM 2827 (3d Cir. 1969); Signal Oil & Gas Co. v. NLRB, 390 F.2d 338, 342-43, 67 LRRM 2706 (9th Cir. 1968).

[86] See, e.g., NLRB v. Charles H. McCauley Assocs., Inc., 657 F.2d 685, 688, 108 LRRM 2612 (5th Cir. Unit B. 1981); NLRB v. Sencore, Inc., 558 F.2d 433, 434, 95 LRRM 2865 (8th Cir. 1977); Randolph Div., Ethan Allen, Inc., 513 F.2d 706, 708, 89 LRRM 2013 (1st Cir. 1975); NLRB v. C & I Air Conditioning, Inc., 486 F.2d 977, 978, 84 LRRM 2625 (9th Cir. 1973); Illinois Ruan Transp. Corp. v. NLRB, 404 F.2d 274, 288-90, 69 LRRM 2761 (8th Cir. 1968) (Lay, J., dissenting); see also Keokuk Gas Serv. Co., 580 F.2d 328, 333-34, 98 LRRM 3332 (8th Cir. 1978).

[87] NLRB v. Lloyd A. Fry Roofing Co., 651 F.2d 442, 107 LRRM 2926 (6th Cir. 1981).

Our conclusion highlights the lack of any meaningful support for the Board's opinion in this case. Not only is the Board's decision grounded on a faulty legal premise (as shown in part III.C. supra), it is also flawed by a lack of rationale. We are therefore constrained, under the authority of Chenery, to remand this case for reconsideration by the Board.

CONCLUSION

[4] We hold that, in adopting the Meyers test of "concerted activities," the Board failed to rely on its own judgment and expertise, and instead based its decision on an erroneous view of the law. The Supreme Court's decision in City Disposal makes clear that the Board is not *required* to give a narrowly literal interpretation to "concerted activities," but has substantial authority to "defin[e] the scope of §7 '... in the first instance as it considers the wide variety of cases that come before it.' "[88] Moreover, we find that, contrary to the Board's view, its Meyers standard does not constitute a mere return to the standards traditionally applied by the Board and the courts to define concerted activity, but instead is substantially more restrictive.

This is not a case in which the "mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached."[89] As our discussion has shown, the Board and courts of appeals have taken a variety of approaches to defining "concerted activities," some of which might result in relief for the petitioner. Moreover, the result in a given case will often turn not only on the governing standard but also on the manner in which that standard is applied, and this may well be influenced by whether the Board believes the standard to be dictated by the statute itself or rather adopted as a matter of policy in order to effectuate the purposes of the Act. Thus, we cannot say that the Board's error in this case clearly had no bearing on the result reached.

Rather than remand to the Board, the dissent would have this court determine for itself whether, applying the City Disposal analysis, the conduct at issue here is sufficiently related to the actions of other employees that it should be held protected under section 7. We believe, however, that such a determination is for the Board and not for this court to make in the first instance. The dissent's extensive efforts to provide a justification for distinguishing between the assertion of rights within and without a collective bargaining context only underscore the failure of the Board to provide a reasoned basis for such a distinction in its own opinion. Our remand in this case is intended to afford the Board a full opportunity to consider such issues in light of the analysis of section 7 in City Disposal.

The dissent unaccountably characterizes our opinion as holding that the Board had discretion under section 7 to adopt the Alleluia doctrine. However, as we have made clear, we do not find it necessary to consider the validity of Alleluia or any other test of concerted activity in this case, and we express no opinion on this issue. The dissent also urges on various grounds that remand is unnecessary because the Board's error in this case is "harmless." We do not believe that an agency decision can be sustained under any notion of "harmless error" where the agency has failed to exercise its lawful discretion and has provided no rational basis for its determination.

Although we, like the Board, find the facts of this case to be egregious, we stress that this in no way forms the basis of our decision. Nonetheless, we think that the facts of this case highlight the Board's failure to give a considered judgment on the issues involved. In the present case, the Board upheld the discharge of an employee for refusing to drive a vehicle determined to be unsafe by state authorities, despite the fact that both the employee and the company were under a legal obligation not to operate the vehicle.[90] Moreover, the Board's decision in Meyers produces the anomaly that a unionized worker who complains about safety or other matters covered by a collective bargaining agreement will be held protected under Interboro and City Disposal, while an unorganized employee will be denied protection for engaging in identical conduct. We agree with the Board that its responsibility is to apply the National Labor Relations Act and not to enforce all state and federal law. This does not mean, however, that with respect to matters within its discretion, the Board should ignore the policy implications of its decisions.

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[88] City Disposal, 104 S.Ct. at 1510 (quoting Eastex, Inc. v. NLRB, 437 U.S. 556, 568, 98 LRRM 2717 (1978)).

[89] Massachusetts Trustees v. United States, 377 U.S. 235, 248 (1964).

[90] See note 18 supra.

Because we have determined that it was "improper for the [Board] to suppose that the standard it has adopted is to be derived without more from a national policy defined by legislation and by the courts,'"[91] we remand the case to the Board for reconsideration of the scope of "concerted activities" under section 7.[92]

So ordered.

Dissenting Opinion

BORK, Circuit Judge, dissenting: — Petitioner Prill asks this court to set aside an order of the National Labor Relations Board denying him reinstatement and other relief. The Board determined that Prill's employer, Meyers Industries, Inc., did not commit an unfair labor practice by discharging Prill, because the conduct for which Prill was discharged was not "concerted activit[y]" under section 7 of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 157 (1982). Meyers Industries, Inc., 268 NLRB No. 73, 115 LRRM 1025 (Jan. 6, 1984) (hereinafter referred to as "Meyers"). In my view, the Board reached a result that seems to me compelled by section 7. If Prill's actions might be called "concerted," almost any actions might be so characterized and the qualifying word that Congress wrote into the statute would effectively be removed from it. But, in any event, the Board's interpretation of the provision is reasonable and should be upheld without hesitation.

I.

The majority does not purport to disturb any of the Board's findings of fact in this case. It is therefore common ground that Prill was discharged for refusing to drive an unsafe vehicle and entering safety complaints about the vehicle to his employer and to state authorities. See Meyers at 15, 115 LRRM at 1030. It is also common ground that "Prill alone refused to drive the truck and trailer: he alone contacted the Tennessee Public Service Commission after the accident; and, prior to the accident, he alone contacted the Ohio authorities. Prill acted solely on his own behalf." Meyers at 16, 115 LRRM at 1030. Moreover, it is undisputed that as to a similar complaint made in Prill's presence by another driver, one Gove, about the same vehicle, "the judge correctly made no factual finding that Prill and Gove in any way joined forces to protest the truck's condition." Meyers at 16-17, 115 LRRM at 1030.

In the course of applying section 7 to this case, the Board overruled its decision in Alleluia Cushion Co., 221 NLRB 999, 1000, 91 LRRM 1131 (1975), which had held that "where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted." The Board held that "the concept of concerted activity first enunciated in Alleluia does not comport with the principles inherent in Section 7 of the Act," and asserted that it would instead rely "upon the 'objective' standard of concerted activity — the standard on which the Board and the courts relied before Alleluia." Meyers at 11, 115 LRRM at 1028-29. The Board then proceeded to set forth a definition of concerted activity that "is an attempt at a comprehensive one, [but] we caution that it is by no means exhaustive. We acknowledge the myriad of factual situations that have arisen, and will continue to arise, in this area of the law." Id. 115 LRRM at 1029. The Meyers reformulation is as follows: "[i]n general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." Id. at 12, 115 LRRM at 1029 (footnote omitted).

The majority does not dispute that, if the Meyers test is valid, Prill's conduct is not concerted activity and therefore cannot be protected under section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1) (1982). The majority also refrains from holding that Prill's conduct was concerted activity under section 7, and claims to "express no view on whether, under § 7, the Board may adopt the

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[91] FCC v. RCA Communications, Inc., 346 U.S. 86, 94 (1953).

[92] In view of our disposition of this case, we have no occasion to consider whether the Board's application of its new standard in this case was supported by substantial evidence.

The petitioner also argues that the Board was required to determine whether § 502 of the Labor Management Relations Act, 29 U.S.C. § 143 (1982), supports his argument that his conduct is protected under § 7. The Board declined to reach this issue on the ground that it was neither raised nor litigated by the General Counsel at the hearing. Meyers at 1 n.1, 115 LRRM at 1025 n.1. We find no basis on which to disturb this ruling by the Board.

Meyers test as an act of discretion." Maj. op. at 16 n.46. Nonetheless, invoking SEC v. Chenery Corp., 318 U.S. 80 (1943), the majority sets aside the Board's order and remands this case to the Board on the grounds that "the Board misinterpreted the law in two respects." Maj. op. at 16. First, the majority argues that the Supreme Court's decision in City Disposal System, Inc., 104 S.Ct. 1505, 115 LRRM 3193 (1984), "makes unmistakably clear that, contrary to the Board's view in Meyers, neither the language nor the history of section 7 requires that the term 'concerted activities' be interpreted to protect only the most narrowly defined forms of common action by employees, and that the Board has substantial responsibility to determine the scope of protection in order to promote the purposes of the NLRA." Maj. op. at 25. Second, the majority states that "contrary to the view expressed by the Board, we find that the Meyers test does not represent a return to the standard relied on by the courts and by the Board before Alleluia, but instead constitutes a new and more restrictive standard." Id. at 6. Because, in the majority's view, the Board in its discretion could have adopted a definition of concerted activity under which petitioner's conduct would be held to be concerted, remand is required. As I shall show, it is the majority rather than the Board that has misinterpreted the law, and in any event the Board's alleged mistakes, if they existed, would be harmless error under the facts of this case.

II.

A.

In this case, the Board has proposed and applied a new test which it regards as consistent with Congress' intent in employing the words "concerted activities" in section 7 of the NLRA. As the majority recognizes, "the task of defining the scope of §7 is for the Board to perform in the first instance as it considers the wide variety of cases that come before it, and, on an issue that implicates its expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference." NLRB v. City Disposal System, Inc., 104 S.Ct. 1505, 1510, 115 LRRM 3193 (1984) (citations and quotation marks omitted). The question for decision would appear to be straightforward: is the Board's new construction of section 7 reasonable or not? The anomalous character of the majority's analysis is well shown by the fact that *the majority never answers this question.*

The Board's reading of section 7 is, in my view, altogether reasonable, and neither City Disposal nor any other Supreme Court decision suggests otherwise. In City Disposal, the Supreme Court upheld the Board's Interboro doctrine, under which an employee's assertion of a right created by a collective-bargaining agreement is treated as concerted activity. See Interboro Contractors, Inc., 157 NLRB 1295, 1298, 61 LRRM 1537 (1966), enforced, 388 F.2d 495, 67 LRRM 2083 (2d Cir. 1967). The Court noted that the Board in Meyers had distinguished cases involving the Interboro doctrine from the run of section 7 cases because Interboro cases concern conduct that relates back to a collective-bargaining agreement, and concluded that "[t]he Meyers case is thus of no relevance here." 104 S.Ct. at 1510 n.6.[1] That remark alone suggests, rather strongly one would think, that City Disposal does not control this case and certainly does not support the majority's position.

The Court described the question to which its opinion was addressed as "whether the Board's application of §7 ... is reasonable." 104 S.Ct. at 1510. The Court summarized the dispute over the Interboro doctrine as one that "merely reflects differing views regarding the nature of the relationship that must exist between the action of the individual employee and *the actions of the group* in order for §7 to apply." City Disposal, 104 S.Ct. at 1511 (emphasis added). As this language indicates, some real connection between the individual's conduct and group action was presupposed by both contending viewpoints before the Court — and the Court in no way repudiated that threshold requirement. For, as the

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[1] Though the Second Circuit originated the Interboro doctrine, that court found no inconsistency in rejecting the Board's later efforts — of which Alleluia is one example — to find concerted activity in "any case in which a cause advanced by an individual would redound to the benefit of his fellow employees." Ontario Knife Co. v. NLRB, 637 F.2d 840, 845, 106 LRRM 2053 (2d Cir. 1980). Writing for the court, Judge Friendly urged that "except in the context of agreements between an employer and his employees which are themselves the product of concerted activities, as in Interboro[,] §7 ... should be read according to its terms." Id. Interboro cases were treated specially because "a collective bargaining agreement ... is itself the result of concerted activity." Id. That very rationable, of course, is central to the Supreme Court's reasoning in City Disposal, see 104 S.Ct. at 1511. Hence Ontario Knife tends to confirm the validity of the distinction between the Interboro and Alleluia doctrines drawn by the Board in Meyers, and relied on by the Supreme Court in City Disposal.

Court went on to say, the process of which the collective bargaining agreement is a part is "a single, collective activity," which "extend[s] through the enforcement of the agreement." Id. The "relationship" the Court identified between individual assertions of rights derived from a collective-bargaining agreement and group action was, moreover, essentially identical to the one it perceived between group action and the individual acts of "joining and assisting a labor organization, which §7 explicitly recognizes as concerted," Id. at 1512. In the latter situation, the individual's "actions may be divorced in time, and in location as well, from the actions of fellow employees. Because of the integral relationship *among the employees' actions*, however, Congress viewed each employee as engaged in concerted activity." Id. (emphasis added). In a footnote the Court added, "[o]f course, at some point an individual employee's actions may become so remotely related to the activities of fellow employees that it cannot reasonably be said that the employee is engaged in concerted activity." Id. at 1512 n.10. The Court briefly examined the legislative history of section 7, and, finding the Interboro doctrine "fully consistent with congressional intent," id. at 1513, concluded that "the doctrine constitutes a reasonable interpretation of the Act." Id. at 1516.

City Disposal establishes only that the Interboro doctrine, which presupposes a real and not imaginary relationship between individual conduct and group action as a condition precedent to finding concerted activity, is a reasonable interpretation of section 7. If the Board in Meyers had held that the Interboro doctrine is inconsistent with the meaning of section 7, I would agree that City Disposal would require us to reject the Board's reasoning. If the Board had held that some other type of individual conduct that was equally directly related to group action could not be deemed concerted activity consistently with section 7, I would agree that City Disposal would strongly suggest the Board was wrong. But that is not what happened here.

Meyers repudiated the Alleluia doctrine, which deems individual protest grounded in a worker protection statute to be concerted activity whether or not any other employees are involved in the protest. Alleluia's test for concerted activity required less than a "remote" relationship between individual and group activity — it required no relationship at all. City Disposal is therefore completely consistent with the Board's determination that "the concept of concerted activity first enunciated in Alleluia does not comport with the principles inherent in Section 7 of the Act." Meyers at 11, 115 LRRM at 1028.

Beyond that, I do not think that City Disposal establishes that the Board has discretion to adhere to the Alleluia doctrine.[2] Nor is there any basis in the language of section 7 for the majority's suggestion that "the case of an employee who is discharged for conduct required by laws designed for the benefit of all employees may be distinguishable from the judicial decisions that have rejected the theory of implied concerted activity in other contexts." Maj. op. at 26 n.72. City Disposal makes clear that the words "concerted activities" were intended to reach individual conduct that is linked to group activity in any of several ways, but it reaffirms the longstanding rule that there must be both group activity and a clear nexus between that activity and the individual's conduct. The Alleluia doctrine destroyed the statutory requirements of group action and a nexus between that action and the individual's conduct, thereby reading the word "concerted" out of section 7 altogether. The City Disposal Court's careful effort to ground the Interboro doctrine in the language of section 7 confirms the proposition that "§7 ... should be read according to its terms." Ontario Knife Co. v. NLRB, 637 F.2d 840, 845, 106 LRRM 2053 (2d Cir. 1980). There is no reading of section 7 "according to its terms" that would allow a finding of concerted action in this case or in Alleluia-type cases generally.[3] Therefore, while I agree with the majority that the Board believed it had no discretion to adhere to the Alleluia doctrine, in my view the Board's belief was entirely correct. Since an individual's appeal to a statute about worker protection involves other workers only in the sense that they "should" be concerned with such protection, it is difficult to see how that case differs from one in which an individual protests about any matter that, in the estimation of the Board or a court, "should" be of concern to other workers. Thus, by sleight of hand, Board or judicial policy replaces congressional policy, individual behavior becomes group action, and the requirement that activity be "concerted" drops from the law.

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[2] The majority denies that it is *holding* that the Board has discretion under section 7 to adopt the Alleluia doctrine. Fair enough. But the majority does not explain how its suggestion, that individual complaints relating to safety statutes are distinguishable from other individual complaints, can be reconciled with the language of section 7 except by reliance on one or both of the rationales the majority identifies as underlying the Alleluia doctrine. Thus, while not directly endorsing "the sweeping Alleluia principle," maj. op. at 26 n.72, the majority also fails to show that there is a middle ground between Alleluia and the general approach taken by the Board in Meyers which, consistently with the language of section 7, could result in a finding of concerted activity in this case.

[3] To be sure, there is one reading of section 7 which purports to be literal and which would ratify the Alleluia doctrine. That reading was suggested in the dissenting opinion in Illinois Ruan Transport Corp. v. NLRB, 404 F.2d 274, 281, 69 LRRM 2761 (8th Cir. 1968) (Lay, J., dissenting): "The words 'concerted activity' are directly related and defined in terms of their intended purpose of 'collective bargaining' or other 'mutual aid or protection.' The phrases are interrelated and derive substantive meaning from each other." Id. at 288. On this reading, concerted

Thus, in Meyers the Board found that "under the Alleluia analytical framework, the Board questioned whether the purpose of the activity was one it wished to protect and, if so, it then deemed the activity 'concerted,' without regard to its form. This is the essence of the per se standard of concerted activity." Meyers at 9, 115 LRRM at 1027. This per se standard presumes that what "*ought to be* of group concern," id. at 10, 115 LRRM at 1028, is for the mutual aid or protection of other employees, and therefore that when an individual employee protests over some such matter he is engaging in concerted activity. Id. at 10, 115 LRRM at 1028. The Board contrasted this approach with the practice of the Board and the courts before Alleluia, which "generally analyzed the concept of protected concerted activity by first considering whether some kind of group action occurred and, only then, considering whether that action was for the purpose of mutual aid or protection," Meyers at 4-5, 115 LRRM at 1026, and held that the Alleluia approach was "at odds with the Act." Id. at 10, 115 LRRM at 1028.

Precisely the same understanding informs City Disposal, where the Court noted at the outset that an employee's assertion of a right derived from a collective-bargaining agreement falls "within the 'mutual aid or protection' standard, regardless of whether the employee has his own interests most immediately in mind." City Disposal, 104 S.Ct. at 1510-11 (citation omitted). Had the Court accepted the reading of section 7 that the Board in Meyers identified as underlying the Alleluia doctrine, it could simply have said that because rights contained in a collective-bargaining agreement are secured for the mutual aid or protection of all employees who work under that agreement, an individual's assertion of any such right must be deemed to be concerted activity. In fact, however, the Court drew no inference from the finding that the "mutual aid or protection" standard had been met. Instead, the Court based its decision that the Interboro doctrine is a reasonable interpretation of section 7 on the integral relationship between the process of collective bargaining — which is indisputably concerted activity — and the assertion of rights based on a collective bargaining agreement. City Disposal, then, contains no suggestion that it is within the Board's discretion to adhere to the Alleluia doctrine or to any other theory of "constructive" concerted activity that is not grounded in the language of section 7.

B.

The majority also claims, however, that City Disposal establishes that "the Board's opinion is wrong insofar as it holds that the agency is without discretion to construe 'concerted activities' except as indicated in the Meyers test." Maj. op. at 16. This claim is flatly wrong because the Board nowhere held or implied any such thing. The Board did not say that the Act requires the exact formulation it tentatively adopted — it said that the general, pre-Alleluia approach which considers "first, whether the activity is concerted, and only then, whether it is protected," is "mandated by the statute itself." Meyers at 10, 115 LRRM at 1028. That is simply another way of saying that section 7 does not authorize the Board to find concerted activity merely because one individual's activity concerns matters that affect the well-being of other employees, and so falls within the "mu-

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activity may be found to exist "if there is some reasonable relationship connecting an employee's conduct with the 'mutual aid and protection' of other employees and such activity is based upon rights collectively recognized within a bargaining agreement." Id. at 289. In the dissent's view, Illinois Ruan turned on the validity of the Interboro doctrine, see id. at 283, so Judge Lay was not required to take his interpretation further than he did. Clearly, however, once the meaning of "concerted activit[y]" is defined in terms of the words that follow it, activity is concerted *either* if it is "for the purpose of collective bargaining *or* other mutual aid or protection." 29 U.S.C. § 157 (1982) (emphasis added).

This reading is not truly literal, for it makes the word "concerted" in section 7 utterly superfluous: so long as an individual's conduct is for the "mutual aid or protection" of other employees it will always be deemed concerted. And both the Board in Meyers and the Supreme Court in City Disposal rejected this reading — the former explicitly, the latter implicitly but no less clearly. See infra p. 8.

tual aid or protection" standard. This is the *only* aspect of its legal analysis that the Board claims is "mandated" by the Act,[4] and, as I have demonstrated in Part II-B supra, the Board's view that section 7 leaves it without discretion on this point is entirely reasonable and fully consistent with City Disposal.[5]

C.

Even if I agreed with the majority that the Board's opinion held that section 7 required it to adopt a definition of "concerted activit[y]" no broader than the Meyers test, and even if I were convinced that such a holding was erroneous, I would not remand in this case. On the facts as we must take them, there is in my view no definition the Board could propose that would, consistently with the language of section 7, afford petitioner relief. For there is no finding here that petitioner's conduct was in any way related to group activity. In order to find concerted activity here, the Board would have been forced to hold that concert can be presumed where two employees complain about the same piece of equipment on different occasions, merely because the second employee to complain was aware of the first employee's protest. Obviously, the *first* employee's protest would not be concerted even under this presumption. Hence the Board would be treating the second protest as concerted not because it was related to group activity but merely because it resembled another employee's individual conduct. The language of section 7 does not admit of such a reading. Since the Administrative Procedure Act requires us to review with due regard for "the rule of prejudicial error," 5 U.S.C. §706 (1982), I would deny the petition and let the alleged infirmities in the Meyers test await challenge on another occasion.

III.

The second flaw the majority finds in Meyers is "a misreading of precedent in selecting the new standard." Maj. op. at 26. The majority's forced reading of the Meyers test wrongly presupposes that the Board intends that test to be exhaustive and resolves every doubt in favor of construing the Meyers test so that it appears as narrow as possible. The Board, it bears emphasizing, explicitly stated that the Meyers test is not meant to be exhaustive, and may be modified as the Board grapples with the "myraid of factual situations" that can be expected to arise under section 7. Meyers at 11, 115 LRRM at 1029. It is virtually certain that there is at least one category of cases the Board would treat as exceptions to the Meyers test: cases involving the assertion of rights under a collective-bargaining agreement (for the Board specifically distinguished the Interboro line of cases, see id. at 11, 115 LRRM at 1028). The Meyers test, as applied to the facts of this case, holds only that, Interboro cases aside, the Board now requires (1) some evidence of intent to actually induce concerted activity, or (2) some evidence of mutual reliance on the conduct or support of other employees, or (3) some evidence of an actual agreement between employees to protest a given situation, as a condition precedent to a finding of concerted action. *Nothing more than this can reliably be made out from* Meyers, and the majority does not establish that this interpretation of section 7 runs counter to the case law.

The proof of this is that neither of the "two important respects" in which the majority finds the Meyers test "narrower" than "the standards traditionally applied by the Board and the courts to define concerted activity," maj. op. at 30, can be established on the basis of the record and decision in the present case. The majority's initial claim, that "the new definition will be strictly construed to include only activity clearly joined in or endorsed by other employees," id. at 17, see also id. at 29, rests solely on the majority's reading of the Board's subsequent decisions in Mannington Mills, Inc., 272 NLRB No. 15, 117 LRRM 1233 (Sept.

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[4] The Board did deny that "section 7, framed as it was to legitimatise and protect group action engaged in by employees for their mutual aid and protection, was intended to encompass the case of individual activity presented here." Meyers at 18, 115 LRRM at 1031. At most, that denial is a claim that the *result* in this case is compelled by the language and purpose of section 7 — a claim that indubitably rests on a reasonable interpretation of the statute.

[5] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953), on which the majority relies in reaching the conclusion that remand is required here, is simply inapposite. RCA Communications holds that when an agency reaches a result in the erroneous belief that the statute compels that result, the court should remand rather than reversing if that result might have been upheld had the agency instead relied on its discretion. Because the Board's discretion in interpreting section 7 is not broad enough to allow the Board to adhere to the Alleluia doctrine, or to hold that Prill's conduct was concerted on any other theory, there is no basis for remanding this case. Remand would be "an idle and useless formality. Chenery does not require that we convert judicial review of agency action into a ping-pong game." NLRB v. Wyman-Gordon Co., 394 U.S. 759, 766 n.6, 70 LRRM 3345 (1969).

21, 1984), and Allied Erecting & Dismantling Co., 270 NLRB No. 48, 116 LRRM 1076 (Apr. 30, 1984). See maj. op. at 17-18 & n.48.[6] In Meyers itself, the only indication given as to the Board's standard in "endorsement" cases is the Board's remark that "there is no evidence here ... that either [Prill or Gove] relied in any measure on the other when each refused to drive the truck." Meyers at 17, 115 LRRM at 1030. That reveals only that *no* reliance will not constitute authorization — it does not tell us how much reliance will suffice. Similarly, the principal indication in Meyers as to the scope of the words "with ... other employees" in the Meyers test is the Board's finding that "there is no evidence here that there was any concerted plan of action between Gove and Prill." Meyers at 17, 115 LRRM at 1030.[7] From this we can infer that the Board will not find a "concerted plan of action" where two employees complain about the same piece of equipment on different occasions, even though the second employee was aware of the first employee's protest. The Board's use of the words "concerted plan of action" suggests that some kind of agreement between the two must be established, but it remains unclear how express that agreement must be, for the record is barren of any evidence even suggesting agreement.

The majority's willingness to go beyond the confines of the record before us to consider how the Meyers test has been applied by the Board in subsequent cases is highly questionable. We are reviewing an *order* issued by the Board in *this* case, not a rule or regulation promulgated after notice-and-comment rulemaking, in which we must necessarily consider how the challenged rule will be applied in whatever cases are likely to arise. If the Meyers test, as applied to petitioner Prill, is a reasonable interpretation of the statute, the order should be sustained. The reasonableness of the Meyers test as applied in subsequent cases can and should be reviewed when the orders in those cases come before a court.

Moreover, even if these subsequent decisions could properly be considered here, there is simply no connection between this criticism of the Meyers test and the result reached in this case. The majority concedes that, even if the Board did misinterpret pre-Alleluia case law, remand would be inappropriate if that mistake clearly had no bearing on the substance of the decision reached as to petitioner Prill. See maj. op. at 34. Since there was no evidence that other employees in any way joined in or endorsed petitioner's conduct, that branch of the majority's critique cannot possibly affect the outcome here.

The majority's second objection is that "it is not clear ... that the Meyers standard would protect an individual's efforts to induce group action." Maj. op. at 31. The majority notes that the Board declined to reach this question in a post-Meyers case, see id. at 31 n.83, and proceeds to engage in the highly speculative enterprise of deducing, from the Board's choice of citations, that the Board will not hold individual efforts to induce group action to be concerted. Id. The majority gives the impression that the Meyers test, whose wording is borrowed from the Ninth Circuit's language in Pacific Electricord Co. v. NLRB, 361 F.2d 310, 63 LRRM 2064 (1966) (per curiam), represents a conscious choice on the Board's part to adopt a formulation that no other circuit has followed,[8] while rejecting the predominant standard, which, according to the majority, is that set out in Mushroom Transportation Co. v. NLRB, 330 F.2d 683, 56 LRRM 2034 (3d Cir. 1964). The Mushroom Transportation standard differs from the Meyers test principally in that it explicitly states that "a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees." 330 F.2d at 685.

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[6] In addition, the facts of Ontario Knife Co. v. NLRB, 637 F.2d 840, 107 LRRM 2053 (2d Cir. 1980), which the Board cited as support for the Meyers test, rather clearly resemble those in Mannington Mills and Allied Erecting & Dismantling Co. Ontario Knife, which found no concerted activity in an individual employee's refusal to work, despite prior activity (in which the same employee was a participant) that was clearly concerted and related to the same issue involved in the refusal to work, see 637 F.2d at 842-43, suggests that at least this degree of strict construction has some authoritative support in the case law.

[7] What we can, I think, be confident of is that the Board does *not* mean that if the employer here had offered the keys to Prill's truck to each of his assembled drivers one day, and each had refused to drive it, the Board would find no concerted activity. Under such circumstances, conscious parallelism would be very strong evidence of spontaneous but quite concerted activity. Cf. NLRB v. Washington Aluminum Co., 370 U.S. 9, 50 LRRM 2235 (1962) (holding a spontaneous walk-out protesting working conditions in a non-union plant concerted protected activity). The Board did say that "*individual* employee concern, even if openly manifested by several employees on an *individual* basis, is not sufficient evidence to prove concert of action," Meyers at 17, 115 LRRM at 1030, and those words could be taken to mean that even this degree of visible cooperation is not concerted activity. But that remark is dictum — and it will also bear a different, narrower, and more sensible meaning. I would give it that meaning.

[8] The Board borrowed the wording of its nonexhaustive Meyers test from that one-sentence opinion, but it also cited as supporting authority Judge Friendly's trenchant opinion for the Second Circuit in Ontario Knife Co. v. NLRB, 637 F.2d 840, 106 LRRM 2053 (1980). Judge Friendly recognized the "inducement" exception to the general rule that only concerted activity comes within section 7, which he traced to the fact that "§ 7 is not limited to concerted activity per se. Instead, it protects the 'right to engage in ... concerted activities.' " Ontario Knife Co., 637 F.2d at 844-45. Since workers have the *right* to engage in concerted activity, Judge Friendly

The majority has overlooked the Board's finding that neither Prill's refusal to drive the truck nor driver Gove's earlier refusal, to which Prill was an accidental and silent witness, was "intended to enlist the support of other employees," Meyers at 17, 115 LRRM at 1031. If the majority were right in thinking that the Meyers test eliminates the "inducement" category of cases from the definition of concerted activity, the Board would have had no need to make this finding.

The majority also slights the Board's discussion of Root-Carlin, Inc., 92 NLRB 1313, 27 LRRM 1235 (1951), which the majority cites as one of the leading cases holding that individual attempts to induce concerted activity are themselves concerted. The Board in Meyers relied on Root-Carlin as one of a series of cases it read as "defin[ing] concerted activity in terms of employee interaction in support of a common goal," Meyers at 5, 115 LRRM at 1026 — cases the Board clearly approved. The Board plainly indicated that, at a minimum, individual efforts to induce group action that *"involve[] only a speaker and a listener,"* id. at 5, 115 L.R.R.M. at 1026 (quoting Root-Carlin, Inc., 92 NLRB at 1314 (emphasis added by the Board in Meyers)), will be treated as concerted when the speaker, an employee, is addressing the listener, another employee.

Indeed, any fair reading of the Meyers opinion would treat it as incorporating the Mushroom Transportation standard, at least as applied by the court that framed it. It was precisely because the "interaction" among employees present in the conversation in Root-Carlin, Inc. was absent in Mushroom Transportation that the court in the latter case found that the individual employee's conduct was not concerted. It reached that result, despite the fact that the discharged employee "had been in the habit of talking to other employees and advising them as to their rights," 330 F.2d at 684, because there was no evidence that his "talks with his fellow employees involved any effort on his or their part to initiate or promote any concerted action to do anything about the various matters as to which [he] advised the men or to do anything about any complaints and grievances which they may have discussed with him." Id. at 684-85. A finding of no concerted activity in the present case would seem to follow *a fortiori* from Mushroom Transportation — for in the present case there was not even a conversation between petitioner and another employee about common grievances, let alone one directed towards concerted activity.[7]

The "inducement" branch of the majority's critique rests, then, on a misreading of the Meyers opinion. Beyond that, the only way in which this alleged error could possibly affect the outcome in this case would be if the Board could have held that where one employee overhears another employee's complaint (as Prill did Gove's), an effort to induce concerted activity on the *second* employee's part should be inferred without more. Any such inference would be preposterous, and the majority has not pointed to a single case as so

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agreed that "as the Third Circuit recognized in Mushroom Transportation Co. v. NLRB, 330 F.2d 683, 56 LRRM 2034 (3 Cir. 1964), employers cannot obstruct an employee's efforts to exercise those rights. Individual activity can be protected, therefore, if it is 'looking toward group action.' Mushroom Transportation, 330 F.2d at 685."

Judge Friendly's statutory argument is a powerful one, and it indicates what is wrong with holding the Board to the standard of exactitude the majority demands of the Meyers test. The Board in Meyers focused, quite understandably, on the words "concerted activities" in section 7, and although it clearly indicated that it would treat at least some "inducement" cases as involving concerted activity, the majority is right in finding some difficulty in bringing such cases within the literal language of the Meyers test. But we are not to suppose that the Board will set that test in concrete, nor should we rush to assume that in a case in which "the *right* to engage in ... concerted activities" is before it, the Board will not adopt the Mushroom Transportation standard on the statutory grounds given by Judge Friendly in Ontario Knife. Here, that issue was not presented, because there was no evidence whatsoever that petitioner's conduct was "looking toward group action."

[7] The majority correctly notes that Prill talked to other drivers about the defective brakes on his truck, see Tr. at 18, J.A. at 42, but there is no indication that these conversations concerned a common grievance, e.g., a pattern of shoddy maintenance by Meyers Industries that had prompted complaints from other drivers about their trucks, or that Prill sought to enlist the aid of other drivers in any way.

holding, let alone established a clear line of authority to that effect.[16] Consequently, even if the majority's dubious criticisms of the Board's reading of the case law in Meyers prove wellfounded, they are harmless error that cannot support a remand in this case.

IV.

There have been protests in recent years that the "concerted activity" requirement produces such anomalous results that anything resembling a literal reading of section 7 should be abandoned. See, e.g., Gorman & Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. Pa. L. Rev. 286 (1981); see also Illinois Ruan Transport Corp. v. NLRB, 404 F.2d 274, 281, 69 LRRM 2761 (8th Cir. 1968) (Lay, J., dissenting). It is a sufficient response that the choice to require that activity be concerted before it may be protected "is one decided by Congress when it drafted § 7. It is not a choice that can be undone by the courts for policy reasons." E.I. du Pont de Nemours & Co. v. NLRB, 707 F.2d 1076, 1078 n.2, 113 LRRM 2931 (9th Cir. 1983). Moreover, as the four dissenting Justices in City Disposal pointed out (without controversion by the majority), "[b]y providing an increased degree of statutory coverage to employees participating in that process, the labor laws encourage and preserve the 'practice and procedure of collective bargaining.' The fact that two employees acting together receive coverage where one acting alone does not is therefore entirely consistent with the labor laws' emphasis on collective action. See NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180, 65 LRRM 2449 (1967); Republic Steel Corp. v. Maddox, 379 U.S. 650, 653, 58 LRRM 2193 (1965)." City Disposal, 104 S. Ct. at 1518 (O'Connor, J., dissenting) (additional citations omitted). Because what the Board did here was compelled by that congressional choice, I would uphold its order." I therefore respectfully dissent.

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[16] The majority does cite a line of cases including Guernsey-Muskingum Elec. Coop., Inc., 124 NLRB 618, 44 LRRM 1439 (1959), enforced, 285 F.2d 8, 47 LRRM 2260 (6th Cir. 1960), and Hugh H. Wilson Corp., 171 NLRB 1040, 69 LRRM 1264 (1968), enforced, 414 F.2d 1345, 71 LRRM 2827 (3d Cir. 1969), in which the Board treated individual complaints as protected if they related to a matter of moment to other employees and if the individual was acting for the benefit of the interested group. See maj. op. at 10 & n.24. But the holdings of those cases are little different (and, if anything, narrower) from one of the rationales the majority identifies as underlying the Alleluia doctrine: "the Board's familiar view that an individual's activity should be protected if it relates to a matter of 'mutual concern' to employees." Maj. op. at 11. That rationale, as I show in Part II-A, reads the word "concerted" out of section 7, and finds no support in City Disposal. And, while that rationale may be "familiar," it has also repeatedly been rejected by the courts of appeals; even when the courts have enforced the Board's orders, they have generally done so because they found actual group activity to which the individual employee's conduct was immediately related. See, e.g., Hugh H. Wilson Corp., 414 F.2d at 1354 (finding concerted activity because "[i]n substance, the employees had a gripe. They assembled. They presented their grievance to management ...."); Guernsey-Muskingum Elec. Coop., 285 F.2d at 12 (finding concerted activity because "a reasonable inference can be drawn that the men involved considered that they had a grievance and decided, among themselves, that they would take it up with management").

Senator HATCH. Mr. Fiss in a 1979 article in the Harvard Law Review: "You asserted that the power of the judiciary should be expanded to embrace or at least encompass something you call 'structural reform'; that is, that litigants ought to be able to seek injunctive relief from the Court that would allow the Court to, in your words, 'radically transform the status quo, in effect, to reconstruct social reality.' "

This captures, does it not, your core philosophical difference with Judge Bork? He would not talk, would he, of using the courts to reconstruct social reality?

Mr. FISS. On Wednesday of last week, Senator Grassley asked Judge Bork a question, and the question was: Judge Bork, do you remember the question that was put to Justice Fortas in his hearings? And the question put to Justice Fortas was: To what extent do you believe that the courts should be used for social reform? Justice Fortas said zero. Absolute zero.

Immediately after that exchange, and in response to it, Judge Bork said, I don't believe that completely, because if there is a value in the Constitution such as the value of racial equality, I believe that that will be a mandate for the courts to engage in reform. I don't believe it in all the areas, but I do believe it—I think this is a paraphrase of Judge Bork's testimony—that if there is a value in the Constitution such as the value of racial equality, then there is an obligation on the courts—to use my language now—to reconstruct social reality.

Senator HATCH. So you think Judge Bork agrees with you on that, then?

Mr. FISS. I think the difference between myself and Judge Bork is that he sees in the Constitution the value of racial equality and then stops. I think that is a very crabbed view of the values that our Constitution embodies.

Senator HATCH. I don't think you have been listening to his testimony in the 5 days he was here because he went far beyond just saying the value of racial equality in the Constitution and then stopping. He went far beyond that.

Of course, when we started this he was criticized for being so narrow in his approach that he could not understand these higher concepts. Now that we find he is not narrow in his approach, then there is the attitude, well, he has been very flexible in his approach and he is trying to be confirmed, so therefore he is fudging the issues by coming across more than he really feels.

The fact of the matter is, as I think Judge Bork's works through the years, and especially if you examine his Solicitor General tenure and his tenure as a judge, I think speak eloquently that he not only recognizes racial equality above and beyond what the present Supreme Court does, but much more beyond. And that is one of the things I think cannot be ignored here no matter what anybody says and no matter how much this record is distorted.

Mr. Chairman, I think my time is——

Mr. FISS. Senator, I didn't mean to reopen all the issues.

Senator HATCH. Neither did I, but I do get a little tired of hearing his record distorted, and I get a little tired of hearing only very stiff comments about what the man has said and what he stands for.

Mr. FISS. I was talking only about his testimony, sir.

Senator HATCH. All right.

Mr. FISS. And I was trying to identify quite precisely and quite correctly what the difference is. There is a difference the views that Judge Bork would hold and my views.

Senator HATCH. I think that is true.

Mr. FISS. And I want to explain exactly what that difference is.

Senator HATCH. All right.

The CHAIRMAN. Thank you very much.

Senator Simpson?

Senator SIMPSON. Wait. Wait.

The CHAIRMAN. Senator Humphrey?

Senator SIMPSON. Oh, no.

Well, I think Senator Thurmond said a great deal. That is why he is really something so special to us all. I know the Chairman will agree, too. Strom has a way of pulling the threads together in a most extraordinary way.

I have been fascinated. I really have. I think it was you, Mr. Bennett, were talking about manipulation. You mentioned it several times.

Would that Judge Bork was as adept at manipulation as those who oppose him? I have never seen more manipulation of a public record in my life, and I have been practicing law for 18 years. I did that out in the real world with real live human beings. People who cried, you know, and retched and got sick and killed people and all sorts of things—real life. I don't know how much law you all practiced with human beings. I assume it was a pretty good amount.

We can't stop for your answers. We only get 5 minutes, and when you are on we never get to say anything. So just hold on tight.

Mr. BENNETT. Remember I stayed within my 5 minutes, Senator.

Senator SIMPSON. Yes. Well, I have to, also.

So, it is interesting whenever the remarks about Brandeis are read the result is always the same. There is a kind of a, Oh, who are they talking about? Ah. Bork. I know who it is. But, no. They are talking about Judge Brandeis. An interesting thing. That has happened several times, and those are brought up once a day.

I see a little reaction to that like, you know, not surprise——

The CHAIRMAN. Take notes, Professor, and you can answer them all at the end.

Senator SIMPSON. Yes, that is right.

The CHAIRMAN. Just let him go. I can assure you it is the best way to do it.

Senator SIMPSON. But you see, someone said that we might engage, perhaps, in a little psychoanalysis, and, boy, we have.

You are all in the profession, and you are remarkable people. You have remarkable prowess. I have heard from all of you how you have discussed cases not yet confronted. You have spent a lot of time on things not confronted that will come in the future if Judge Bork is on the bench and how he will handle it.

I was so fascinated when I heard one—and I am just sorry I didn't check it off, but when Judge Bork said that the courts, I think in a speech, were crowded with legal trivia. Well, let me tell you there are a lot of remarkable judges who are saying that.

Judge Burger has been saying that. We have been dealing with that in the Judiciary Committee of the United States Senate, with what is called an Inter-Circuit Tribunal. It is a very interesting idea, and it is to clean some stuff out from underneath. Not because we don't "like persons"—now, really. I mean, to say those things are trivia and therefore Judge Bork doesn't like persons is a manipulation and a distortion of the first order. I hope we won't get into that.

And when he got to the *Griswold* case, he didn't say the case was nutty. He said the law was nutty. And so, if you go read *Griswold*, and read Black, too—and I hear the test of restraint talked about continually, I think everybody so far has flunked the test of restraint—but you can, you know. Really, there is not a thing to show yet in the public record that Judge Bork is less a loving and caring person, and you would think that. You really would think that. That his decisions are harsh, mean-spirited against people. He would let, you know, women's sterilization, and blacks and poll taxes—it just rolls like a tide. And I say you can dramatically pooh-pooh comments, which you have. You have done that dramatically.

But you know, the interesting thing about the law, and we all know it so well, or we better remember it so well, is this. When he said to us in 32 hours of testimony what he would do on the Supreme Court in an extraordinary array of issues—and you will never see that happen again in your lifetime, I can assure it will never occur again—while under oath, and he was under oath, remember that? We all know something about that as lawyers. How can you in a sense of academic exercise, flapping of wings, an intellectual cat and mouse with just a touch of arrogance, deny what the man said what he would do on the U.S. Supreme Court while he was under oath?

I think you might want to accept his views as to what he said about what he would do, while he was under oath, and his sincerity. But you always preface the remarks with "but." Oh, he is marvelous, he has a lot of integrity, he is sincere, but. You know, there he was saying what he would do, and he said something that all human beings can hear, even politicians and judges and little guys, who count, too. He was very forthcoming, and he said he would be confident and he would never want to be disgraced in history, and that is why he would carry out what was required of him.

To say that we are too sophisticated to draw much from the statistics of this man and his not being overruled, but it was Justice Burger that said, you know, over 5-1/2 years, and no denial of cert. on each of those occasions in 5-1/2 years has real significance, that's what Justice Burger said, and he said it would be astonishing to think of him as an extremist.

But I think, you know, we can do the head-of-the-pin exercise forever, and we have been doing a lot of it in this, both sides. Both sides. And I just think that, remember the man was under oath and told exactly what he would do when he was on the Supreme Court, and there is no way you can Fancy Dan your way around that one.

Ms. RESNIK. I would like to respond for a moment——

Senator THURMOND. Your time is up.

Ms. RESNIK [continuing]. By reminding you that we are all also under oath. And I know from my conversations, but I certainly can speak only for myself, I take what I say here extremely seriously, and I do not describe his record lightly. I spent more hours than I would like to have having read Judge Bork's opinions. I take some offense at your description of this as manipulation, since I read with care his decisions and the cases within my expertise. Moreover, I am not alone in my criticism. Others of his colleagues, on the bench, have described him as well. I quoted one of his colleagues as arguing that Judge Bork had misconstrued other's opinions.

Those of us who have taken out time from our activities in order to provide some information have come here, in most instances, with reluctance. We all know each other all too well, and it would be so easy to just have the kind of glow of having one of "us" law professors on the Court, or actually another one of "us" on the Court. But it is only with pain and distress—and more time than any of us wanted to spend—that we had to come here and to say that we really regret to report that the parts of the record that are within our expertise does not suggest that this person should be elevated to be one of the nine most powerful Justices in this country.

Now we may disagree about that, but I think we should admit that our disagreement comes from the fact and act of interpretation, and since all of us here see that that Justices on the Supreme Court will be interpreting as well, we all must read the words and do our best to interpret them to fulfill what we all are committed, which is a constitutional democracy.

Senator SIMPSON. Indeed. And I appreciate that. And it is almost like what I was saying. I have the greatest respect for your integrity and what you have done and the work you have put in, and the extraordinary things you have presented to us—but. And that is what I have heard now for quite a while—but—and that is what I am saying.

Senator THURMOND. Any more questions for the witnesses?

Senator SIMPSON. I think this gentleman. . . I fired a shot at him, he gets a shot back.

Senator THURMOND. Mr. Bennett, you want to make a statement?

Mr. BENNETT. Yes, I do. I will be brief, Senator Thurmond.

It certainly gives me no joy to come here and be critical of Judge Bork, and I think it would be the easiest thing in the world for a law professor—I am a dean of a law school—to sit back and remain silent and play no role in the possible—or in the criticism of somebody who may sit on the U.S. Supreme Court. And when we instead see fit to come here and offer our views on the implications, the inferences to be drawn from the public record of what this man has said, it seems to me fair game to disagree with it, but not fair game to suggest without more that we are manipulating the record or misreading it in some way.

Senator SIMPSON. I say that with clarity of thought and speech because manipulation is what it is. It is in the record of Mr. Fiss. Here is his statement on page 10. I think you totally mischaracterized Judge Bork's views on the first amendment. You said that literary expression was conspicuously absent from his list of protected speech, and then you went on, you indicated that only in these proceedings—that is simply untrue—in 1984 and—I am not going to go into that. But Judge Bork included many other forms of discourse. Many other forms of discourse deserve protection. That is a mischaracterization.

He even spoke and said in a speech, he said it applies to moral speech and scientific speech and into fiction, and so forth. See, those things came out. And when you come and you present things as remarkable people, and you are, then, you know, we have to know that—and the opponents of Bork have spent untold thousands of hours on the non-unanimous decisions of the man, and every comment and utterance of the man, and that is only 14 percent of his work product.

And all I am saying, manipulation does not mean cheating. It means manipulation. Parents do it to children. Children do it to parents. Wives do it to husbands. Husbands do it to wives. That is what I am talking about. That is what I am talking about.

Mr. FISS. Senator, may I respond?

Senator THURMOND. We have been going on here for over an hour. Any more questions?

Senator HUMPHREY. Mr. Chairman? I haven't had a round, Mr. Chairman.

Mr. FISS. Well, there was an accusation of a misrepresentation, sir.

Senator SIMPSON. Yes, I have it, a quote, and I will be glad to go over it with you. I have mine, you have yours, we can go through it some more. It is right here, book, page and hymn number, and I will put it in the record.

Senator THURMOND. Each side speaks for itself. There is no use to keep arguing, I don't think.

But if you want to answer it, you can answer it quickly. Any further questions?

Senator SIMPSON. You go ahead. I will stick around. I will chair it until you are through.

Mr. FISS. I would urge you to read the sentence immediately preceding it. It says, "In a 1984 letter to the ABA Journal, he claimed that his views on the first amendment had changed inasmuch as he now believed that scientific and moral discourse are protected. Conspicuously absent, however, from the forms of protected discourse were literary and artistic expression."

Senator SIMPSON. You left out the first part which said "many other forms of discourse."

Senator THURMOND. Professor——

Senator HUMPHREY. Humphrey. Yes.

Senator THURMOND. You are next.

Senator HUMPHREY. Yes. Thank you.

Professors, we recognize you put a lot of work into your effort, as it has been a hell of a lot of work for everybody, to be honest. More than we bargained for, I suppose. And surely it is fair game to criticize, but it is also fair game for us to assess the weight that we should give your criticism. If it is fair for the Bork opponents to probe Robert Bork, scrutinize him under the microphone, it is fair for us likewise to scrutinize his critics. And in that vein, I want to address an article, an editorial published in the September 22nd issue of The Wall Street Journal, entitled "Meet the Legal Extremists." I am sure you are familiar with it, at least three of you anyway, inasmuch as you were not kindly mentioned therein.

Getting to know you a little better, and understanding how much weight to give your testimony and where you are coming from, I would like to address a few questions in this regard.

First, to Professor Fiss, is it true, Professor, that in your publications, or in any event in your statement and your views, that you regard the litigiousness of the United States, which is perhaps the greatest litigiousness in the world—I do not know; it certainly is an amazing thing to behold—but in any event, you regard the litigiousness of the United States as something we, quote—how do I phrase this; I am getting very tired.

You are quoted here as saying it is possible----

Mr. FISS. Maybe I could help you, sir?

Senator HUMPHREY. Well, give me a chance. I do not want too much help here.

It is possible you were misquoted. I have been misquoted many times, so if you have, I can understand it. But are you correctly quoted when you say that the amount of litigation in the United States "should be a source of pride rather than shame"?

You have seen the article. You have thought about these charges, no doubt.

Mr. FISS. Well, I have seen the article——

Senator HUMPHREY. Is that a correct quote?

Mr. FISS. ——and I was greatly amused by the article.

Senator HUMPHREY. Is that quote correct?

Mr. FISS. That quote that you have read, I do not recall ever saying that. What I did——

Senator HUMPHREY. Well—you did not—

Mr. FISS. Would you like me to explain?

Senator HUMPHREY. First I want to establish whether or not you agree that this is a quote from Owen Fiss.

Mr. FISS. "The litigiousness"—could you read it again for me, sir?

Senator HUMPHREY. The author, who is Gordon Crovitz, the assistant editor of the Wall Street Journal's editorial page, writes—these are Crovitz' words—"In his view, the amount of litigation in the United States, quote"—here you come—" 'should be a source of pride rather than shame'."

Mr. FISS. I never said that the amount of litigation should be a source of pride.

Senator HUMPHREY. To what were you referring, then, in this quote?

Mr. FISS. I was referring to the use of the judicial power to deal with injustice in our society.

Senator HUMPHREY. Okay. I will accept that. That sounds reasonable.

Is it also true that, according to the assertions of the author, the day after President Reagan's 1984 landslide victory, Mr. Fiss boasted to a class that, quote, "Not only do I not know anyone who voted for Ronald Reagan; I do not know anyone who knows anyone who voted for Ronald Reagan."

Now, I can understand someone at Yale saying that, but is this a correct—was that your statement?

Mr. FISS. Could I explain the context, sir?

Senator HUMPHREY. By all means. Well, first, would you confirm or deny that this is an accurate quote?

Mr. FISS. I do not have—I think it is possible that I said it. I think the event that was described by the author was an accurate event—it was a description that such an event occurred, but if I could just explain——

Senator HUMPHREY. Well, he uses quotes.

Mr. FISS. Well, I think the author was—there was no transcript——

Senator HUMPHREY. Did you make a remark of that kind before one of your classes?

Mr. FISS. Of that kind, yes. Could I explain the context, sir?

Senator HUMPHREY. It is only fair—but not in too awfully many words.

Mr. FISS. I believe that in dealing with our students, professors should sometimes mock themselves.

Senator HUMPHREY. Use humor. I agree.

Mr. FISS. For the previous month or two I had been trying to explain to the students that some conceptions of litigation were out of touch with reality and that there should be a more realistic perception of what adjudication can do and cannot do. That was a constant theme of my course. The statement quoted was meant to be a form of self-mockery and to make the students understand that as much as we talk about social reality, we have a way of becoming isolated and insular.

And the students took it as an extraordinarily funny event. Indeed, the student who stood up and made the remark that is quoted there was a student that I have great respect for and I would regard him to be someone who made the remark in very good nature. I actually thought it was one of the funniest classes I had taught.

Senator HUMPHREY. I am sure they were rolling in the aisles.

Mr. FISS. In New Haven, they were.

Senator THURMOND. Senator, your time is about up. Do you want a little more time?

Senator HUMPHREY. Just a little more, if you will. I have got to find something that sticks here.

Is it correct that in your book The Civil Rights Injunction, published in 1978, you call for a new kind of injunction which can be used to—where are your quotes here—this is a quote from your book—"which would go well beyond the traditional use of injunctions to order someone to stop an activity or to take a specific action"? That is not your quote. I have made such a mess of this thing I cannot even read my own writing. But let us talk about this new kind of use of an injunction that you propose, "an injunction that can be used not just to vindicate a claim of racial equality," using your words, "but also vindicate other claims such as the right against cruel and unusual punishment or the right to treatment."

Have you called for a new use of injunctions that goes far beyond the power of injunctions as presently used?

Mr. FISS. For the last week, I have felt somewhat envious of Judge Bork, since his scholarly writings have been discussed so extensively, and I am pleased to discuss my writings from now until the end of the month.

Let me say that the injunction that I was talking about in that book was the injunction that was used to desegregate the schools of the United States. I do not feel any element of qualification or reluctance to affirm that kind of use of the injunctive power.

Senator HUMPHREY. Well, you say in your book that this new kind of injunction would give judges long-term powers to "effectuate the reorganization of an ongoing social institution"—sort of like running a telephone company, for example, that kind of sweeping power?

Mr. FISS. No, but to bring the school systems of the Nation into conformity with the promises of the Constitution, to bring the police departments of the nation into conformity with the promises of the Constitution.

Senator HUMPHREY. How would you do that, practically speaking? Give me an example, if you will, especially with regard to the police powers.

Mr. FISS. If a claim could be made out that the police department of a city had engaged in a pattern and practice of abuse so that the minorities of that city were subject to abuses, they could bring a suit in a United States court, claiming that their rights to be free of discrimination and to be free from invasions of privacy under the fourth amendment were being violated, and that it was necessary for the courts in order to correct those abuses, not simply to sary for the court in order to correct those abuses, not simply to give them a little bit more hope that it would not be done again.

Senator HUMPHREY. A little bit more; in other words, to take control of the police department to the extent of rewriting its regulations and procedures. Is that what you are saying? That is what it sounds like to me.

Mr. FISS. If you want to characterize it as take control, fine.

Senator HUMPHREY. Well, am I being unfair with that characterization?

Mr. FISS. Yes, I think you are, sir.

Senator HUMPHREY. You would not just order them to stop these kinds of——

Mr. FISS. No. I would ask them to submit a plan to establish procedures that they think would help curb these abuses. I would give the plaintiffs' attorneys a chance to object to those procedures or to accept those procedures. I would have the court examine them and have a hearing and decide whether these procedures were necessary in order to curb the abuses. I do not think that is taking control.

Senator HUMPHREY. You would give to the judiciary the power, then, to effectively manage a police department is what it seems to come to—going beyond simply the present use of an injunction, which requires the police department in this case either to stop doing something or to start doing something.

Mr. FISS. No——

Senator HUMPHREY. You would rewrite their whole——

Mr. Fiss. No more than the courts of the fifth circuit took over the management of the schools of the Southern States.

Senator HUMPHREY. Thank you. I have no more time.

Senator THURMOND. I want to express my appreciation to you people who came and testified. Whether we agree with you or you agree with us, we appreciate your coming and testifying.

Thank you very much.

The last witnesses are a bar leaders panel, including: John Shepherd and Wallace Riley, Charles Rhyne and James Bland.

Gentlemen, if you will stand and be sworn. Will the testimony you give in this hearing be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. SHEPHERD. It will.

Mr. RILEY. It will.

Mr. RHYNE. It will.

Mr. BLAND. It will.

Senator THURMOND. I am just wondering if we could stick to 5 minutes, and if you wish to say more than that, put it in the record. It is getting late. Would that suit you, gentlemen?

The announcement this morning was that each witness would have 5 minutes and then your full statement would go in the record. Is that agreeable to you?

If you will state your name for the record, and then make your statements. We will just start with Mr. Rhyne, on the end.

TESTIMONY OF A PANEL CONSISTING OF CHARLES S. RHYNE, JOHN SHEPHERD, WALLACE RILEY, AND JAMES T. BLAND, JR.

Mr. RHYNE. My name is Charles S. Rhyne, past president of the American Bar Association. I appear here with two past presidents of the American Bar Association and the president of the Federal Bar Association, who will introduce themselves.

Senator THURMOND. Mr. Shepherd, past president; and who else?

Mr. RILEY. Wallace Riley.

Senator THURMOND. Glad to have you. And this gentleman is?

Mr. BLAND. I am Jim Bland, Jr., president of the Federal Bar Association.

Senator THURMOND. Before you start, I want to take just a minute. I regret to announce the death of Judge Emory Sneeden yesterday, who died with cancer at the Duke University Hospital in Durham, North Carolina.

General Sneeden was a General Officer in the U.S. Army; he was Chief Judge in the Judge Advocate General's Corps at one time. He was also a former chief counsel to the Judiciary Committee. He was Associate Dean of the University of South Carolina Law School. He was Circuit Court Judge in the Fourth U.S. Circuit Court of Appeals in Richmond, Virginia.

His funeral is going to be held in Columbia, South Carolina, tomorrow, Saturday, September the 26th, at 4 p.m., at Asbury Methodist Church.

I just want to announce that because he had a lot of admirers and friends on this committee and others around the Capitol here, and in the event any of you wish to attend that funeral.

We will now proceed.

Mr. Rhyne, do you want to go ahead?

Mr. RHYNE. Yes, Mr. Chairman, being the oldest——

Senator THURMOND. Yes, I remember a few years ago when you were president of the American Bar. We are glad to have you with us.

Mr. RHYNE. That is right. I was told today that I was to start.

My name is Charles S. Rhyne. I am from Washington, D.C., and I appear before you to urge that you recommend to the Senate of the United States that it confirm the nomination of Judge Robert H. Bork as an Associate Justice of the Supreme Court of the United States.

And although I appear today along with other past presidents of the American Bar Association, perhaps I can help the committee most by giving you my perspective on Judge Bork based on my experience in arguing constitutional cases before the Supreme Court since 1939—particularly cases in which I have been involved and which Judge Bork and myself have been involved when he was Solicitor General of the United States.

Although I have not followed these hearings with an eye to refuting particular criticism of Judge Bork, and I have not spoken to him about them, I do know that respect for precedent and its capacity to supersede an individual's criticism of the reasoning of particular Supreme Court decisions have been topics of some discussion here.

Some have found it a surprising notion that the result of a case can be separated from its reasoning, the resulted accepted and the reasoning rejected. I do not. The Supreme Court's own decisions reflect instances where Justices have concurred in the results of decisions only sometimes expressly stating they disapproved of the reasoning.

I have known, I think, all of the Justices and Solicitor Generals of the United States since 1939, and I have learned over the years that the members of that corps disagree among themselves often to a degree not reflected in their opinions on the reasoning behind and even the holding of particular cases.

Good advocates know that and, as a consequence, rarely try to win cases by citing decisions of the Supreme Court of the United States. They state the facts, and they state the law, unless a citation of a decision is absolutely necessary.

I have argued against Solicitor General Bork in the Supreme Court, and I have seen him operate under this principle as well. Overemphasis of the reasoning of particular decisions is a trait common in academic settings, but not in well-conducted Supreme Court litigation. Even academics who participate in litigation often come to change their way of looking at cases. I have argued cases before the Supreme Court when it included, for example, Felix Frankfurter, long a distinguished professor at Harvard before he was appointed to the Court. In fact, when I argued and won the original one man, one vote case, *Baker* v. *Carr*, Justice Frankfurter vigorously opposed this view of the equal protection clause I was urging, but never, in my view, in a professorial or academic manner.

The case was ordered to be reargued—and I will put a part of my statement into the record—it was reargued, and in the final decision I did prevail, and Mr. Justice Frankfurter's opposition was joined only by one Justice of the Court.

Senator THURMOND. Your entire statement will be included in the record at this point.

Mr. RHYNE. And as I mentioned, I have observed Judge Bork before the Supreme Court. The oral argument of a case before the Supreme Court is perhaps the truest test of the behavior of a legal advocate under pressure. If any tendency toward intellectual arrogance, rigidity or disrespect for precedent were present in an advocate, it would show under the vigorous questioning of the Justices.

While any Solicitor General takes with him an argument in the Supreme Court, the great respect the Court traditionally has shown for that great office and its views on the case to be decided, I have never noted that the Supreme Court in any way did not treat Solicitor General Bork with the utmost respect; and I have found that his arguments, even in supporting federal legislation which I was challenging and which the Court declared unconstitutional, were fair, vigorous and well-grounded in the precedents I was seeking to change and did change.

The point of all this is that I would like to give more weight to Judge Bork's respect for precedent and to his views on whether a particular case were properly decided on his facts and law, than I would give to any academic writings, criticizing the reasoning of a particular case.

Lawyers like to talk about the cases they have won, particularly great constitutional cases, and I would be glad to answer any questions this committee has about the cases I have argued before the United States Supreme Court, particularly the constitutional questions.

The case in particular which I argued that is of major national importance because it involved the issue of federalism, against Judge Bork, was *National League of Cities, Arizona, California,* and some other States, v. *Usery.* While I argued against Solicitor General Bork and won, I was also on the same side with him in a number of cases.

I would like to conclude by saying that I am a member of the Lawyers 'Committee for Civil Rights Under Law, and served as a member of the first board of trustees of that committee, and I cite many other instances in here where I desegregated the D.C. Bar, I desegregated Duke University where your wife and myself graduated, and I have had the word "race" taken off the membership application of the American Bar Association. So I am very sensitive to the claims that minorities have made that their fear Judge Bork as a nominee to the Supreme Court, and I think they are not justified because, given the countervailing influence of precedent and the nominee's basic sense of simple fairness I have encountered in my contacts with him and his legal expertise, intellectual capacity, integrity, and unqualified judicial temperament, I have no fear that the cause of equality would suffer from his elevation to the Supreme Court. And I see no legitimate basis for any such fear.

Nothing Judge Bork has ever written or said keeps me from fully supporting his nomination, and I urge this committee to favorably report on his nomination and support Senate confirmation of Judge Robert H. Bork as a Justice of the Supreme Court of the United States.

Thank you.

Senator THURMOND. Thank you very much, Mr. Rhyne.

We are very honored to have you distinguished gentlemen here, all very prominent people, past presidents of the Federal Bar Association, three of you, and the other is a President of the Federal Bar Association, I believe.

Mr. RHYNE. I would appreciate it if the remainder of my statement appear in the record.

Senator THURMOND. Without objection, your entire statement will appear in the record.

Mr. RHYNE. Thank you.

[Statement of Charles S. Rhyne follows:]

STATEMENT

OF

CHARLES S. RHYNE

PAST PRESIDENT OF THE
AMERICAN BAR ASSOCIATION (1957-58)

IN SUPPORT OF CONFIRMATION OF THE

NOMINATION OF

THE HONORABLE ROBERT H. BORK

TO BE

ASSOCIATE JUSTICE

OF THE

SUPREME COURT OF THE UNITED STATES

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

SEPTEMBER 25, 1987

Charles S. Rhyne
Rhyne & Rhyne
1000 Connecticut Avenue, NW
Washington, D.C. 20036

My name is Charles S. Rhyne, I live at 1404 Langley Place, McLean, Virginia and have my Law Office at 1000 Connecticut Avenue, Washington, D.C. I appear before you to urge that you recommend to the Senate of the United States that it confirm the nomination of Judge Robert H. Bork as an Associate Justice of the Supreme Court of the United States.

Although I appear today along with other Past Presidents of the American Bar Association, perhaps I can help the Committee most by giving you my perspective on Judge Bork based on my experience in arguing cases, constitutional cases, before the Supreme Court since 1939. Particularly, cases in which I have been involved in which Judge Bork and myself were involved when he was Solicitor General of the United States.

Although I have not followed these hearings with an eye to refuting particular criticisms of Judge Bork, and I have not spoken to Judge Bork about them, I do know that respect for precedent and its capacity to supersede an individual's criticism of the reasoning of particular Supreme Court decisions have been topics of some discussion here. Some have found it a suprising notion that the result in a case can be separated from its reasoning, the result accepted and the reasoning rejected. I do not. The Supreme Court's own decisions reflect instances where Justices have concurred in the result of decisions only, sometimes stating their disagreement with the reasoning.

I have known, I think, nearly all of the Justices and the Solicitors General of the United State since 1939. I have learned over the years, that the Members of the Court disagree among themselves, often to a degree not reflected in their opinions, on the reasoning behind, and even on the holding of, particular cases. Good advocates know this, and as a consequence, rarely try to win cases by repeating the reasoning of particular cases, even those they consider necessary to victory for their clients. They present the facts and the law they believe applicable without citing past decisions of the Court unless that citation is absolutely essential.

I have argued against then - Solicitor General Bork, in the Supreme Court so I have seen him operate under this principle as well.

Over - emphasis of the reasoning of particular decisions is a trait common in academic settings, but not in well-conducted Supreme Court litigation.

Even academics who participate in litigation often come to change their way of looking at cases. I have argued cased before the Supreme Court when it included Felix Frankfurter, long a distinguished professor of law at Harvard before he was appointed to the Court. In fact, when I argued and won the original "one person one-vote" case, Baker v. Carr, Justice Frankfurter vigorously oppposed the view of the Equal Protection Clause I was urging, but never in my view in a professorial manner.

The case was ordered to be reargued and when I arose to begin my reargument Justice Frankfurter hammered me with a flurry of statements. He was obviously worked up about the case. He finally paused to demand that if I was going to make an argument that I "get on with it". I replied that I thought he was stating his positions, not asking questions, but if I must consider his statements as questions I would answer them with one word. He said "that is preposterous". The Chief Justice intervened to suggest that Justice Frankfurter let me give him the word. I then said the word was "equality". The 14th Amendment of the Constitution imposes a duty upon him and all Justices of the Court to enforce that "equality". He replied "don't tell me my duty". My recollection is I refferred him to a Law Review article by him in which he had said it was the duty of Counsel to educate the Court. The other Justices got a big laugh from this. It broke Justice Franfurter's momentum and enabled other Justices friendlier to my side of the case to interject questions. No one that day seriously would have thought Justice Franfurter was bound to adhere to a position as a Justice simply because he once articulated it as a professor.

As I mentioned, I have observed Judge Bork before the Supreme Court. The oral argument of a case before the Supreme Court is perhaps the truest test of the behavior of a legal advocate under pressure. If any tendency toward intellectual arrogance, doctrinal rigidity, or disrespect for precedent were present in an advocate, it would show under the vigorous questioning of the Justices.

While any Solicitor General takes with him to the argument of a case the great respect the Court traditionally has had for that great office and its views on the cases to be decided, I have seen and heard members of Solicitors' General's staffs treated harshly, and deservedly so, by the Court because their views were poorly supported or expressed with an excess of partisan zeal rather than acceptable legal advocacy. The Court did not treat Solicitor General Bork in that fashion at all. I found his arguments, even in supporting federal legislation which I was challenging and which the Court declared unconstitutional, to be fair, vigorous and well grounded in the precedents I was seeking to change.

The point of all this is that I would give much more weight to Judge Bork's respect for precedent and to his views on whether a particular case was properly decided on its facts and law than I would give to any academic writing criticizing the reasoning of a particular case.

Lawyers like to talk about cases they have won, particularly great constitutional cases. I would be glad to answer any questions this Committee may have about cases I have argued before the United States Supreme Court, particularly National League of Cities, Arizona, California and other states v. Usery, 426 U.S. 245 (1976) which I argued against Solicitor General Bork and won. I was also on the same side with him in cases before the Court where he signed briefs but the cases were argued by his Assistants.

I am aware that a question asked of many witnesses already before this Committee is: Should minorities and other groups which have received the protection of the Court in past decisions fear the appointment of Judge Bork? While I cannot, of course, answer for any member of these protected groups, I feel I have some perspective to add on this issue.

As a young lawyer I ran for the office of President of the Bar Association of the District of Columbia on the ground that as my first action at the first meeting of the Association after my election I would ask the required three-fourths of the members to vote to strike the word "white" from the Association's Constitution. I won the election and made good on my promise. I had won the Presidency by some 2,000 to 200 votes. No one today could possibly imagine the abuse I and my family incurred as a result of this matter. The issue was so inflammatory the entire bench of the D.C. Federal Court recused themselves when I was sued by the dissidents. An outside Judge was brought in and he, after a trial, ordered all Bar Association members to vote again by going through turnstiles after proper personal identification. The vote was around 90% in favor of striking the word "white".

I made the motion to desegregate my Alama Mater, Duke University at my first meeting as a member of the Duke Board of Trustees. It was adopted 24 to 2, then made unanimous.

I, with others, made a motion that the word "race" be stricken from the membership application of the American Bar Association. The Board of Governors adopted the motion.

I helped found the Lawyer's Committee for Civil Rights Under Law and served as a member of the First Board of Trustees of that Committee.

Each of these activities in the 1950's and early 1960's was controversial, and was opposed by a substantial number of educators and lawyers at the time. I think I am sensitive enough to the concerns of equality to sense whether fear of a Nominee to the Supreme Court is justified on this ground. Given the countervailing influence of precedent and the Nominee's basic sense of simple fairness I have encountered in my contacts with him, his legal expertise, intellectual capacity, integrity and unqualified judicial temperament I have no fear that the cause of "equality" would suffer from his elevation to the Supreme Court, and I see no legitimate basis for any such fear.

Nothing Judge Bork has ever written or said prevents me from wholeheartedly endorsing his nomination. I urge this Committee to favorably report on his nomination and support Senate Confirmation of Judge Robert H. Bork as A Justice of the Supreme Court of the United States.

Thank you.

Senator THURMOND. Mr. Shepherd, we are happy to hear from you next.

TESTIMONY OF JOHN SHEPHERD

Mr. SHEPHERD. Thank you very much, Mr. Chairman, and gentlemen.

I, too, am a past president of the American Bar Association, having served in the years 1984 and 1985. I would like at the outset to say that there are other past presidents of the bar who, if time constraints had not prevented it, would certainly want to join us here at this table.

And if I may, I would like to read a portion of a letter from Mr. James D. Fellers, also a past president of the American Bar, a letter addressed to me.

"Dear John, It is with appreciable interest that I have read your article 'In Support of Bork' in the National Law Journal of September 21, 1987, and I want to endorse and approve enthusiastically your discerning evaluation of Robert H. Bork as superbly qualified for appointment to the United States Supreme Court."

"Although his indicated views have not always coincided with my own, since our earliest contacts, when he was Solicitor General of the United States, I have come to regard and respect him as one of the truly outstanding jurists of our country."

"It had been my hope to go to Washington to express my support for this nomination, but other commitments made this impossible. I am sending copies of this communication to Senators Dave Boren and Don Nickles, and will be grateful for your conveying personally to the committee and to President Reagan my considered conclusion that Judge Bork does have the substantive qualifications, professional integrity, and judicial temperament to serve commendably on our highest Court. I hope that he will be confirmed without further delay."

"Sincerely yours, James D. Fellers."

Mr. William Falsgraf assumed the office of president of the American Bar immediately after my term concluded, and he writes to Senator Biden—and if I may, briefly—it is a short letter.

"Dear Senator Biden, Although you have already received the report and favorable recommendation of the American Bar Association's Standing Committee on the Federal Judiciary relative to Judge Robert Bork's nomination for the United States Supreme Court, I wanted you to know my views as well."

"I served as president of the American Bar Association from July 1985 to August 1986. During that period in particular, but also before and after it, I have had repeated occasions to observe and reflect upon the performance and temperament of federal judges from the districts and circuits to the Supreme Court level. Based upon this experience, I am confident that Judge Bork will make an outstanding Justice of our highest Court."

"His academic credentials are peerless; his experience broad and inclusive; his dedication to the law and to justice unquestionable."

"Accordingly, I strongly urge you and the Senate Judiciary Committee to vote favorably on Judge Bork's nomination."

Mr. Shepherd Tate, of Memphis, Tennessee, along the same lines——

Senator THURMOND. Now, who was this letter from, a past president of——

Mr. SHEPHERD. This was Mr. William Falsgraf, of Cleveland, Ohio.

Senator THURMOND. Thank you.

Mr. SHEPHERD. And now, if I may, Mr. Chairman, I will supplement the record with copies of these letters.

Mr. Tate, of Memphis, Tennessee, writes, "As a past president of the American Bar Association, 1978 to 1979, I am familiar with the process of the ABA's Standing Committee on the federal judiciary in evaluating nominees to the federal courts. My familiarity convinces me that the committee does a very thorough job in its evaluation."

"As an individual, I heartily support the recommendation of the committee that Judge Robert H. Bork is well-qualified to be a Justice of the Supreme Court of the United States. In my opinion, he has the intelligence, the ability, the fairness, honesty, diligence, experience, and judicial temperament to be on our highest court. I believe he will serve with distinction and promote the administration of justice."

Senator THURMOND. I think it is important that all these letters be put in the record. Do you have copies of them you can give us?

Mr. SHEPHERD. I do, Mr. Chairman.

Senator THURMOND. And if you would just put them all in the record, I think that will take care of the situation, and then just tell us anything else you want to say.

Mr. SHEPHERD. All right. May I then close this portion of it by mentioning the name of Leonard S. Janofsky, a distinguished past president of the American Bar, of Los Angeles, California.

Senator THURMOND. Yes, sir. His statement will go in the record.

Mr. SHEPHERD. His letter, I will furnish to the committee; and the letter as well of Mr. Earl F. Morris, a past president of the American Bar Association, of Columbus, Ohio.

Senator THURMOND. And his letter will go in the record.

Mr. SHEPHERD. Thank you very much, Mr. Chairman.

Senator THURMOND. Now, if you have any other letters from any other past presidents, we will be glad to have them go in the record.

Mr. SHEPHERD. Thank you very much, Mr. Chairman.

[Letters follow:]

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September 18, 1987

Senator Joseph R. Biden
489 SROB
Washington, DC 20510-0801

Dear Senator Biden:

Although you have already received the report and favorable recommendation of the American Bar Association Standing Committee on the Federal Judiciary relative to Judge Robert Bork's nomination for the U.S. Supreme Court, I wanted you to know of my views as well.

I served as president of the American Bar Association from July 1985 to August 1986. During that period in particular, but also before and after it, I have had repeated occassions to observe and reflect upon the performance and temperment of federal judges from the districts and circuits to the Supreme Court level. Based upon this experience, I am confident that Judge Bork will make an outstanding justice of our highest court. His academic credentials are peerless; his experience broad and inclusive; his dedication to the law and justice unquestionable. Accordingly I strongly urge you and the Senate Judiciary Committee to vote favorably on Judge Bork's nomination.

Sincerely,

William W. Falsgraf

WWF/dp

bcc: A. V. Culvahouse
R. E. Wiley

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D. DWIGHT MILLER
D. ANDREW BYRNE
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PATRICK B. MASON

JOHN D. MARTIN, JR. (1910-1984)
GEORGE E. MORROW (1922-1982)

EAST OFFICE
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September 18, 1987

The Honorable Joseph R. Biden, Jr., Chairman
The Honorable Strom Thurmond, Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senators Biden and Thurmond:

As a Past President of the American Bar Association (1978-79) I am familiar with the process of the ABA's Standing Committee on the Federal Judiciary in evaluating nominees to the Federal courts. My familiarity convinces me that the Committee does a very thorough job in its evaluations.

As an individual I heartily support the recommendation of the Committee that Judge Robert H. Bork is well qualified to be an Associate Justice of the Supreme Court of the United States. In my opinion he has the intelligence, ability, fairness, honesty, diligence, experience and judicial temperament to be on our highest court. I believe he will serve with distinction and promote the administration of justice.

Sincerely yours,

S Shepherd Tate

S. Shepherd Tate

SST/mb

September 18, 1987

Senator Joseph Biden
Chairman
Senate Judiciary Committee
United States Senate
Washington, D.C.

Dear Senator Biden:

I write as Past President of the American Bar Association to endorse Judge Robert Bork for the position of Associate Justice of the United States Supreme Court.

I feel Judge Bork is qualified to serve because he is an eminent legal scholar, has acquitted himself well as a Judge of the Court of Appeals, and will uphold the rights of the citizens of our country under the Constitution and Bill of Rights.

I note that a substantial majority of the Federal Judiciary Committee of the ABA has found Judge Bork to be well qualified.

Respectfully,

Leonard S. Janofsky

(Paul, Hastings, Janofsky & Walker letterhead)

AMERICAN BAR ASSOCIATION

EARL F. MORRIS
PAST PRESIDENT

41 South High Street
[illegible]
COLUMBUS, OHIO 43215
TELEPHONE: 614/227-2093

September 18, 1987

Senator Joseph Biden
Chairman, Judiciary Committee
  of U. S. Senate
United States Senate
Washington, D.C. 20510

Dear Senator Biden:

As Past President of the American Bar Association and as a practicing attorney who is deeply concerned with the administration of justice, I wish to support the nomination of Judge Bork as a Justice of the Supreme Court.

Judge Bork's experience as a practicing attorney, a law professor, Solicitor General and judge of a Court of Appeals admirably qualifies him to serve on the Supreme Court. I am confident that, if his nomination is approved, he will serve with distinction on the Supreme Court and will acquit himself in the finest traditions of that Court.

I sincerely hope that the Senate Judiciary Committee will act favorably on his nomination.

Respectfully yours,

EFM:rh

September 18, 1987

John C. Shepherd, Esquire
Shepherd, Sandberg & Phoenix, P.C.
One City Centre - Suite 1500
St. Louis, Missouri 63101

Dear John:

It is with appreciable interest that I have read your article "In Support of Bork" in the National Law Journal of September 21, 1987, and I want to endorse and approve enthusiastically your discerning evaluation of Robert H. Bork as superbly qualified for appointment to the United States Supreme Court. Although his indicated views have not always coincided with my own since our earliest contacts when he was Solicitor General of the United States, I have come to regard and respect him as one of the truly outstanding jurists of our country.

It has been my hope to go to Washington to express my support for this nomination, but other commitments make this impossible. I am sending copies of this communication to Senators Boren and Don Nickles and will be grateful for your conveying personally to President Reagan my considered conclusion that Judge Bork does have the substantive qualifications, professional integrity, and judicial temperament to serve commendably on our highest Court. I hope that he will be confirmed without further delay.

Sincerely yours,

James D. Fellers

cc: Hon. David L. Boren
Hon. Don Nickles

JDF/DJ (on ABA stationery)

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CHARLES S RHYNE RHYNE & RHYNE
1000 CONNECTICUT AVENUE
WASHINGTON DC 20036

THIS IS A CONFIRMATION COPY OF THE FOLLOWING MESSAGE:

7037901270 POM TDMT MCLEAN VA 267 09-13 1236P EST
~~ZIP~~ PRESIDENT RONALD REAGAN
WHITE HOUSE DC 20500
I AM A FORMER PRESIDENT OF THE AMERICAN BAR ASSOCIATION HAVING SERVED AS PRESIDENT IN 1957-1958 AND AM IN FAVOR OF CONFIRMATION OF SUPREME COURT NOMINEE ROBERT H BORK BY THE UNITED STATE SENATE.
I AM THE LAWYER WHO WON THE FAMOUS "ONE MAN ONE VOTE" DECISION IN THE U.S. SUPREME COURT, BAKER VS CARR. I HAVE ARGUED CASES AGAINST JUSTICE NOMINEE BORK WHEN HE WAS SOLICITOR GENERAL IN THE SUPREME COURT ON THE GREAT ISSUE OF "FEDERALISM". THE MOST FAMOUS CASE PROBABLY IS NATIONAL LEAGUE, ARIZONA, CALIFORNIA AND OTHER CITIES VERSUS USERY. THAT CASE WAS WON BY ME IN A 5 TO 4 DECISION AND REVERSED BY SIMILIAR VOTE BY THE SUPREME COURT 10 YEARS LATER IN THE Garcia SAN ANTONIO CASE ETC. Case.
I HAVE WORKED BOTH WITH AND AGAINST JUSTICE NOMINEE BORK IN OTHER CASES. I ADVISED THE FBI OF THESE CASES AND MY SUPPORT POSITION ~~ARE~~ for JUSTICE NOMINEE BORK BEFORE I LEFT THE UNITED STATES TO PRESIDE OVER THE SOUEL KOREA CONFERENCE ON THE LAW OF THE WORLD ON SEPTEMBER 2, 1987. HAVING JUST RETURNED FROM SOUEL I REAFFIRMED ALL I SAID TO THE FBI.
I HAVE SERVED AS ~~COUNCIL~~ counsel BEFORE THE SUPREME COURT IN MANY CASES REPRESENTING STATES, CITIES, LABOR UNIONS, CORPORATIONS AND INDIVIDUALS FROM 1938 UNTIL NOW. I BASE MY SUPPORT OF JUSTICE NOMINEE BORK UPON MY [illegible] extensive AND VARIED EXPERIENCE BEFORE THE SUPREME COURT OVER THE PAST 49 YEARS. HAVING THUS WORKED WITH AND AGAINST JUSTICE NOMINEE BORK IN SUPREME COURT CASES I WANT TO SAY, THAT IN MY JUDGEMENT, HE IS ONE OF THE MOST BRILLIANT, ~~FARE~~ fair MINDED, AND JUDICIOUS PERSONS EVER NAMED AS A NOMINEE TO SERVE UPON OUR NATION'S HIGHEST COURT.
CHARLES S RHYNE, PAST PRESIDENT 2024665420
AMERICAN BAR ASSOCIATION
1000 CONNECTICUT AVENUE
WASHINGTON DC 20036
~~Tel # 466-2420~~ at office
12:36 EST
990-1270 at home
MGMCOMP

TO REPLY BY MAILGRAM MESSAGE, SEE REVERSE SIDE FOR WESTERN UNION'S TOLL - FREE PHONE NUMBERS

Mr. SHEPHERD. Mr. Chairman, there was reference made in Mr. Fellers' letter to an article which I have written and which was published in The National Law Journal dated September 21, entitled, "In Support of Bork." I would like, Mr. Chairman, especially in view of the lateness of the hour, to submit that article, and without any undue lack of humility, urge that the committee members read my article.

Senator THURMOND. Without objection, we will put it in the record.

Mr. SHEPHERD. Thank you.

[Article follows:]

In Support of Bork

By John C. Shepherd
Special to The National Law Journal

AS THE SENATE Judiciary Committee prepares to begin hearings on the nomination of U.S. Circuit Judge Robert H. Bork to the Supreme Court, the continuing drumbeat of publicity concerning the appointment should not be allowed to obscure the crucial question that the Senate must address: Does Judge Bork have the substantive qualifications, professional integrity and judicial temperament to render outstanding service on the court?

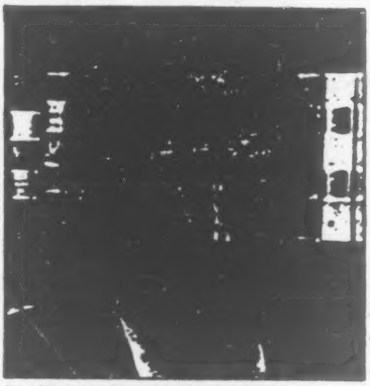
In my view, the answer to this question is a resounding yes. The Senate should not hesitate to confirm Judge Bork's nomination.

There can be little question that Judge Bork is superbly qualified for a Supreme Court appointment. Former Chief Justice Warren E. Burger recently stated that during the 50 years since he graduated from law school, there never has been a better-qualified nominee. In the words of Justice John Paul Stevens, Judge Bork would be "a very welcome addition to the Supreme Court."

Ideally, a Supreme Court nominee should possess outstanding academic credentials, well-honed practical lawyering skills, some exposure to public service and judicial experience. Judge Bork clearly fits this profile. His academic credentials are superlative. Having shown initial academic promise as executive editor of the University of Chicago Law Review (1952-'53), Judge Bork subsequently earned academic renown as a professor at the Yale Law School (1962-'73 and 1977-'81), where he published and lectured extensively in the fields of constitutional law and antitrust. Before turning to academia, Judge Bork had enjoyed a highly successful career as a litigator at the Washington, D.C., office of the Chicago firm now known as Kirkland & Ellis (1955-'62), which elected him to the partnership, and to which he briefly returned in 1981-'82. Judge Bork rendered distinguished public service as solicitor general of the United States (1973-'77). Last, but certainly not least, Judge Bork has amassed an impressive record over the past five years (since 1982) as a judge on the U.S. Circuit Court of Appeals for the District of Columbia. Before his unanimous confirmation by the Senate, he was given the American Bar Association's highest rating for federal courts of appeals nominees, "exceptionally well-qualified." In short, Judge Bork has enjoyed not one but four distinguished legal careers.

SOME COMMENTATORS have charged that while Judge Bork may have strong professional credentials, he nevertheless is someone outside the judicial mainstream who would seek to implement a conservative agenda through his opinions on the court.

Judge Bork's writings do not support this charge. He has stressed repeatedly that he follows a judicial philosophy that requires a judge to adhere to the words of the statutory or constitutional provision before the court. Such an approach subordinates judges' personal policy preferences, conservative or liberal, to the values and rules that can be drawn fairly from the statutory or constitutional provision before them.[1] Because it limits the scope of judicial discretion, Judge Bork's judicial philosophy is antithetical in spirit to the "right-wing activism" with which Judge Bork has been charged.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U.S. CIRCUIT JUDGE ROBERT H. BORK

To my mind, Judge Bork's philosophy is synonymous with judicial integrity. Judges who ignore the words of the constitutional or statutory provision before them are, in a very real sense, no longer engaging in judging. Rather, they are imposing their own policy preferences on the public and the parties before them without authority to do so — a profoundly unconstitutional and undemocratic result. As Judge Bork has put it, "[T]he judge who looks outside the Constitution always looks inside himself and nowhere else."[2]

Furthermore, neglect of the law lessens the predictability of judicial outcomes, thereby undermining the rule of law. When advising my clients or addressing myself to a court, I want to know what legal principles will be brought to bear in deciding a legal dispute. Judge Bork's judicial philosophy — which in truth is the classic philosophy of our courts — assures me that the resolution of the dispute will turn on an interpretation of the words of the statutory or constitutional provision at issue. It really is nothing more than the traditional lawyerly craft of construing the terms of a legal provision. It is a consistent, well-understood framework for resolving legal issues. The judge who faithfully adheres to such a framework will be fair and consistent — prime hallmarks of judicial integrity.

SOME OF JUDGE Bork's critics have charged that he merely gives lip service to judicial restraint — that, in reality, he is an ultraconservative activist who will reach a predetermined result regardless of whether it follows from the statutory or constitutional provision he is construing.

If that charge were accurate, Judge Bork would lack judicial integrity and would not merit being nominated to the high court. An examination of the facts, however, reveals that, far from being an unprincipled activist, Judge Bork is a highly principled jurist well within the jurisprudential mainstream.

Although naked statistics say very little about how a judge analyzes complex legal issues in a myriad of factual circumstances, a statistical analysis of Judge Bork's record on the D.C. Circuit belies any assertion that he is a result-oriented activist of the far right. In fact, Judge Bork voted with the majority in 94 percent of the 426 cases on which he sat from 1982 through early July 1987.[3] Liberal D.C. Circuit judges also voted with Judge Bork in the vast majority of cases: Ruth Bader Ginsburg, 90 percent of the time;

Mr. Shepherd, a member of St. Louis' Shepherd, Sandberg & Phoenix, P.C., is a former president of the American Bar Association. The views expressed herein are his own.

Patricia M. Wald, 79 percent; Harry T. Edwards, 89 percent; Abner J. Mikva, 89 percent; and J. Skelly Wright, 74 percent.

Most impressive of all, none of Judge Bork's majority opinions has been reversed by the Supreme Court. In fact, none of the 461 majority opinions authored or joined by Judge Bork ever has been reversed by the Supreme Court, and only one was reversed by the D.C. Circuit en banc. This is the record of a distinguished mainstream judge, not of an extremist.

Certain critics nevertheless have attempted to portray Judge Bork as an extremist by cataloging his votes "for" or "against" certain interests. The AFL-CIO Executive Council, for example, has issued a legal memorandum couched in such terms that focuses on Judge Bork's "non-unanimous" opinions — opinions in which he disagreed with one or more judicial colleagues. The problem with this approach is that it ignores the vast majority (about 85 percent) of the cases on which Judge Bork sat.

A far more accurate portrayal of Judge Bork's record can be gleaned by a statistical overview of all the cases in which Judge Bork participated. Moreover, stripped from the context of the statutory or constitutional terms being construed, this is a meaningless exercise. Such a "result-oriented," analytic framework is irrelevant to, and at odds with, Judge Bork's approach of neutrally applying the law that bears upon each case presented to him. The fact that Judge Bork is said to have voted "against" civil rights plaintiffs or "against" labor in particular cases does not indicate that Judge Bork is a "result-oriented" activist, if he achieved these results through a fair construction of the statute before him. Certainly, Judge Bork's many votes in favor of civil rights plaintiffs or labor has not led his critics to label him a result-oriented "liberal activist."

By examining his opinions in just a few substantive areas, it is easy to refute the charge that Judge Bork always reaches an "ultraconservative" result. For example, according to the AFL-CIO memorandum, in the labor law area Judge Bork "voted in favor of union/employees" on only two occasions. That statistic does not take into account Judge Bork's "pro-labor" or "anti-employer" votes in such cases as *United Scenic Artists v. National Labor Relations Board* (secondary boycott by union not an unfair labor practice); *Northeast Airlines v. Airline Pilots International* (alcoholism a "disease" not constituting good cause for pilot's dismissal); *National Treasury Employees Union v. Devine* (office of personnel management not allowed to implement new personnel regulations); *Oil Chemical Atomic Workers International v. National Labor Relations Board* (private agreement cannot settle dispute over replacing "strikers" concerned with safety conditions); *United Mine Workers of America v. Mine Safety Health Administration* (MSHA could not exclude individual mining companies from compliance with a mandatory safety standard); *Donovan v. Carolina Stalite Co.* (state gravel-processing facility deemed a "mine" subject to civil penalties); *Munsey v. Federal Mine Safety and Health Review Commission* (union and its attorneys entitled to costs and attorney fees); *Amalgamated Transit Union v. Brock* (upholding union's claim that its collective bargaining right had not been adequately protected); and *Black v. Interstate Commerce Commission* (ICC decision causing the displacement of railroad employees overturned).

Likewise, the AFL-CIO memorandum states that Judge Bork "voted against civil rights/civil liberties plaintiffs" on 18 out of 20 occasions. That compilation did not take into account the judge's votes in such cases as *Emory v. Secretary of Navy* (the military branches are subject to judicial review of civil rights claims involving the selection of senior officers subject to Senate confirmation); *Palmer v. Shultz* (State Department's foreign service is subject to the Equal Pay Act); *Laffey v. Northwest Airlines* (female flight attendants may not be paid less than male pursers in jobs that are nominally different); *Ososky v. Wick* (back pay under the Equal Pay Act should be determined by figuring a woman's total experience, and inferences of intentional discrimination can arise from statistics alone); and *County Council of Sumter County, S.C. v. U.S.* (South Carolina county failed to show that its adoption of an at-large system had "Neither the purpose nor effect of denying or abridging the right of black South Carolinians to vote").

Clearly, it is simply inaccurate to assert that Judge Bork always votes "for" conservative results and "against" liberal causes. Many of his votes have produced results that liberals would applaud. Accordingly, the charge that Judge Bork's judicial philosophy is a smoke screen for ultraconservative judicial activism simply does not withstand serious scrutiny. True to his philosophy, Judge Bork faithfully construes the terms of the law and applies it to the facts at hand. He does not decline to reach a liberal result that is mandated by principled legal analysis.

JUDGE BORK HAS been criticized by some for not having a sufficiently open mind. Depending upon what is meant by this potentially misleading phrase, this criticism either reflects fundamental confusion about the proper intellectual qualities a good judge ought to possess or is entirely inaccurate when applied to Judge Bork.

If, by lack of open-mindedness, his critics mean that Judge Bork has a well-developed view of constitutional jurisprudence and the proper role of the judiciary, they are surely correct; but this hardly constitutes a defect in judicial temperament.

A good judge is not a tabula rasa whose first contact with significant legal issues occurs when he opens the briefs in a particular case, nor one who shifts his analysis from case to case to reach the results he deems most suitable to a particular litigant or group. If this were the standard applied in assessing judges, our court would be populated exclusively with uninformed mediocrities who could not do justice in its broader, proper sense — that is, evenhanded and consistent application of legal principles that do not vary on account of the judge's personal policy preferences or sympathies for a particular party.

I believe that Judge Bork's writings set forth a sound, eminently sensible analysis of the proper role of the courts in a democratic society — one that follows directly in the tradition of such eminent jurists as Justices John M. Harlan, Felix Frankfurter and Hugo L. Black. While it is not possible in the space provided to respond to all of the criticisms of Judge Bork's scholarship, an examination of one such line of attack reveals the extent to which his record and standing have been seriously misrepresented.

Specifically, certain critics contend that Judge Bork's antitrust scholarship is "over the edge" and "anti-consumer." This criticism is unwarranted. While a number of scholars disagree with Judge Bork's views on antitrust, there is no serious question that his antitrust scholarship is widely regarded as distinguished and highly influential — hardly the characteristics of non-mainstream analysis.

On Aug. 7, 18 former chairmen of the American Bar Association's Section of Antitrust Law who hold a variety of different viewpoints on antitrust wrote to the Washington Post to praise Judge Bork's antitrust scholarship. The authors stated that Judge Bork's 1978 treatise on antitrust, "The Antitrust Paradox," is "among the most important works written in this field in the past 25 years," adding that 75 Supreme Court and U.S. Circuit Courts of Appeals decisions have cited the book. They also stressed this book's influence by noting that it has been cited approvingly in six majority opinions by justices viewed as having such varied philosophies as Justice William J. Brennan Jr., Justice Stevens and former Chief Justice Burger. Justices Sandra Day O'Connor (in a concurrence) and Harry A. Blackmun (in a dissent) also have relied on "The Antitrust Paradox," according to these former chairmen, who also noted "that every member of the present Supreme Court joined one or another of these opinions."

Refuting the charge that Judge Bork's antitrust analysis is at odds with consumer welfare, the authors concluded "that Judge Bork advocates pro-competitive policies which promote the very efficiency that makes the enhancement of consumer welfare possible . . . the mainstream view, which no one has helped promote more than Judge Bork, is that the proper antitrust policy is one which encourages strong private and government action to promote consumer welfare rather than unnecessary government intervention to protect politically favored competitors." In sum, Judge Bork's antitrust scholarship is highly respected and deemed extremely influential by a wide spectrum of judges and practitioners, including all the members of the Supreme Court. Far from being out of the mainstream, it has "helped shape the contours" of the mainstream.

DESPITE THIS record of marked academic distinction, high judicial integrity and true judicial temperament, a variety of groups can be expected to testify that Judge Bork is "insensitive," "closed-minded," and "out of the mainstream." Such critics, of course, have every right to be heard. I do not doubt their sincerity, although I believe they are mistaken.

Nevertheless, while Judge Bork's critics should and will be given a fair hearing, one should not lose sight of the fact that sitting Supreme Court justices, who are widely deemed to be distinguished, just and honorable jurists, were subjected to similar criticism during their confirmation hearings.

For example, in opposing the 1971 nomination of Justice Lewis F. Powell Jr. to the Supreme Court, noted civil rights lawyer Henry L. Marsh III, who, while testifying on behalf of the Old Dominion Bar Association of Virginia, castigated Justice Powell's "record of continued hostility to the law, his continual war on the Constitution."[20]

Paul O'Dwyer testified that "Powell has already taken sides with the executive branch. He would be but their echo."[21] Wilma Scott Heide, president of the National Organization for Women, testified that if Justice Powell were confirmed, "justice for women will be ignored or further delayed which means justice denied."[22] Catherine G. Roraback, president of the National Lawyers' Guild, stated that "Powell does not 'bend' or 'twist' the Constitution, to use the President's language. Rather, he totally ignores it."[23]

In opposing the 1975 nomination of Justice Stevens to the Supreme Court, Margaret Drachsler, on behalf of the National Organization for Women, stated: "We oppose his confirmation not solely because of his consistent opposition to women's rights but, more importantly, because Judge Stevens has demonstrated that his legal opinions on women's issues are based on an apparent personal philosophy and not on the facts and laws of the cases before him. . . His record as circuit judge clearly reveals that he cannot [fairly, judiciously and impartially review women's rights cases]. . . His decisions have flown in the face of the applicable law as duly passed by Congress, elected by the people, both men and women. Thus, NOW believes that Judge Stevens lacks the fairness and impartiality requisite for appointment to the Supreme Court of the United States."[24] Citing his "blatant insensitivity to discrimination against women," Nan Aron, President of the Women's Defense Fund, also testified against Justice Stevens' nomination.[25]

I submit the record demonstrates that women's and civil rights groups' concerns about Lewis Powell and John Paul Stevens have proved to be unfounded. As justices, their opinions have embodied open-mindedness, high principle and integrity — not the bigotry, insensitivity and result-oriented jurisprudence that their critics feared. Judge Bork obviously is not a clone of Justices Powell and Stevens, and undoubtedly would disagree with them on various issues. Nevertheless, these groups' history of reflexive opposition on ideological grounds to fair-minded justices suggests that their criticism of Judge Bork is similarly misguided, however sincere and well-intentioned it may be.

JUDGE BORK'S career has been characterized by outstanding achievement. His scholarly contributions have been distinguished, influential and well within the mainstream of American jurisprudence. He has achieved great success as a practitioner, a professor, a public servant and a judge. Most important, his judicial record clearly demonstrates his high integrity, true judicial temperament and principled, evenhanded jurisprudence.

For all of these reasons, Judge Bork deserves to sit on the Supreme Court. He should be confirmed.

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(1) See Bork, "Styles in Constitutional Theory," 26 South Texas L.J. 383 (1985); Bork, "The Struggle Over the Role of the Court," National Review," Sept. 17, 1982, at 1137.

(2) "The Struggle Over the Role of the Court," supra note 1 at 1138.

(3) These cases include [illegible] appellate cases and three cases in which Judge Bork sat as a trial judge on a three-judge panel.

(4) AFL-CIO Executive Council, Memorandum on Judge Robert H. Bork's Academic Writings and Judicial Opinions (Aug. 17, 1987). Subsequent textual references refer to case law summaries set forth in this memorandum.

(5) [illegible] F.2d [illegible] (D.C. Cir. [illegible]).

(6) [illegible] F.2d 76 (D.C. Cir. 1987).

(7) 720 F.2d 116 (D.C. Cir. [illegible]).

(8) [illegible] F.2d [illegible] (D.C. Cir. [illegible]).

(9) (D.C. Cir. July 30) (slip op.).

(10) 726 F.2d 1367 (D.C. Cir. [illegible]).

(11) 791 F.2d 976 (D.C. Cir. [illegible]).

(12) [illegible] F.2d [illegible] (D.C. Cir. 1987).

(13) 816 F.2d 700 (D.C. Cir. 1987).

(14) 43 Fair Empl. Prac. Cas. (BNA) [illegible] (D.C. Cir. 1987).

(15) 43 Fair Empl. Prac. Cas. (BNA) [illegible] (D.C. Cir. 1987).

(16) 740 F.2d 1071 (D.C. Cir. 1984).

(17) 786 F.2d 1284 (D.C. Cir. [illegible]).

(18) (D.D.C. Jan. 10, 1983) (slip op.).

(19) Letter written Aug. 7 by James T. Halverson (on behalf of himself and 16 other former antitrust section chairmen) to Benjamin C. Bradlee, executive editor, the Washington Post.

(20) Nominations of William H. Rehnquist and Lewis F. Powell Jr.: Hearings Before the Senate Comm. on the Judiciary, 92nd Cong., 1st Sess. [illegible] (1971).

(21) Id. at [illegible].

(22) Id. at [illegible].

(23) Id. at [illegible].

(24) Nomination of John Paul Stevens to Be a Justice to the Supreme Court: Hearings Before the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. [illegible] (1975).

(25) Id. at [illegible].

Mr. SHEPHERD. I might say, Mr. Chairman, that unlike the previous panel, I do not come to you from the campus of a law school; I come instead as a trial lawyer who has spent 35 years of my professional life, in addition to bar work and other ancillary duties, as a trial lawyer, talking to people, as Senator Simpson referred to, the real, live people of this country. And I would simply supplement the remarks I have made in the article to which I have referred by saying that it is very important in my judgment that this committee recognize that what the Senators are saying is being heard throughout the world.

I have no doubt that in foreign lands, as well as throughout our own country, what is being said by this committee as it judges the qualification of Judge Bork is being closely watched by many. Therefore, it is a burden upon us all to be certain that we conduct ourselves as Dean Meador called upon us to today, by looking at the objective evidence and qualifications of the man, and not to engage in what might be called political hyperbole—and I do not want to make a Fourth of July speech here at this hour of the night and on this day, but I cannot think of a better place to make one, and I cannot think of a better time.

America believes—the people that I have talked to, and I have taken surveys; I wish Senator Metzenbaum could be here. I have asked a lot of people about their judgment of what kind of a man we need today on the Court. None of them have answered that they fear, as Senator Metzenbaum seems to, that our country is in desperate straits and that our liberties are about to be lost. No—we are a confident people, and we depend upon the Senators who are conducting these hearings, as well as the witnesses, to bring out the strengths of our country as well as pointing the finger to our unfortunate defects where they exist.

And so, the work you are engaged in goes far beyond the walls of this building, and it goes to people who have not had the breaks that some of us have had to have had legal education or college education. And I wish that some of the professors would be a little more temperate in their analysis of the work that is going on here, because our country and all of us as presidents of the Bar Associations have proudly said throughout our land and indeed in many foreign countries that America is a country that respects the rule of law. And so we do. And one judge, as important as it is, or one Senator, or one past president of the American Bar, is not going to drastically change the protection of the rights of these citizens. And they need somebody in authority, like this committee, to assure them of that fact.

And I say, Senator, with great respect for you and all the members of this committee, that the fact is that the business of justice in America is too important to be left to professors and Senators and, yes, even to judges. In America, the business of justice is everybody's business.

Thank you.

Senator THURMOND. Thank you very much.

Mr. Riley?

TESTIMONY OF WALLACE RILEY

Mr. Riley. Mr. Chairman and members of the committee, wherever you are, I thank you for the opportunity to appear before you to express my support for the confirmation of Judge Robert H. Bork as Associate Justice of the United States Supreme Court.

I appear before you today as an individual, as a citizen, as a lawyer, and as a person dedicated to the highest principles of professional competency and integrity for lawyers.

I am also committed to the requirement of exceptional professional qualifications—that is, professional competence, judicial temperament, and integrity—for those who would fulfill the responsibility of a Supreme Court Justice.

I have practiced law now for 35 years, and I am married to a State Supreme Court Justice. Except for 2 years of active duty as an Army Judge Advocate General Officer, I have been privileged to spend all of my professional life practicing as an active member of the organized bar.

Recently, I concluded my term as president of the American Bar Association, and before that as president of the State Bar of Michigan. But I want to state for the record that I am not here representing either of those organizations.

You have already heard the statement of Harold R. Tyler, Jr., the Chairman of the ABA Standing Committee on the Federal Judiciary; and you have had the September 21st, 1987 letter report of that committee. I have read it. One cannot help but be impressed with the scope of that committee's investigation, and the effort put forth by the members of that committee in the 69 days that they had to work on their assignment. Their investigation seems to have tracked all the procedures outlined in Part II of the committee's pamphlet on "What It Is and How It Works.

Unfortunately, perhaps through no fault of the committee, the committee's adherence to Part III of that same pamphlet, on confidentiality, is not quite as impressive.

At the last annual meeting of the American Bar Association, out in San Francisco in August, and just last week at the meeting of the State Bar of Michigan in Grand Rapids, Michigan, I talked to a lot of lawyers. And I found that a great majority of the lawyers with whom I spoke were of the belief that Judge Robert Bork was a good choice for the Supreme Court.

These people are practicing lawyers who are impressed by the outstanding academic credentials, by the military and public service record, by the law firm practice, and by the appellate judicial experience of Judge Bork. Most would settle for Judge Robert Bork's success in any one legal career. He has distinguished himself in four.

I and the lawyers and the leaders of the bar with whom I have spoken have not read all of Judge Bork's opinions and are not in any position to represent how he will write or vote on his next case. You have already heard, perhaps from too many witnesses who unhesitatingly would make so bold. If past is prologue for the future, one can take comfort in his astonishingly low reversal rate in the Supreme Court that he seeks to join. Robert Bork, I believe, deserves a chance to continue his judicial career. He stands tall among the best available for appointment to the Supreme Court. And like so many prior Supreme Court nominees confirmed in controversy, I believe the best of Bork is yet to be.

Thank you.

Senator **THURMOND**. Thank you very much.

[Statement of Wallace D. Riley follows:]

STATEMENT
OF
WALLACE D. RILEY
OF DETROIT, MICHIGAN
BEFORE THE SENATE JUDICIARY COMMITTEE
ON THE NOMINATION OF JUDGE ROBERT H. BORK
TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES
SEPTEMBER 25, 1987

Chairman Biden and Members of the Committee:

I thank you for the opportunity to appear before you to express my support for the confirmation of Judge Robert H. Bork as Associate Justice of the United States Supreme Court. I appear before you today as an individual, a citizen, a lawyer and a person dedicated to the highest principles of professional competence and integrity for lawyers. I am also committed to the requirement of exceptional professional qualifications --- that is, professional competence, judicial temperament and integrity --- for those who would fulfill the responsibility of a Supreme Court Justice. I have practiced law for 35 years, and I am married to a State Supreme Court Justice. Except for two years of active duty as an Army Judge Advocate General officer, I have been privileged to spend all of my professional life practicing as an active member of the organized Bar. Recently, I concluded my term as President of the American Bar Association, and before that as President of the State Bar of Michigan. For the record, I state that I am not here representing either of those organizations.

You have already heard the Statement of Harold R. Tyler, Jr., Chairman of the ABA Standing Committee on Federal Judiciary, and you have had the September 21st, 1987 letter report of the Committee. One cannot help but be impressed with the scope of investigation and the effort put forth by the members of that Committee in the sixty-nine days they worked on their assignment.

Their investigation seems to have tracked all of the procedures outlined in Part II of the Committee's pamphlet on What It Is and How It Works. Unfortunately, perhaps through no fault of its own, the Committee's adherence to Part III of that same pamphlet on Confidentiality is not quite as impressive.

At the last Annual Meeting of the American Bar Association and just last week at the Annual Meeting of the State Bar of Michigan, I found that a great majority of the lawyers with whom I spoke were of the belief that Judge Robert Bork was a good choice for the Supreme Court. These are practicing lawyers who are impressed by the outstanding academic credentials, the military and public service record, the law firm practice and appellate judicial experience of Judge Bork. Most would settle for Robert Bork's success in any one legal career. He has distinguished himself in four.

I, and the lawyers and leaders of the Bar with whom I have spoken, have not read all of the Bork opinions and are not in a position to represent how he will write or vote on his next case. You have heard already from many witnesses who unhesitatingly would make so bold. If the past is prologue for the future, one can take comfort in his astonishing low reversal rate in the Supreme Court he seeks to join. Robert Bork deserves a chance to continue his judicial career. He stands tall among the best available for appointment to the Supreme Court --- and like so many prior Supreme Court Nominees confirmed in controversy --- the best of Bork is yet to be.

Senator THURMOND. Mr. Bland?

Mr. BLAND. Thank you, Mr. Chairman.

TESTIMONY OF JAMES T. BLAND, JR.

I am James T. Bland, Jr., of Memphis, Tennessee. I am the current president of the Federal Bar Association.

Mr. Chairman, Senator Humphrey, I am very humble to be here this evening to testify before this body. I am also somewhat in awe of being asked to testify together with a panel of some of the most influential and well-respected members of the bar.

I am not here today as a young tax lawyer in private practice in Memphis, Tennessee. I am here solely as the spokesperson of the national leadership of the Federal Bar Association, an organization that has been fortunate enough to have three former Attorney Generals of the United States and a former Associate Justice of the United States Supreme Court serve as my predecessors as president of the Federal Bar Association.

I want to stress that I am speaking only on behalf of our nationally-elected officers, not our entire membership. We did not conduct a referendum of our entire membership, which is composed of more than 15,000 lawyers and judges in government service, in private practice, and in our federal judiciary.

We did, however, conduct a poll of our nationally-elected leaders several months ago, when the administration requested our input as to the qualifications of Judge Robert Bork. We were not asked if we liked Judge Bork. We were not asked if we would like to see Judge Bork on the Supreme Court. We were merely asked if, in our professional opinions, we believed Judge Bork was qualified to sit on the Supreme Court of the United States. The answer? It was overwhelmingly "yes".

Before you ask me what "overwhelmingly" means, let me state it for the record. The vote of our national officers was ten to one, with one judge abstaining, in support of Judge Bork's confirmation. While one officer did express some concern about Judge Bork's so-called judicial philosophy, all 11 officers believe that Judge Bork has the requisite ability, qualifications, and integrity to serve on our nation's highest court.

Although the FBA has worked closely in the past with members of both the House and the Senate Judiciary Committees, and many of you may know what we stand for, I want everyone to know that, yes, we are a special interest group. As the national representative and spokesperson for the federal legal profession, we have one overriding concern—to promote the sound administration of justice.

Mr. Chairman, I want you and the members of your committee to know that I am not a constitutional law scholar; I am not a personal friend or supporter of Judge Bork; I have never had the privilege of working for or presenting an oral argument before Judge Bork. But I have had the opportunity to talk to a number of the members of the Federal Bar Association who have had the chance to work for him in the United States Department of Justice, or who have argued before him at the Court of Appeals.

Each one of the lawyers, all of whom are well-respected members of the federal bar, that have argued before Judge Bork expressed the same viewpoint, whether they won or lost their case. That was that Judge Bork was well-prepared for their hearing; he had done his homework; he had read the briefs; he knew which questions to ask to get to the issue. And most importantly, he was fair.

Mr. Chairman, the night before last, I was on the couch at my home in Memphis, Tennessee, watching a taped replay of Wednesday's testimony. I have watched a great deal of these proceedings on TV during the past several weeks because of the interest that I and my organization have in our federal judicial system. I have seen a number of impressive witnesses both for and against Judge Bork's confirmation. But there was one witness that really impressed me. I thought at that time that if I was sitting up there on the Judiciary Committee, I would have been sorely tempted to lift the cover off my microphone and state to the other committee members, "Gentlemen, I believe we have all heard enough.

"If your minds weren't made up before, they should be now. I call the question." I know I would have been ruled out of order by Senator Biden, but I think I would have had to do it just the same. I'm talking about an individual who had little to gain and much to lose by coming here to testify before this committee.

As he said himself, he had no axe to grind. I'm referring, of course, to former Chief Justice Warren Burger. I think he did a great service to our country, not just as Chief Justice of the United States Supreme Court, not as Chairman of the Bicentennial Commission, but by breaking with tradition to come and testify before this committee. He made me very proud to be a member of the legal profession.

Thank you.

Senator THURMOND. Thank you very much, Mr. Bland.

The hour is late and I'm not going to take the time to ask you a lot of technical questions and how you differentiate one case from another, his position on the first amendment and equal protection and all of those things.

We've heard all of that. We've been hearing it for 2 weeks.

I want to ask you one question just for the record. I know how you feel, but this is just for the record. The question is—and if you favor it, you can say yes; if you don't, you can say no. I will start with Mr. Riley and go right down the line.

In your opinion, is Judge Bork qualified to be a member of the Supreme Court of the United States? Does he have the integrity, judicial temperament, and the professional competency to serve in that capacity?

We'll start with Mr. Riley. What's your answer?

Mr. RILEY. The answer is yes to all of your questions.

Senator THURMOND. Mr. Rhyne?

Mr. RHYNE. My answer is yes to all of your questions.

Senator THURMOND. Mr. Shepherd.

Mr. SHEPHERD. Mine is also yes to all of your questions.

Senator THURMOND. Mr. Bland?

Mr. BLAND. Exceptionally well qualified.

Senator THURMOND. I want to say again that it is an honor to have you gentlemen here. Three of you are past presidents of the

American Bar Association. That's as high an honor as you can arrive at in this country, I guess. And then we have the president of the Federal Bar Association, and that's the highest position in that organization, isn't it?

Mr. BLAND. Yes, sir.

Senator THURMOND. We are very proud to have you.

Now I'm going to turn to the able and distinguished Senator from New Hampshire.

Senator HUMPHREY. Mr. Chairman, you will be relieved to know I have no questions. I do have, however, my thanks to offer to the witnesses who have waited so very long, and who probably missed their planes home by now. You must be tired to the point of—and hungry—to the point of nearly passing out. I know I was. I had a sandwich back here that I don't think you had a chance to get. But, in any event, thanks very much for your efforts and thanks for your fine testimony.

Senator THURMOND. Thank you very much.

Senator Biden, you——

The CHAIRMAN. Gentlemen, I don't have more than an hour-and-a-half's worth of questions.

I apologize for having to leave while your testimony was being taken. But both you, Mr. Riley, and Mr. Shepherd, are incredibly distinguished members of the bar, president of the ABA, and Judge Bork is indeed fortunate to have people of your caliber willing not only to testify on his behalf, but obviously you feel strongly about it or you wouldn't be here.

This is a Friday night, you've been taken away from your homes and your practice, and you have been here the entire day. It should be noted, not only the substance of what you have to say, but the degree to which you are committed to the propositions you put forward on why Judge Bork should be on the bench. I appreciate it and it accounts for a lot.

Would any of you like to make a closing comment at all? It's not a requirement, but I don't want to shut you off before I close down the hearings for the weekend.

Mr. SHEPHERD. Well, Mr. Chairman, I would say, while you had to be out of the room for other duties, I called the Chairman's attention to an article which I have filed with the record.

It's interesting to note, as I did some of my research, that some of the people who have appeared before this committee also appeared, or their organizations appeared, in the confirmation hearings, for example, of Lewis Powell.

In opposing his 1971 nomination, noted civil rights lawyer Henry L. Marsh, who while he was testifying on behalf of the Old Dominion Bar, castigated Justice Powell's record—and this is a quote—"record of continued hostility to the law. His continual war on the Constitution." In deference to the hour, I will not cite the other people who had such comments to make not only about Lewis Powell, who I think we can all agree is a distinguished past president of the American Bar, and a distinguished jurist, but same type of comments were urged upon the confirmation hearing about John Paul Stevens.

So, with respect for your time as well as ours, may I ask that you give some time to the study of some of these quotes that I have been able to find, and with the help of my research people.

The **Chairman**. I would be delighted to do that.

Let me make sure I understand. Mr. Mills, the gentleman you quoted, has he testified here?

Mr. **Shepherd**. No.

The **Chairman**. This was in the past.

Mr. **Shepherd**. We were speaking about what I would call probably a distant past, 1971. But it did have to do with the confirmation of Lewis Powell.

The **Chairman**. I see your point.

Mr. **Shepherd**. And the other organizations whose current officers, I guess, have been here and you've heard from, their organizations spoke as well with vehemence against John Paul Stevens. I think you will find that of interest, Mr. Chairman.

The **Chairman**. I will.

The only point I was trying to determine was whether or not any of the people who have testified so far, none of the people who have testified, that I'm aware of, have—Well, if the same groups testified thus far and testified in 1971 and vice versa, if that was the point you were making. I think the only ones who testified representing groups, the Lawyers Committee and others, the Old Dominion Bar has not, to the best of my knowledge, or any of the other ones you mentioned earlier.

Mr. **Shepherd**. No.

The **Chairman**. But they may. I don't know the answer to that. I don't know who else may be coming.

Anyway, thank you very, very much. I appreciate the time for people of your stature to wait this long. It's a compliment to the committee that you would be willing to do that. And it's a great compliment to Judge Bork.

Thank you all very much. The hearing is adjourned until 7:30 tomorrow morning—[Laughter.] No. No one thought that was funny.

The hearing is adjourned until 10 o'clock on Monday.

[Whereupon, at 8:50 p.m., the committee adjourned, to reconvene at 10 a.m. on Monday, September 28, 1987.]

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